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New Hampshire Motor Transport Association v. Rowe: Federal Preemption of Maine's Attempt to Regulate Internet Sales of Tobacco to Minors

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NEW HAMPSHIRE MOTOR TRANSPORT ASSOCIATION
V. ROWE: FEDERAL PREEMPTION OF MAINE'S
ATTEMPT TO REGULATE INTERNET SALES OF
TOBACCO TO MINORS

Nathaniel Bryans

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*Nathaniel Bryans**

I. INTRODUCTION

In *New Hampshire Motor Transport Ass'n v. Rowe*,¹ trade associations sought a declaratory judgment that the Federal Aviation Administration Authorization Act of 1994 (FAAAA)² preempts a Maine law enacted to facilitate collection of state taxes and restrict the delivery of tobacco products to minors (the Tobacco Delivery Law).³ The district court granted the plaintiffs' second motion for summary judgment in part, finding that a single provision of little independent consequence escaped preemption, and enjoined enforcement of the preempted provisions.⁴ The state appealed to the United States Court of Appeals for the First Circuit, which held that most of Maine's Tobacco Delivery Law is preempted.

Part II of this Note will outline the contours of FAAAA preemption jurisprudence from which the *N.H. Motor Transport IV* court was purportedly confined to draw in reaching its conclusion. It will briefly address the Airline Deregulation Act of 1978 (ADA)⁵—the predecessor to the FAAAA—and the United States Supreme Court's interpretation of its preemptive provision in *Morales v. Trans World Airlines, Inc.*⁶ It will then analyze select progeny of *Morales* decided following the enactment of the FAAAA: *American Airlines, Inc. v. Wolens*⁷ and *United Parcel Service, Inc. v. Flores-Galarza*.⁸

Part III will examine the purposes and mechanics of Maine's Tobacco Delivery Law and Maine's arguments against FAAAA preemption. To some degree, these

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1. 448 F.3d 66 (1st Cir. 2006), *petition for cert. filed*, 75 U.S.L.W. 3197 (U.S. Aug. 16, 2006) (No. 06-457).

2. Federal Aviation Administration Authorization Act of 1994, Pub. L. No. 103-305, 108 Stat. 1569 (express preemption provisions codified as amended at 49 U.S.C. §§ 14501(c)(1) & 41713(b)(4)(A) (2000)).

3. An Act to Regulate the Sale of Tobacco Products and to Prevent the Sale of Cigarettes to Minors, codified at ME. REV. STAT. ANN. tit. 22, §§ 1551, 1555-C & -D (West 2004).

4. *N.H. Motor Transp. Ass'n v. Rowe* (*N.H. Motor Transport III*), 377 F. Supp. 2d 197, 200-01 (D. Me. 2005), *aff'd in part and rev'd in part*, 448 F.3d 66 (1st Cir. 2006). The district court issued three separate summary judgment opinions in the underlying litigation. For the sake of convenience, the opinions of the district court will be referred to as *N.H. Motor Transport I, II & III*; the opinion of the Court of Appeals for the First Circuit will be referred to as *N.H. Motor Transport IV*.

5. Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (codified as amended at 49 U.S.C. § 41713(b)(4)(A) (2000)).

6. 504 U.S. 374 (1992).

7. 513 U.S. 219 (1995).

8. 318 F.3d 323 (1st Cir. 2003).

arguments are based on the legislative history of the FAAAA, which provides in relevant part:

State economic regulation of motor carrier operations causes significant inefficiencies, increased costs, reduction of competition, inhibition of innovation and technology and curtails the expansion of markets. . . . In the small package express business, companies frequently ship goods across state lines and back into the state of origin to avoid the higher rates for purely intrastate shipments. Lifting of these antiquated controls will permit our transportation companies to freely compete more efficiently and provide quality service to their customers. Service options will be dictated by the marketplace; and not by an artificial regulatory structure.⁹

Maine argued that its efforts to protect the health and welfare of its minor citizens and collect unpaid tobacco taxes cannot be characterized as components of an artificial regulatory structure. To the contrary, the state maintained that its law (1) is foremost a legitimate exercise of Maine's police power that advances a vested interest of the state as a consumer of federal grants and a provider of health-related anti-smoking services for minors, and (2) was duly enacted pursuant to its concurrent jurisdiction—as provided by federal law—to enforce proscriptions on trafficking in contraband cigarettes.¹⁰

Part IV will analyze the *N.H. Motor Transport* litigation. Before focusing on the First Circuit's decision, it will address the district court's three summary judgment decisions, as they are necessary to understand the two equally important threshold issues regarding association standing and mootness that the First Circuit was required to decide before reaching the merits of FAAAA preemption.¹¹ Once these predicate jurisdictional issues were settled in appellees' favor, the *N.H. Motor Transport IV* court issued a decision on the merits that represents a compromise of doubtful

9. H.R. REP. NO. 103-677, at 87-88 (1994) (Conf. Rep.), as reprinted in 1994 U.S.C.C.A.N. 1715, 1774-75.

10. See *N.H. Motor Transp. Ass'n v. Rowe (N.H. Motor Transport IV)*, 448 F.3d 66, 78 n.12 (1st Cir. 2006) (discussing the Synar Amendment); *N.H. Motor Transport III*, 377 F. Supp. 2d 197, 203 (D. Me. 2005) (discussing the Contraband Cigarette Trafficking Act). At least with respect to the first two of the following three federal laws—the Contraband Cigarette Act, the Synar Amendment, and the Jenkins Act—the Attorney General advocated that although the Tobacco Delivery Law may be “regulatory,” it is hardly “artificial.” The Synar Amendment, 42 U.S.C. § 300x-26, provides that a state may qualify to receive certain federal grants for the purpose of planning, carrying out, and evaluating activities to prevent and treat substance abuse only if the state “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) (2000). In addition, the Contraband Cigarette Trafficking Act, 18 U.S.C. §§ 2341-46, explicitly provides that federal cigarette trafficking laws do not disturb “the concurrent jurisdiction of a State to enact and enforce cigarette tax laws, to provide for the confiscation of cigarettes and other property seized for violation of such laws, and to provide for penalties for the violation of such laws.” 18 U.S.C. § 2345(a) (2000). Moreover, lax federal enforcement of the Jenkins Act reporting requirements, 15 U.S.C. §§ 375-377, which require that interstate cigarette retailers report all untaxed sales to state taxing authorities, has created something of a regulatory vacuum in which states cannot reasonably be expected to languish in perpetuity. See generally U.S. GEN. ACCOUNTING OFFICE, REPORT TO CONGRESSIONAL REQUESTERS: INTERNET CIGARETTE SALES—GIVING ATF INVESTIGATIVE AUTHORITY MAY IMPROVE REPORTING AND ENFORCEMENT, GAO 02-743 (Aug. 2002) (detailing the lack of federal enforcement of the Jenkins Act reporting requirements), available at <http://www.gao.gov/new.items/d02743.pdf>.

11. *N.H. Motor Transport IV*, 448 F.3d 66, 71-74 (1st Cir. 2006).

prospective utility between Congress's commerce power on the one hand and the police power of the state on the other.¹² The analysis will show that although the appeal provided the court an opportunity to demarcate clearly the limits of the express preemption provisions of the FAAAA¹³ in a manner consistent with other jurisdictions, the First Circuit's approach to FAAAA preemption represents a significant departure from other courts' interpretations of closely-related issues. This Note suggests that the uncertain—and arguably wrongly decided—precedent by which the court was ostensibly bound ultimately rendered the court's efforts unsatisfactory.¹⁴

Part V will consider whether an alternatively drafted law that strengthens Maine's regulatory hand would survive FAAAA challenge in the First Circuit. Part V will address the following questions: Is it possible that Maine over-reached by combining in a single enactment a revenue collection provision and a citizen health provision? Should simpler mechanisms be employed to forestall a future adverse preemption ruling based on a finding of "forbidden significant effect" of state law on interstate carriers? Does New York's law—which proscribes all delivery of cigarettes to consumers¹⁵—represent a viable model?

This Note will conclude by suggesting that, notwithstanding whatever course the United States Supreme Court may chart in this or a related case,¹⁶ Congress should clarify the inherent authority of the states to control the importation of harmful tobacco products across their borders. Only by affirming the jurisdiction of states in the quasi-regulation of instrumentalities of interstate commerce—when those instrumentalities choose to deal in notoriously harmful consumer goods—can the seemingly intractable issues raised by the *N.H. Motor Transport* litigation be put to rest.

II. FAAAA PREEMPTION

As the district court explained in *N.H. Motor Transport III*, "[f]ederal regulation of the transportation industry dates back to the Interstate Commerce Act of 1887, which created the Interstate Commerce Commission (ICC) to regulate interstate railroad carriers."¹⁷ Congress brought interstate motor carriers under ICC control by enacting the Motor Carrier Act of 1935,¹⁸ and likewise extended ICC control to air transportation by the Civil Aeronautics Act of 1938.¹⁹ The duly-created Civil

12. *See id.* at 82.

13. *See infra* notes 50-51 and accompanying text.

14. *See N.H. Motor Transport IV*, 448 F.3d at 82 (holding (1) a provision requiring tobacco retailers to utilize carriers that provide purchaser age verification services on delivery to be preempted, and (2) a provision charging a carrier with knowledge, under certain circumstances, that a package it transports contains contraband tobacco products likewise to be preempted, but that (3) "to the extent that the Tobacco Delivery Law merely bars all persons (including carriers) from knowingly transporting contraband tobacco into Maine, the FAAAA is not implicated").

15. *See infra* note 132.

16. On June 25, 2007, the Supreme Court granted certiorari. *See* Docket in *Rowe v. N.H. Motor Transp. Ass'n*, No. 06-457 (1st Cir. Filed Aug. 16, 2006), available at <http://www.supremecourtus.gov/docket/06-457.htm>.

17. *N.H. Motor Transport III*, 377 F. Supp. 2d 197, 201 (D. Me. 2005).

18. *Id.*; *see also* Motor Carrier Act, ch. 498, 49 Stat. 543 (1935) (codified as amended in scattered sections of 49 U.S.C.).

19. *N.H. Motor Transport III*, 377 F. Supp. 2d at 201; *see also* Civil Aeronautics Act, ch. 601, 52 Stat. 973 (1938) (codified as amended in scattered sections of 49 U.S.C.); *Braniff Airways, Inc. v. Neb. State*

Aeronautics Authority, reorganized as the Civil Aeronautics Board (CAB) in the Federal Aviation Act of 1958, was charged with “govern[ing the] entry, routes, rates, business practices and safety of the airline industry.”²⁰

A. The Deregulatory Background

CAB’s jurisdiction of aviation was not exclusive of state jurisdiction, however, until Congress enacted the ADA in 1978 in an effort to deregulate air transportation.²¹ By virtue of pre-1978 concurrent state and federal jurisdiction over air travel, there existed an awkward possibility that airline passengers traveling between two cities within the same state would be charged different fares.²² Even though these passengers were purchasing identical services, the fares they could expect to pay would depend on “whether [they] were interstate passengers whose fares [were] regulated by the CAB, or intrastate passengers, whose fare[s] [were] regulated by a State.”²³ In order to “prevent conflicts and inconsistent regulations,”²⁴ the ADA included an express preemption provision:

[N]o State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority . . . to provide interstate air transportation.²⁵

Bd. of Equalization & Assessment, 347 U.S. 590, 595-96 (1954) (recognizing Air Commerce Act of 1926 and Civil Aeronautics Act of 1938 are bottomed on Congress’s commerce power).

20. *N.H. Motor Transport III*, 377 F. Supp. 2d at 201-02.

21. Airline Deregulation Act of 1978, § 105(a)(1), 92 Stat. 1705, 1708 (current version at 49 U.S.C. § 41713(b)(4)(A) (2000)). Federal deregulation of the air transportation industry and judicial interpretation thereof has generated extensive scholarly comment. See Matthew Azoulay, Note, *American Airlines, Inc. v. Wolens: The Supreme Court’s Reregulation of the Airline Industry*, 5 WIDENER J. PUB. L. 405 (1996); John W. Freeman, *State Regulation of Airlines and the Airline Deregulation Act of 1978*, 44 J. AIR L. & COM. 747 (1979); Joshua Iacuone, Note, *Wellons v. Northwest Airlines, Inc.—Defining “Service” Under the Airline Deregulation Act: Why the Majority of Circuits Are Wrong*, 66 J. AIR L. & COM. 861 (2001); Matthew J. Kelly, Comment, *Federal Preemption by the Airline Deregulation Act of 1978: How Do State Tort Claims Fare?*, 49 CATH. U. L. REV. 873 (2000); Eric W. Maclure, Note, *Morales v. Trans World Airlines, Inc.: Federal Preemption Provision Clips States’ Wings on Regulation of Air Fare Advertising*, 71 N.C. L. REV. 905 (1993); Eric E. Murphy, Comment, *Federal Preemption of State Law Relating to an Air Carrier’s Services*, 71 U. CHI. L. REV. 1197 (2004); Daniel H. Rosenthal, Note, *Legal Turbulence: The Court’s Misconstrual of the Airline Deregulation Act’s Preemption Clause and the Effect on Passengers’ Rights*, 51 DUKE L.J. 1857 (2002); Kyle Volluz, Comment, *The Aftermath of Morales and Wolens: A Review of the Current State of Federal Preemption of State Law Claims Under the Airline Deregulation Act of 1978*, 62 J. AIR L. & COM. 1195 (1997).

22. H.R. REP. NO. 95-1211, at 15-16 (1978), as reprinted in 1978 U.S.C.C.A.N. 3737, 3751-52.

23. *Id.* at 3773 n.1 (“An interstate carrier may carry two types of passengers between two cities in a single State: intrastate passengers whose entire journey is between those two cities, and interstate passengers who are traveling between the two cities on one airline and then connecting to another airline to complete an out-of-State journey.”).

24. *Id.*

25. Airline Deregulation Act of 1978, § 105(a)(1), 92 Stat. 1705, 1708 (current version at 49 U.S.C. § 41713(b)(4)(A) (2000)).

As the First Circuit recognized in *N.H. Motor Transport IV*, the Supreme Court decision of *Morales v. Trans World Airlines, Inc.*²⁶ is the “seminal case” interpreting the explicit preemption provision of the ADA, and, by extension, the similarly worded provision in the FAAAA.²⁷ In *Morales*, the Texas Attorney General sought review of a lower court’s order²⁸ enjoining the state’s enforcement of “standards governing the content and format of airline advertising” that had been adopted by the National Association of Attorneys General (NAAG).²⁹ Plaintiffs Trans World Airlines, Continental Airlines, and British Airways argued that the states were preempted by the ADA from enforcing these advertising guidelines because they related to the carriers’ rates.

The *Morales* Court³⁰ began its preemption analysis with the proposition that any question regarding federal preemption, whether express or implied, is “at bottom . . . one of statutory intent,” and all answers “begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.”³¹ Accordingly, focusing its interpretive energies on the ADA’s “relating to” language, the Court consulted not only a common reference work³² but also its own precedent³³ in the semantically analogous area of Employment Retirement Income Security Act of 1974 (ERISA) preemption.³⁴

Petitioner advanced five arguments in an attempt to dissuade the Court from adopting an overly broad interpretation of ADA preemption to which the NAAG guidelines would most certainly fall prey.³⁵ Although the Court duly noted each, all

26. 504 U.S. 374 (1992).

27. *N.H. Motor Transport IV*, 448 F.3d 66, 75 (1st Cir. 2006).

28. *Trans World Airlines, Inc. v. Mattox*, 712 F. Supp. 99, 101 (D. Tex. 1989), *aff’d in part, rev’d in part sub nom. Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992).

29. *Morales*, 504 U.S. at 379 (“[The Air Travel Industry Enforcement Guidelines] contain[ed] detailed standards governing the content and format of airline advertising, the awarding of premiums to regular customers . . . and the payment of compensation to passengers who voluntarily yield their seats on overbooked flights.”).

30. Justice Scalia wrote for a 5-3 majority; Justice Souter took no part in the decision. *Id.* at 378, 391.

31. *Id.* at 383 (quoting *Park ’N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985) (applying textual rule of statutory construction under the Lanham Act)).

32. *Id.* (quoting the then-current edition of Black’s Law Dictionary, the majority reported that “relating to” meant “to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with”).

33. *Id.* at 383-84 (citing prior characterizations of ERISA preemption provision: *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 (1983) (“[The] breadth of [ERISA’s] pre-emptive reach is apparent from [its] language.”); *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 739 (1985) (ERISA preemption has a “broad scope.”); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 46-47 (1987) (“[D]eliberately expansive” ERISA preemption has “expansive sweep.”); *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 137 (1990) (ERISA preemption provision is “broadly worded.”); *FMC Corp. v. Holliday*, 498 U.S. 52, 58 (1990) (ERISA preemption clause is “conspicuous for its breadth.”)).

34. 29 U.S.C. § 1144(a) (2000) (“[T]he provisions of this title and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan”) (emphasis added).

35. *Morales*, 504 U.S. at 384-87. The state argued that the following considerations counseled against borrowing from ERISA jurisprudence: First, the extraordinary reach of ERISA preemption is a function not of the statutory language, but of ERISA’s comprehensive regulatory scheme, a defining characteristic that the ADA lacked. Second, the ADA clause that saved from preemption then-existing common law and statutory remedies is broader than the ERISA saving clause. Third, the ADA only prevents states from

were summarily rejected.³⁶ Blinded by the identical statutory language of the ADA and ERISA, the *Morales* Court evidently understood petitioner's arguments to amount to an invitation to overrule ERISA precedent. At the very least, the Court may have decided that any agreement with petitioner would have resulted in grave confusion in the area of ERISA preemption. Perhaps motivated by these concerns, the majority's disposition seems to suggest that given its chosen method of statutory construction—intent divined from a plain reading of the language—two identically phrased explicit preemption provisions cannot be interpreted differently. The conclusion that the ERISA standard should define the contours of ADA preemption was thus inescapable.³⁷

Once the *Morales* Court satisfied itself that the ERISA standard was applicable to the challenged NAAG guidelines, it had little trouble finding the guidelines preempted.³⁸ The Court took two approaches to this analysis, reaching the same result under each: First, the Court determined the guidelines contained damning “reference to’ airfares.”³⁹ Second, the Court found as an economic matter that the guidelines had a “forbidden significant effect upon fares.”⁴⁰ Because the majority's economic analysis was unsupported by any actual economic data, the advertising guidelines' “significant effect” on the airlines' rates was proven on purely theoretical grounds, which the dissent found unsatisfactory.⁴¹ Restrictions on price advertising in the singularly

actually prescribing rates, routes, and services. Fourth, only state law directly addressed to the airline industry is preempted, saving the challenged guidelines to the extent they are state laws of general applicability. Finally, preemption is inappropriate where state and federal law are not in conflict. *Id.*

36. *Id.* (noting that first, breadth of ERISA preemption was based on meaning of “relates to”; second, general remedies saving clause cannot be read to trump specific preemptive language; third, “relates to” obviously cannot be restrictively read to mean “regulates”; fourth, a generally applicable state regulation may yet “relate to” a subject Congress has carved out for itself; and fifth, consistency with federal law is immaterial under an express preemption provision).

37. *Id.* at 383-84 (“State enforcement actions having a connection with, or reference to, airline ‘rates, routes, or services’ are pre-empted under [the ADA].”).

38. *Id.* at 391.

39. *Id.* at 388 (citing *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 97 (1983) (quoting definition of “relate” provided by same edition of Black's Law Dictionary consulted by the *Morales* Court)). The *Morales* Court stated that violations of the NAAG guidelines pertaining to advertised airfares “would give consumers a cause of action . . . for an airline's failure to provide a particular advertised fare—effectively creating an enforceable right to that fare when the advertisement fails to include the mandated explanations and disclaimers.” *Id.*

40. *Id.* Following the *Morales* analysis, the courts of appeals have been attempting to discern “significant forbidden effects” in subsequent cases, with varying success. *See, e.g., N.H. Motor Transport IV*, 448 F.3d 66, 71-74 (1st Cir. 2006); *Gary v. Air Group, Inc.*, 397 F.3d 183, 185 (3d Cir. 2005) (holding airline employee's state law whistleblower claim not preempted by ADA); *Witty v. Delta Air Lines, Inc.*, 366 F.3d 380, 386 (5th Cir. 2004) (holding airline passenger's state law tort claim preempted by the ADA); *United Parcel Serv. v. Flores-Galarza*, 318 F.3d 323 (1st Cir. 2003); *Branche v. Airtran Airways, Inc.*, 342 F.3d 1248, 1264 (11th Cir. 2003), *cert. denied*, *AirTran Airways, Inc. v. Branche*, 540 U.S. 1182 (2004) (holding airline employee's retaliatory discharge claim under state law not preempted by the ADA); *Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259, 1261 (9th Cir. 1998) (holding ADA does not preempt airline passengers' state law tort claims arising from provision of in-flight services by airline employees); *Wagman v. Federal Express Corp.*, 47 F.3d 1166 (4th Cir. 1995) (Table) (holding state law consumer fraud claims based on misleading advertising preempted by the ADA).

41. *Morales*, 504 U.S. at 427 & n.7 (internal quotation omitted) (“[T]he airlines have not sustained their burden of proving that compliance with the NAAG guidelines would have a ‘significant’ effect on

complex airline industry, the majority reasoned, would result in less information broadcast to consumers. To the extent the NAAG guidelines required additional disclosures, and sometimes different notices in different states based on local taxes and surcharges, “the obligations imposed by the guidelines would have a significant impact upon the airlines’ ability to market their product, and hence a significant impact upon the fares they charge.”⁴²

By way of conclusion, the majority pondered a hypothetical state restriction on non-price advertising where “the connection [between the restriction and carrier rates] would be far more tenuous.”⁴³ While reminding its audience that the NAAG guidelines did not present a borderline question, the Court suggested such a borderline case might exist, and certain state regulations “‘may affect [airline fares] in too tenuous, remote, or peripheral a manner’ to have pre-emptive effect.”⁴⁴ Absent a requirement that degrees of effect—whether substantial or tenuous—be proven in subsequent cases on a quantifiable basis, however, the Court’s rule merely invites future litigants to argue theoretical relatedness and theoretically significant effects. Moreover, the Court’s passing reference to the Department of Transportation’s (DOT) authority to regulate airline advertising in the state attorneys’ general stead does little to clarify what role such federal authority, as a backstop for suspended police powers of the states, should play in FAAAA preemption analysis. It is reasonably clear that had Congress not conferred on the DOT “power to prohibit advertisements which in its opinion do not further competitive pricing,”⁴⁵ the majority’s conclusion would have remained the same.

The dissent, on the other hand, was convinced not only that adoption of the ERISA standard was incorrect, but also that the airlines’ failure to adduce data in support of their arguments required reversal, even under the majority’s generous standard.⁴⁶ The crux of the dissent’s disagreement with the majority was the extent to which Congress intended to preempt state laws that “related,” first and foremost, to the advertising of a product—in this case airline services—rather than to the services themselves.⁴⁷ Proceeding under the presumption against preemption,⁴⁸ the dissent investigated the

their ability to market their product and, therefore, on their rates.”) (Stevens, J., dissenting).

42. *Id.* at 390.

43. *Id.* (noting, for example, that the decision does not “lead[] to pre-emption of state laws against gambling and prostitution as applied to airlines”).

44. *Id.* (quoting *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 100 n.21 (1983)).

45. *Id.* at 390-91.

46. *Id.* at 419 (“[In adopting the ERISA standard], the Court disregards established canons of statutory construction, and gives the ADA pre-emption provision a construction that is neither compelled by its text nor supported by its legislative history.”) (Stevens, J., dissenting).

47. *Id.* at 419-20 (“In deciding whether a federal law pre-empts a state statute, our task is to ascertain Congress’ intent in enacting the federal statute at issue.” (quoting *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 738 (1985))). See also *Metropolitan Life*, 471 U.S. at 740 (Stevens, J., dissenting) (“[The] presumption that Congress did not intend to pre-empt areas of traditional state regulation” underscores preemption analysis.); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 522 (1981) (“[Preemption analysis] must be guided by respect for the separate spheres of governmental authority preserved in our federalist system.”).

48. As the First Circuit noted in *N.H. Motor Transport IV*, the presumption against federal preemption was articulated by the Supreme Court in *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Although it may be fairly well understood how the presumption is to be rebutted in any given case, the

history, purpose, and structure of the ADA and concluded “there [is no] indication that the House and conferees thought that the pre-emption of state laws ‘relating to rates, routes, or services’ pre-empted substantially more than state laws ‘regulating rates, routes, or services.’”⁴⁹

B. The FAAAA

It was against this backdrop that Congress amended the ADA and enacted the FAAAA in 1994. In doing so, Congress extended the preemption provision of the ADA to independent motor carriers of property⁵⁰ and certain other property carriers.⁵¹ This extension was in response to certain judicial interpretations of the ADA that had resulted in “inequities” between independent motor carriers on the one hand and motor carriers affiliated with air carriers on the other.⁵² Additionally, congressional findings indicated that “[s]tate economic regulation of motor carrier operations causes significant inefficiencies” in the marketplace, and that preemption of these regulations is “necessary to facilitate interstate commerce.”⁵³ For the most part, however, Congress was satisfied with the judiciary’s treatment of the ADA, and took steps to assure that the “prior judicial case law interpreting” the ADA would be unimpaired by minor linguistic adjustments in the FAAAA.⁵⁴ In particular, the House Report explicitly approved of the *Morales* Court’s interpretation of the ADA preemption provision, and explained the conferees’ intention not to “alter the broad preemption interpretation” articulated in *Morales*.⁵⁵

Following the FAAAA’s enactment, the Supreme Court was again called upon to analyze the preemption provision in *American Airlines v. Wolens*.⁵⁶ Consumers participating in American’s frequent flyer program sought monetary damages for the

requisite conditions for its proper application in the first instance are not altogether clear. *N.H. Motor Transport IV*, 448 F.3d 66, 74-75 n.10 (1st Cir. 2006). See *infra* note 108.

49. *Morales*, 504 U.S. at 426 (Stevens, J., dissenting).

50. 49 U.S.C. § 14501(c)(1) (2000) (“[A] State . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . with respect to the transportation of property.”).

51. 49 U.S.C. § 41713(b)(4)(A) (2000) (“[A] State . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier or carrier affiliated with a direct air carrier through common controlling ownership when such carrier is transporting property by aircraft or by motor vehicle . . .”).

52. H.R. REP. NO. 103-677, at 87 (1994) (Conf. Rep.), as reprinted in 1994 U.S.C.C.A.N. 1715, 1759 (noting the decision of the Court of Appeals for the Ninth Circuit in *Federal Express Corp. v. California Public Utilities Commission*, 936 F.2d 1075 (9th Cir. 1991), cert. denied, 504 U.S. 979 (1992), where state regulations were held to apply to UPS because of its status as a motor carrier, whereas the same regulations were preempted by the ADA as to Federal Express because it was an air carrier). Accordingly, the legislative history of the FAAAA indicates that the two preemption provisions are “intended to function in the exact same manner . . . to create a completely level playing field between air carriers and carriers affiliated with a direct air carrier through common controlling ownership on the one hand and motor carriers on the other.” *Id.* at 85.

53. *Id.* at 87.

54. *Id.* at 83 (“In substituting the word ‘related’ for the prior word ‘relating’ and the word ‘price’ for the [prior] word ‘rates’ we are intending no substantive change to the [ADA] preemption provision . . .”).

55. *Id.*

56. 513 U.S. 219 (1995).

airline's alleged devaluation of their accumulated credits caused by retroactive modifications to the program.⁵⁷ The plaintiffs argued that American's modifications constituted breach of contract and violated state consumer protection laws.⁵⁸ The Illinois Supreme Court refused to find the contract and state law claims preempted by the ADA, deciding instead that both categories of claims fit the "too tenuous, remote, or peripheral" exception referenced in the *Morales* Court's conclusion.⁵⁹

On appeal, the *Wolens* Court determined that although the claims based on violations of enacted state law were preempted, the private contract claims could proceed.⁶⁰ The Court reasoned that to the extent the relevant provisions of the state consumer protection laws were legislative attempts to impose on airlines a standardized marketing regime, and because plaintiffs' claims were predicated on deviation from this regime, they were preempted by the FAAAA.⁶¹ Conversely, because enforcement of American's contractual bargain with consumers would merely "afford[] relief to a party who claims and proves that an airline dishonored a term the airline itself stipulated,"⁶² those contract claims were not preempted by the FAAAA.⁶³ Because the majority noted substantial, qualitative similarities between the NAAG guidelines struck down in *Morales* and the state law cause of action under which plaintiffs were claiming damages in *Wolens*, the decisions provide points of reference for each of the FAAAA's proscriptions on state action: A state shall neither enact (*Morales*) nor enforce (*Wolens*) a law related to a carrier's price, route, or service.

In *United Parcel Service, Inc. v. Flores-Galarza*,⁶⁴ the United States Court of Appeals for the First Circuit was asked to decide whether the FAAAA preempted a statutory scheme enacted and enforced by Puerto Rico to effect collection of certain excise taxes.⁶⁵ Although much of the court's unanimous opinion is devoted to predicate jurisdictional issues, it is significant for present purposes in two respects. First, the court provided a definition of United Parcel Service (UPS) "services" as a carrier under the FAAAA, a definition employed in the *N.H. Motor Transport IV*

57. *Id.* at 222.

58. *Id.* at 225 (citing Illinois Consumer Fraud and Deceptive Business Practices Act, 815 Ill. Comp. Stat. § 505 (1992)).

59. *Wolens v. American Airlines*, 157 Ill. 2d 466, 473 (1993) ("In view of our finding that frequent flyer programs are peripheral to the operation of an airline, it follows that plaintiff's State law claims for money damages bear only a tangential, or tenuous, relation to American's rates, routes, and services.").

60. *American Airlines v. Wolens*, 513 U.S. 219, 228 (1995).

61. *Id.* (noting the FAAAA's purpose to leave exclusively to the airlines "the selection and design of marketing mechanisms" in furtherance of their commercial enterprise).

62. *Id.* at 232-33.

63. *Id.* at 233 ("This distinction between what the State dictates and what the airline itself undertakes confines courts, in breach-of-contract actions, to the parties' bargain, with no enlargement or enhancement based on state laws or policies external to the agreement.").

64. 318 F.3d 323 (1st Cir. 2003).

65. *Id.* at 326 ("No interstate carrier transporting a package subject to an excise levied by the Commonwealth may deliver the package to its intended recipient unless the recipient (the 'consignee') presents a certificate from the Department of the Treasury evidencing payment of the requisite tax." (citing P.R. LAWS ANN. tit. 13, § 9066 (2004))).

court's subsequent preemption decision regarding Maine's Tobacco Delivery Law.⁶⁶ Second, the court clearly broadcast its straightforward understanding of *Morales*, and likewise previewed its disposition towards arguments against preemption advocated by the Attorney General in *N.H. Motor Transport IV*, which essentially echoed those advanced by the Secretary of the Department of the Treasury of the Commonwealth of Puerto Rico (the Secretary) in defense of the excise tax collection regime challenged in *United Parcel Service*.

The *United Parcel Service* court described UPS as being in the business of "offer[ing] door-to-door delivery service and the delivery of packages on an express or time-guaranteed basis."⁶⁷ Because of the complexity that inheres in UPS's daily delivery of thousands of packages, and because UPS provides for refund of delivery charges for delayed deliveries, the court found that any regulatory scheme that causes "delays and disruptions" in the delivery of packages ipso facto affects UPS services.⁶⁸ The court further reasoned that Puerto Rico's excise tax collection scheme not only "refers to" but also "has a forbidden significant effect on UPS's prices, routes, or services" to the extent that it mandates suspension of package deliveries under certain circumstances, levies fines for noncompliance,⁶⁹ and imposes undue costs on UPS's business.⁷⁰

Having thus adopted wholesale the broad ERISA-based *Morales* standard, the *United Parcel Service* court rather summarily dismissed the Secretary's arguments that, on the one hand, intervening material changes in ERISA law mandated a narrower interpretation of FAAAA preemption,⁷¹ and on the other that UPS had not overcome

66. Circuit Judge Howard authored the unanimous opinions in both *United Parcel Service* and *N.H. Motor Transport IV*.

67. *United Parcel Serv.*, 318 F.3d at 325.

68. *Id.* at 336.

69. *See, e.g.*, P.R. LAWS ANN. tit. 13, § 9066 (2004):

No sea, air or land carrier who has taxable items in custody may deliver them to the consignee or person properly claiming them, unless the person presents a certificate from the Secretary authorizing its delivery. Any carrier who violates this provision shall be subject to the imposition of an administrative fine and the payment of the tax corresponding to said articles, including surcharges and interest computed from the date of introduction of the article, when the taxpayer does not make such payment.

70. *United Parcel Serv.*, 318 F.3d at 335-36.

71. *Id.* at 335 n.19. The Secretary cited, as examples of restrictions on ERISA's preemptive reach, *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995), and *California Division of Labor Standards Enforcement v. Dillingham Construction, Inc.*, 519 U.S. 316 (1997). In *Travelers*, the Court held that New York State's regulation of hospital surcharges was neither related to nor connected to ERISA plans. Even though the differential rates charged to variously insured patients encouraged ERISA plans to purchase insurance from preferred insurers, the "indirect economic influence" of the surcharge did not "bind plan administrators to any particular choice and thus function as a regulation of an ERISA plan itself." *Travelers*, 514 U.S. at 659. In *Dillingham*, the Court likewise found that a state regulation that required payment of prevailing wages to employees in non-state approved apprenticeship programs but allowed lower pay to those in state-approved programs, was not preempted by ERISA because it only "alters the incentives, but does not dictate the choices, facing ERISA plans." *Dillingham*, 519 U.S. 316 at 334. When transposed from the ERISA to the FAAAA context—a transposition invited by the *Morales* Court's reading of the statutes' preemptive standards *in pari materia*—these cases indicate that FAAAA preemption analysis may very well be different when a carrier that is supposedly suffering "significant forbidden effects" retains a choice whether or not to continue suffering them.

the properly applicable presumption against federal preemption of Commonwealth taxation laws. In rejecting the Secretary's first argument, the court explained that the courts of appeals are not free to cobble together binding precedent from other areas of the law. Absent a new holding from the Supreme Court that resolves an apparent inconsistency owing to divergent interpretations of identical statutory language, the lower courts will refuse to resolve such an inconsistency on their own initiative.⁷² With regard to the presumption against preemption, the *United Parcel Service* court acknowledged that such a presumption exists, but denied the propriety of its imposition in that case.⁷³ The court reminded the Secretary that the presumption attaches when "Congress legislates in a field traditionally occupied by the states."⁷⁴ Under those circumstances, preemption analysis "start[s] with the assumption that the historic police powers of the States were not to be superseded."⁷⁵ In response to the Secretary's argument that the appropriate field was state taxation, the court decided the presumption did not apply because the appropriate field was air transportation, one in which Congress enjoys a "significant—and undisputed—presence."⁷⁶

III. MAINE'S TOBACCO DELIVERY LAW

Maine's Tobacco Delivery Law⁷⁷ was enacted in June 2003, supplementing an existing legislative scheme regarding retail tobacco sales in an effort "to limit the consumption of tobacco products by minors, and to track delivery sales in order to acquire lost tax revenue."⁷⁸ The amendments to existing law effected by the Tobacco Delivery Law represent the Maine Legislature's response to two significant consequences of the growth in Internet retail sales of tobacco products. First, the state's retail licensing requirements, prohibition of over-the-counter sales to minors, and attendant enforcement mechanisms—although reasonably successful at curbing minors' access to tobacco through standard retail channels⁷⁹—were powerless to stem

72. *United Parcel Serv.*, 318 F.3d at 335 n.19 ("If developments in pension law have undercut holdings in air-transportation law, it is for the Supreme Court itself to make the adjustment. Our marching orders are clear: follow decisions until the Supreme Court overrules them." (quoting *United Airlines, Inc. v. Mesa Airlines, Inc.*, 219 F.3d 605, 608 (7th Cir. 2000) (Easterbrook, J.))).

73. *Id.* at 336.

74. *Id.* (citing *United States v. Locke*, 529 U.S. 89, 108 (2000)).

75. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

76. *United Parcel Serv.*, 318 F.3d at 336. What the *United Parcel Service* court neglects to explain is the fate of the presumption when federal law, promulgated in a field traditionally occupied by Congress, is brandished as a shield by private parties challenging the validity of state law promulgated in fields within the traditional ambit of the states.

77. ME. REV. STAT. ANN. tit. 22, §§ 1551, 1555-C & -D (West 2004).

78. *N.H. Motor Transp. Ass'n v. Rowe (N.H. Motor Transport I)*, 301 F. Supp. 2d 38, 44 (D. Me. 2004) (citing Committee File of the Committee on Health and Human Services and Committee on Taxation on "An Act to Regulate the Delivery and Sales of Tobacco Products and to Prevent the Sale of Tobacco Products to Minors" (Apr. 29, 2003)). See also ME. REV. STAT. ANN. tit. 22, § 1551(3) (West 2004) ("Tobacco products" includes any form of tobacco and any material or device used in the smoking, chewing or other form of tobacco consumption, including cigarette papers and pipes.").

79. See *N.H. Motor Transport III*, 377 F. Supp. 2d 197, 203 (D. Me. 2005) ("As a result of these efforts, Maine's tobacco addiction rates have plummeted among youth . . ." (quoting Testimony of Dora Anne Mills, Director, Bureau of Health, Department of Human Services)); see also 1995 ME. LAWS 470 § 17, which provided:

the flow of Internet tobacco delivered directly to minors' homes.⁸⁰ Second, Internet tobacco purchases—by consumers of any age—were not subject to state tax, causing losses of “tremendous tax revenues as a result of tax free sales by unlicensed companies.”⁸¹ The Tobacco Delivery Law thus included measures to restrict delivery of tobacco to minors,⁸² facilitate collection of applicable state taxes directly from consumers,⁸³ and provide for the seizure of contraband cigarettes.⁸⁴

A. Interdiction of Sales to Minors

In order to understand the mechanisms that the Tobacco Delivery Law employs to restrict Internet sales of tobacco products to minors, it is first necessary to understand the components of an Internet retail tobacco transaction as contemplated by Maine's law. The Tobacco Delivery Law clearly defines “delivery sale”⁸⁵ as including only those sales (1) to consumers who are not licensed distributors or retailers, (2) of tobacco products that are delivered by common carriers of packages, including the United States Post Office.⁸⁶ In order for an Internet retailer to accomplish a lawful delivery sale, that retailer must take certain measures, the linchpin of which is found at section 1555-C(3)(C) (the Age Verification Provision).⁸⁷ The Age

To the extent that funds are available, the Department of Human Services and the Office of Substance Abuse shall collaboratively coordinate, develop and implement programs to educate retailers, schools, retail clerks, juveniles and the general public about the laws relating to cigarette sales to, and purchases by, juveniles, the consequences of violating those laws and the consequences of using tobacco products.

80. *N.H. Motor Transport IV*, 448 F.3d 66, 69 (1st Cir. 2006).

81. *Id.* (citing Testimony of Representative Glen Cummings Before the Joint Standing Committee on Health & Human Services, Apr. 29, 2003).

82. ME. REV. STAT. ANN. tit. 22, § 1555-C(3)(C) (West 2004) (requiring Internet retailers to demand that delivery companies both deliver tobacco products only to the purchaser/addressee and verify the age of the purchaser/addressee).

83. *Id.* § 1555-C(4) (referencing the federal Jenkins Act reporting regime and requiring Internet retailers to report all delivery sales, including purchaser identity and quantity and brand of tobacco sold, to the Department of Administrative and Financial Services, Bureau of Revenue Services); *see also supra* note 10 (discussing the Jenkins Act).

84. ME. REV. STAT. ANN. tit. 22, § 1555-D(6) (West 2004) (defining as contraband subject to seizure all tobacco products purchased from unlicensed retailers).

85. *Id.* § 1551(1-B):

“Delivery sale” means a sale of tobacco products to a consumer in this State when:

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

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

A sale to a person who is not licensed as a tobacco distributor or tobacco retailer is a delivery sale.

86. *See id.* § 1551(1-C) (“‘Delivery service’ means a person, including the United States Postal Service, who is engaged in the commercial delivery of letters, packages or other containers.”).

87. *See id.* § 1555-C(3):

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

A. Prior to shipping, the tobacco retailer shall provide to the delivery service the age of the purchaser

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

Verification Provision requires that “[t]he tobacco retailer shall utilize a delivery service” that will ensure the purchaser of the product is the addressee, and that the addressee is at least eighteen years old—a determination that requires on-delivery inspection of government-issued photographic identification.

Notably, however, the only private actor subject to liability for violation of the delivery sale requirements is the tobacco retailer.⁸⁸ Under no factual scenario could a delivery service be sanctioned under these provisions. Even if an Internet retailer were to utilize a delivery service that did not provide the age verification services that the retailer is required by law to demand as a matter of private contract, and the illegally shipped tobacco products are thus deemed contraband subject to forfeiture, the delivery service is nonetheless held harmless.⁸⁹ Accordingly, were Maine allowed to enforce these delivery sale requirements, the probable result would be multiple civil judgments against interstate Internet retailers whose only conceivable defense—lack of personal jurisdiction—would likely be unavailing under Maine’s long-arm statute.⁹⁰ Assuming the legislature knew that interstate common carriers such as UPS did not offer the age verification services that retailers are required by law to demand, the intended effect of these provisions is clear: discourage Internet retailers from accepting Maine residents’ orders for delivery sales by threatening civil penalties that increase in magnitude upon multiple violations.

B. Revenue-Capture Provisions

As noted above, the Tobacco Delivery Law is meant not only to restrict minors’ access to tobacco products, but also to collect lost tax revenue on tobacco sales to Maine residents notwithstanding their ages. The sale reporting requirements of section

State of Maine tobacco license number of the tobacco retailer.

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

- (1) The purchaser must be the addressee;
- (2) The addressee must be of legal age to purchase tobacco products and must sign for the package; and
- (3) If the addressee is under [twenty-seven] years of age, the addressee must show valid government-issued identification that contains a photograph of the addressee and indicates that the addressee is of legal age to purchase tobacco products.

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

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

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

88. *Id.*

89. *Id.* § 1555-C(7) (“Any tobacco product sold or attempted to be sold in a delivery sale that does not meet the requirements of this section is deemed to be contraband and is subject to forfeiture . . .”).

90. See ME. REV. STAT. ANN. tit. 14, § 704-A (West 2004) (deeming that a person who transacts business within Maine has submitted to personal jurisdiction); see also Rita H. Logan, *Reaching into Cyberspace with Maine’s Long-Arm Statute*, 14 ME. B.J. 306, 309 (1999) (speculating how the Maine Supreme Judicial Court will perform jurisdictional contacts analysis under the statute in the context of Internet business transactions).

1555-C(4),⁹¹ which require retailers to report all delivery sales to state tax authorities and provide civil penalties for failure to so report, are a clear attempt to recoup unpaid tobacco taxes directly from consumers in a manner consistent with the Jenkins Act.⁹² In contrast, section 1555-D of the Tobacco Delivery Law (the Proscribed Delivery Provision),⁹³ which subjects delivery services under contract with unlicensed retailers to liability for knowingly transporting tobacco products, stands on what is perhaps a less legitimate ground. Tobacco retailers who are unlicensed are already transacting unlawful business with Maine consumers and are subject to criminal—as opposed to civil—sanction for doing so.⁹⁴ It is therefore not unexpected that Maine would deem all products sold by unlicensed retailers contraband and subject to forfeiture.⁹⁵ In addition, if licensed retailers consistently report their delivery sales to the state revenue service (as is likely the case), Maine should expect to increase licensing⁹⁶ as well as tax revenues by imposing quasi-co-conspirator liability on carriers that serve unlicensed retailers. However, the Proscribed Delivery Provision cannot reasonably be justified—as can the Age Verification Provision or the Jenkins Act reporting requirements—by a narrow appeal to Maine’s compelling interests in protecting citizen health or augmenting the public fisc. At best, it can be characterized as merely an attempt to bootstrap the pre-existing scheme to chill the unlicensed Internet tobacco trade. At worst, it appears to be an arguably draconian backlash against the carriers, actors who constitute the broadest and most conspicuous enforcement target when compared to rogue e-commerce retailers and their widely-dispersed customer base.

91. See *supra* note 83.

92. See *supra* notes 10 and 83; see also ME. REVENUE SERVS.—SALES, FUEL & SPECIAL TAX DIV., INSTRUCTIONAL BULLETIN: TOBACCO PRODUCTS 3 (2006) (“Individual purchasers and users of tobacco products . . . must report tobacco products purchases that have not previously been taxed in Maine (for example, imports from other states or countries and purchases made over the Internet).”), available at <http://www.maine.gov/revenue/othertaxes/tobacco/FinalOTPBulletin073106.pdf>.

93. See ME. REV. STAT. ANN., tit. 22, § 1555-D (West 2004):

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

94. See *id.* § 1555-C(1) (requiring that retailers who accept and fill orders for delivery sales of tobacco products acquire retail tobacco license pursuant to title 22, section 1551-A(1) of the Maine Revised Statutes); see also *id.* § 1554-B(3) (defining unlicensed retail sale of tobacco products a strict liability Class E crime under title 17-A, section 34(4-A) of the Maine Revised Statutes).

95. See *id.* § 1555-D(6) (“[A]ny tobacco product sold or attempted to be sold in a delivery sale [by an unlicensed tobacco retailer] is deemed to be contraband and is subject to forfeiture . . .”).

96. See 10-144-203 ME. CODE R. § 3 (2006) (providing for maximum annual retail tobacco license fee of \$150).

IV. THE *N.H. MOTOR TRANSPORT* LITIGATION

A. N.H. Motor Transport I, II & III

New Hampshire Motor Transport Association, Massachusetts Motor Transportation Association, Inc., and Vermont Truck and Bus Association, Inc., “non-profit trade associations whose members are in the interstate transportation business,”⁹⁷ filed suit in October of 2003, seeking a declaration from the district court that the Age Verification Provision and the Proscribed Delivery Provision are preempted by the FAAAA.⁹⁸

The parties’ litigation strategy in the district court involved three discrete rounds of summary judgment briefing. In the first (*N.H. Motor Transport I*), plaintiffs unsuccessfully alleged a theory of “facial” preemption.⁹⁹ In the second (*N.H. Motor Transport II*), the Maine Attorney General moved to dismiss for lack of standing and for summary judgment that the Tobacco Delivery Law was not “facially” preempted.¹⁰⁰ In the third (*N.H. Motor Transport III*), both parties moved for summary judgment on the plaintiffs’ ultimately successful “as-applied” challenge.¹⁰¹

The associations’ “bifurcated summary judgment strategy”¹⁰²—supposedly based on the First Circuit’s interpretation of *Morales* in *United Parcel Service*—injected into the litigation an arguably distracting procedural complication.¹⁰³ In *N.H. Motor Transport I*, the court confirmed that the appropriate standard under which the associations’ challenge was to be decided was that announced by the First Circuit in *United Parcel Service*: “A sufficient nexus [for preemption] exists if the law expressly references the [motor] carrier’s prices, routes or services, or has a ‘forbidden

97. *N.H. Motor Transport I*, 301 F. Supp. 2d 38, 40 (D. Me. 2004).

98. *Id.* at 40-41.

99. *Id.* at 46 (denying summary judgment that the Tobacco Delivery Law is “facially” preempted).

100. *N.H. Motor Transp. Ass’n v. Rowe (N.H. Motor Transport II)*, 324 F. Supp. 2d 231, 232 (D. Me. 2004) (granting summary judgment that the Tobacco Delivery Law is not “facially” preempted but holding that plaintiff associations have standing to mount an “as-applied” challenge).

101. *N.H. Motor Transport III*, 377 F. Supp. 2d 197, 220 (D. Me. 2005) (granting plaintiff associations’ “as-applied” challenge, and holding that the Age Verification Provision and the Proscribed Delivery Provision are preempted, but section 1555-C(3)(A) is not).

102. *N.H. Motor Transport II*, 324 F. Supp. 2d at 233.

103. *Id.* In his second summary judgment disposition, United States District Judge Hornby described one consequence of the morass as follows:

I am perplexed by the carrier associations’ argument [raised in opposition to the Attorney General’s motion for summary judgment regarding facial preemption] that “there is no ‘Facial Preemption Claim’ in the Complaint on which the Attorney General could be granted judgment.” To be sure, the Complaint states two causes of action (under the Supremacy Clause and the Declaratory Relief Act), and neither is entitled “Facial Challenge.” But the Complaint also asserts that the Maine provisions are preempted by federal law because they “expressly refer to” and “have a significant effect on” motor carrier services. It was the carrier associations who embarked upon a bifurcated summary judgment strategy

Id. (citations omitted). Moreover, in *N.H. Motor Transport III*, Judge Hornby noted that commentators have addressed the substantial confusion wrought by the “facial” and “as-applied” labels attached to suits that challenge the validity of statutes. *N.H. Motor Transport III*, 377 F. Supp. 2d at 201 n.9 (citing Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1335-41 (2000); Gillian E. Metzger, *Facial Challenges and Federalism*, 105 COLUM. L. REV. 873, 879-83 (2005)).

significant effect upon the same.”¹⁰⁴ This standard for FAAAA preemption, extracted from the *Morales* Court’s interpretation of the ADA, may appear to require, or at least invite, the two-stage analysis pursued by the associations in their challenge to the Tobacco Delivery Law. However, as is clear from the absence of economic data substantiating the *Morales* Court’s determination of “forbidden significant effect,”¹⁰⁵ the second avenue to FAAAA preemption is equally susceptible to determination under a “facial” challenge. In *Morales*, the Court found that the NAAG guidelines had a “forbidden significant effect” on airline rates simply as a matter of economic logic, without reference to its “as-applied” effect.¹⁰⁶ Such a standard, as the *Morales* dissent hinted, necessarily breeds this kind of confusion, especially when applied in the context of summary judgment disposition.¹⁰⁷ Nonetheless, the associations proceeded under this theory, and *N.H. Motor Transport I, II & III* demonstrate its patent inefficiency.

An unintended and ultimately immaterial effect on the litigation of the associations’ bifurcated summary judgment strategy was that in granting the associations’ “as-applied” summary judgment motion in *N.H. Motor Transport III*, District Judge Hornby withdrew the presumption against preemption¹⁰⁸ he had applied in *N.H. Motor Transport I*.¹⁰⁹ In addition to being motivated by a mistaken reading of *Morales*—that the alternative avenues to FAAAA preemption are inherently different inquiries—the associations’ bifurcated approach may also be characterized as a tactic to avoid, or at least postpone, the exposure of the identities of the corporate interests the associations represent.¹¹⁰ By first moving for summary judgment that the Tobacco Delivery Law

104. *N.H. Motor Transport I*, 301 F. Supp. 2d at 42 (quoting *United Parcel Serv., Inc. v. Flores-Galarza*, 318 F.3d 323, 334 (1st Cir. 2003)).

105. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 388-89 (1992); see also *supra* note 41 and accompanying text.

106. *Morales*, 504 U.S. at 388-89.

107. *Id.* at 427 & n.7 (Stevens, J., dissenting); see also FED. R. CIV. P. 56(c) (“[Summary] judgment . . . shall be rendered forthwith if . . . there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.”). Under the substantive law of FAAAA preemption, because the necessity of adducing “material facts” is almost wholly erased, and a “genuine issue” as to them therefore rendered impossible to raise, FAAAA preemption challenges are arguably ill-suited to the awkward “facial” and “as-applied” labels invoked by the plaintiff associations in their challenge to the Tobacco Delivery Law.

108. See *N.H. Motor Transport IV*, 448 F.3d 66, 74-75 n.10 (1st Cir. 2006) (describing the substantial uncertainty surrounding the application of the presumption, comparing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (stating that preemption analysis starts “with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress”) with *United States v. Locke*, 529 U.S. 89, 108 (2000) (presumption inapplicable where “the State legislates in an area where there has been a history of significant federal presence”). For a different articulation of the predicate to the presumption, see *United Parcel Service v. Flores-Galarza*, 318 F.3d 323, 336 (1st Cir. 2003) (“The presumption [against preemption] only arises . . . if Congress legislates in a field traditionally occupied by the states.”). As is evident in *N.H. Motor Transport III* and *IV*, the advantage of the presumption to the Attorney General was nullified, whether or not it was applied.

109. *N.H. Motor Transport III*, 377 F. Supp. 2d at 206 (“I conclude that I erred in my analysis in my earlier decision on the associations’ facial motion for summary judgment, where I applied the presumption against preemption [However,] [e]ven if I continued to apply the presumption, I would find Maine’s Tobacco Delivery Law preempted . . .”).

110. *N.H. Motor Transport II*, 324 F. Supp. 2d 231, 237 n.7 (D. Me. 2004) (“At oral argument . . . the plaintiffs’ lawyer advanced reasons why the associations are the party plaintiffs, one of those being that it

is “facially” preempted, the associations theoretically stood to achieve the goal of its members without “going into the facts.”¹¹¹ However, because the *N.H. Motor Transport I* court denied their “facial” challenge,¹¹² the associations were forced to adopt their back-up position: proof of the Tobacco Delivery Law’s “significant forbidden effect” on carrier services “as-applied” to UPS, one of their many constituents.¹¹³

Having prevailed in *N.H. Motor Transport I*, the Attorney General in *N.H. Motor Transport II* sought to dismiss the associations’ suit for lack of standing, hoping to fend off the associations’ promised “as-applied” attack.¹¹⁴ The Attorney General’s argument was based on the three-part associational standing test articulated by the Supreme Court in *Hunt v. Washington State Apple Advertising Commission*,¹¹⁵ which provides:

[A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization’s purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.¹¹⁶

The Attorney General focused on the third *Hunt* prong and argued that the contemplated “as-applied” challenge, because of its fact-intensive nature, would require the participation of UPS, the party who controls all relevant discoverable material.¹¹⁷ The court, however, found the Attorney General’s arguments to be without merit and held the third *Hunt* prong required an analysis not of discovery burdens, but rather of the “nature of relief requested.”¹¹⁸ The court reasoned that associational standing was appropriate because the associations were seeking injunctive relief, which

can be disadvantageous for a particular company to challenge a tobacco-regulating law.”); see also *N.H. Motor Transport IV*, 448 F.3d at 81 n.13 (noting that research failed to uncover any FAAAA challenge to any state law banning transport of contraband other than tobacco, and inviting reflection on Sir Arthur Conan Doyle’s following conceit: “Detective Gregory: ‘Is there any other point to which you would wish to draw my attention?’ Sherlock Holmes: ‘To the curious incident of the dog in the night-time.’ Gregory: ‘The dog did nothing in the night-time.’ Holmes: ‘That was the curious incident.’” SIR ARTHUR CONAN DOYLE, *Silver Blaze* (1890), in II THE ANNOTATED SHERLOCK HOLMES (William S. Baring-Gould ed., 1967)).

111. *N.H. Motor Transport II*, 324 F. Supp. 2d at 233 (quoting Transcript of Conf. of Counsel at 3, *N.H. Motor Transport II*, 324 F. Supp. 2d 231 (D. Me. 2004) (No. 03-0178)).

112. *N.H. Motor Transport I*, 301 F. Supp. 2d 38, 42-44 (D. Me. 2004) (applying presumption against preemption and holding that (1) because the Age Verification Provision applies to retailers and not delivery companies, and does not “expressly reference[] . . . [motor] carrier’s prices, routes or services,” it is not “facially preempted,” and (2) the Proscribed Delivery Provision, although it expressly refers to carrier services, is likewise not “facially” preempted because it is a generally applicable prohibition on transportation of contraband).

113. *N.H. Motor Transport II*, 324 F. Supp. 2d at 235.

114. *Id.* at 232.

115. 432 U.S. 333 (1977).

116. *Id.* at 343.

117. *N.H. Motor Transport II*, 324 F. Supp. 2d at 234-35.

118. *Id.* at 236 (citing *Warth v. Seldin*, 422 U.S. 490, 511 (1975)).

“usually inures to the benefit of all members injured,”¹¹⁹ as opposed to damages, where “individualized proof” is required.¹²⁰

After the *N.H. Motor Transport II* court affirmed that they had standing to proceed, the associations moved for summary judgment that the Tobacco Delivery Law was preempted “as-applied” to UPS. Curiously, in granting the associations’ second motion, the *N.H. Motor Transport III* court reversed its prior holding that the Proscribed Delivery Provision was not facially preempted by the FAAAA.¹²¹ Nonetheless, the court went on to explain that the Proscribed Delivery Provision “would be preempted because . . . it also has a forbidden significant effect on carriers’ services” to the extent it requires UPS to inspect packages in transit, and to compare labels with lists of licensed tobacco retailers provided by the Attorney General.¹²² Perhaps unsurprisingly in light of *Morales*, the court concluded “that there is no need for empirical studies to prove that a change in the normal, uniform procedure, such as removing the package from the delivery process . . . would cause a delay in the process.”¹²³

Turning its attention to section 1555-C(3)(A) and the Age Verification Provision, the court concluded that because neither provision “impose[s] any direct obligations on carriers, and carriers face no penalties under them” they should be subjected to “forbidden significant effect” rather than “express reference” analysis.¹²⁴ Although the court appeared to struggle with this interruption in the causal link between state legislative mandate and carrier services, it concluded that the provision is preempted:

The analysis is similar to that for [the Proscribed Delivery Provision]. Like that section, [the Age Verification Provision] impermissibly affects carriers’ services because it results in a carrier (*who wishes to participate in this commerce*) having to identify the contents of the package to determine whether it must impose the delivery conditions listed in the statute. Imposing these conditions on delivery causes carriers’ drivers to alter their delivery practices for packages in Maine¹²⁵

119. *Id.* (citing *Warth*, 422 U.S. at 515).

120. *Id.* (rejecting the Attorney General’s argument that an “as-applied” challenge is “akin to proving damages”).

121. *N.H. Motor Transport III*, 377 F. Supp. 2d 197, 211 (D. Me. 2005) (“Section 1555-D thus expressly references carriers’ services. Under the analysis of *Morales* and *UPS*, that is enough to result in preemption. This conclusion differs from what I said in my preliminary rulings. My conclusion has changed because I no longer apply the presumption against preemption . . .”).

122. *Id.*

123. *Id.* at 213 n.72. The court reached the same conclusion after analyzing the associations’ challenge to the Age Verification Provision:

Despite the Attorney General’s argument that, because of dollar amounts, I should consider the effects here not sufficient to reach the ‘significant’ level of the ‘forbidden significant effect’ standard, I conclude that no more is required. *Morales* should not be read to require courts to assess the actual competitiveness of a particular market to determine when effects reach the level of significance. For the same reason, I reject the Attorney General’s argument that UPS was required to do more empirical research or industrial engineering studies. . . . Therefore, I do not resolve the parties’ disagreement over whether an additional two seconds are really necessary to examine every package coming to Maine

Id. at 216 n.92.

124. *Id.* at 215.

125. *Id.* at 216 (emphasis added).

However, the court concluded that section 1555-C(3)(A), which requires a retailer to supply the carrier with purchaser age information, is not preempted to the extent “the carrier does not have to do anything with [the] information.”¹²⁶

The *N.H. Motor Transport III* court ultimately entered declaratory judgment that the Age Verification and Proscribed Delivery provisions are preempted and invited the parties to submit a proposed injunction that would completely enjoin enforcement of the former, but would limit the injunction regarding the latter only as against motor and air/ground carriers.¹²⁷ In its conclusion the court noted that, at least with regard to the Age Verification Provision, “unless a carrier is willing to make the required guarantees, it is foreclosed from this part of the transportation market.”¹²⁸

B. N.H. Motor Transport IV

The Attorney General appealed not only from the *N.H. Motor Transport III* court’s ultimate preemption ruling,¹²⁹ but also from the *N.H. Motor Transport II* court’s standing ruling.¹³⁰ In addition, the Attorney General argued that the associations’ case became moot while on appeal because UPS had settled¹³¹ “an enforcement action brought by the New York Attorney General under a New York law restricting the ability of carriers to deliver cigarettes to consumers.”¹³² As a consequence of this settlement, the Attorney General argued, UPS had altered its business practices and policies to such an extent that it was no longer engaged in the activities proscribed by the Tobacco Delivery Law.¹³³ Although the *N.H. Transport IV* court recognized that

126. *Id.* at 217.

127. *Id.* at 218.

128. *Id.* at 219. For this statement to be true, it must be assumed that out-of-state retailers will comply with the Tobacco Delivery Law and require that carriers provide the Age Verification service. To the extent some of these foreign retailers are unlicensed and are thus operating in violation of Maine tobacco laws already, the strength of this assumption is questionable. Moreover, as noted above, the court fails to analyze whether or not the compensation a carrier could demand for making the required guarantees would suffice to render the forbidden effect insignificant for FAAAA preemption purposes.

129. *See N.H. Motor Transport IV*, 448 F.3d 66, 74 (1st. Cir. 2006).

130. *See id.* at 71. In affirming the lower court’s standing ruling, the *N.H. Motor Transport IV* court noted that the operative language of the FAAAA preemption provisions essentially rendered the case ideal for association standing. *Id.* at 72. The court reasoned that because the FAAAA provisions, 49 U.S.C. §§ 14501(c) and 41713(b)(4)(A), preempt state laws that relate to a price, route or service of “any motor carrier” or “an air carrier,” respectively, association standing was eminently appropriate: the associations can prevail on their preemption claim “by establishing that the challenged provisions of the Tobacco Delivery Law have a forbidden significant effect on one carrier.” *Id.* at 72-73.

131. The *N.H. Motor Transport III* summary judgment order was entered on May 27, 2005. *N.H. Motor Transport III*, 377 F. Supp. 2d at 220. The Assurance of Discontinuance between UPS and the Attorney General of the State of New York was executed on October 21, 2005. Assurance of Discontinuance in the Matter of United Parcel Service, Inc. 20 (Oct. 21, 2005), available at <http://www.oag.state.ny.us/press/2005/oct/9tiupsaodfinal.oct.pdf> [hereinafter *UPS Settlement*].

132. *N.H. Motor Transport IV*, 448 F.3d at 73. The New York Health Law cited by the court provides: It shall be unlawful for any common or contract carrier to knowingly transport cigarettes to any person in this state reasonably believed by such carrier to be other than [a licensed tax agent or wholesale dealer, an export warehouse proprietor, or an officer, employee or agent of the government of the United States or New York State].

N.Y. PUB. HEALTH LAW § 1399-ll(2) (McKinney 2001).

133. Reply Brief of Defendant-Appellant at 4, *N.H. Motor Transport IV*, 448 F.3d 66 (1st Cir. 2006)

“Article III considerations require that an actual case or controversy exist between the parties *throughout the course of the litigation*,”¹³⁴ the court explained that the party who argues the absence of such a case or controversy “must show that the court cannot grant any ‘effectual relief whatever’ to its opponent.”¹³⁵ Analysis of the *N.H. Transport IV* court’s rather perfunctory finding that the Attorney General had not met “this heavy burden”¹³⁶ of establishing mootness illustrates the unique and difficult issues raised by the associations’ bifurcated summary judgment strategy and the theories on which the associations ultimately prevailed.

The UPS Settlement provides, in relevant part:

4. [N.Y. Pub. Health Law section 1399-II] became effective on or about April 10, 2003 (the “Implementation Date”). . . .

10. UPS represents that, after the Implementation Date, the UPS Tariff and UPS’s Terms and Conditions, which describe the terms and conditions pursuant to which UPS provides package delivery services for shippers, and together form parts of the UPS shipping contract, were amended to provide in pertinent part: “Shippers are prohibited from shipping, and no service shall be rendered in the transportation of, any tobacco products that shippers are not authorized to ship under applicable state law or that are addressed to recipients not authorized to receive such shipments under applicable law.” . . .

15. UPS has made a business decision to adopt a formal policy expressly prohibiting the shipment of cigarettes to individual consumers in the United States while still permitting the lawful shipment of cigarettes to licensed tobacco businesses and other persons legally authorized to receive shipments of cigarettes . . .¹³⁷

The *N.H. Transport IV* court reasoned that because the UPS Settlement “applies only to the delivery of cigarettes”¹³⁸ and the Tobacco Delivery Law applies to a broader category of products,¹³⁹ UPS retained a “legally cognizable stake in the outcome”¹⁴⁰ of the appeal.¹⁴¹ However, to the extent UPS agreed that “no service shall be rendered in the transportation of [] any tobacco products that shippers are not authorized to ship under applicable state law,”¹⁴² it is difficult to understand how the UPS Settlement failed to jeopardize the court’s jurisdiction over the litigation. After all, the Proscribed Delivery Provision of the Tobacco Delivery Law makes illegal the

(No. 05-2136) (“Now, without advising this Court, UPS has implemented a program effectively doing what Maine law mandates—checking packages and ensuring they are shipped by licensees—which obviously must have been studied and analyzed by UPS.”).

134. *N.H. Motor Transport IV*, 448 F.3d at 73 (citing *Ramirez v. Sanchez Ramos*, 438 F.3d 92, 100 (1st Cir. 2006)) (emphasis added).

135. *Id.* (quoting *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992)).

136. *Id.*

137. *UPS Settlement*, *supra* note 131, at 2-4.

138. *N.H. Motor Transport IV*, 448 F.3d at 73.

139. See ME. REV. STAT. ANN. tit. 22, § 1551(3) (West 2004) (“‘Tobacco products’ includes any form of tobacco and any material or device used in the smoking, chewing or other form of tobacco consumption, including cigarette papers and pipes.”).

140. *N.H. Motor Transport IV*, 448 F.3d at 73 (quoting *Goodwin v. C.N.J., Inc.*, 436 F.3d 44, 46 (1st Cir. 2006)).

141. *Id.* at 74 (“Because enjoining the challenged provisions would permit UPS to deliver *all* tobacco products, effectual relief remains available.”).

142. *UPS Settlement*, *supra* note 131, at 4.

shipment of a “tobacco product” from an unlicensed tobacco retailer.¹⁴³ Unlicensed retailers are, by definition, not authorized to sell tobacco products in Maine.¹⁴⁴ Accordingly, UPS’s agreement to discontinue servicing “shippers [that] are not authorized to ship under applicable state law” appears to render moot the associations’ claim that the Proscribed Delivery Provision is preempted by the FAAAA, or as the Attorney General argued in the alternative, no longer ripe for decision.¹⁴⁵

By failing to parse exactly what remained of UPS’s stake in the outcome of the appeal before it, the *N.H. Motor Transport IV* court avoided articulating the only possible scenario under which UPS remained adversely affected by the Tobacco Delivery Law: delivery sale of non-cigarette tobacco products by a licensed retailer. Under such a scenario, only the Age Verification Provision requirements attach. UPS would thus have no legally cognizable stake in the outcome of the appeal of that portion of the *N.H. Motor Transport III* court’s ruling that the Proscribed Delivery Provision was preempted.

It is plausible that the *N.H. Motor Transport IV* court’s failure to explicitly analyze this issue represents its reluctance to acknowledge that in the field of FAAAA preemption much—perhaps too much—appears to turn on the business decisions of a carrier arguing preemption. On the one hand, arguably implicit in the court’s reasoning is the following logic: even if UPS may no longer have been adversely affected by the Proscribed Delivery Provision, another motor carrier that both (1) enjoyed FAAAA protection from artificial state regulation and (2) had not made a similar decision to discontinue certain service, would, in theory, have remained adversely affected. Thus, to the extent the associations were pleading preemption on behalf of all of their members—while singling out UPS for strategic purposes—the *associations* retained a cognizable stake in the appeal. On the other hand, the court might have considered that because the Proscribed Delivery Provision expressly references carrier services, it is facially preempted by the FAAAA,¹⁴⁶ and the existence *vel non* of adverse effects on UPS, or any carrier for that matter, is irrelevant. However, because this latter explanation is inconsistent with the *N.H. Motor Transport IV* court’s ultimate finding

143. *See supra* note 93.

144. ME. REV. STAT. ANN. tit. 22, § 1555-C(1) (West 2004) (“It is unlawful for any person to accept an order for a delivery sale of tobacco products to a consumer in the State unless that person is licensed under this chapter as a tobacco retailer.”).

145. *See* Reply Brief of Defendant-Appellant at 11 n.7, *N.H. Motor Transport IV*, 448 F.3d 66 (1st Cir. 2006) (No. 05-2136) (“Also applicable here is the doctrine that to bring a pre-enforcement challenge to a statute, the plaintiff at least must allege that it has ‘an intention to engage in a course of conduct . . . proscribed by the statute.’”) (quoting *Babbit v. United Farm Workers Nat’l Union*, 442 U.S. 289, 298 (1979)). This conclusion is only buttressed by the UPS Terms and Conditions, which currently provide: “Packages containing tobacco or tobacco products, as those terms are variously defined under applicable state law (“Tobacco Product Shipments”), are accepted for transportation only from shippers who are licensed and authorized to ship tobacco and tobacco products pursuant to applicable laws.” UPS Terms and Conditions of Service for Customers Located in the 48 Contiguous States, Alaska and Hawaii at 4 (Nov. 1, 2006), available at http://www.ups.com/media/en/terms_service_11012006.pdf. Moreover, because the Attorney General is required by title 22, section 1555-D(1) of the Maine Revised Statutes to “provide to a delivery service lists of licensed tobacco retailers and known unlicensed tobacco retailers,” the Tobacco Delivery Law in fact facilitates UPS’s compliance with its own Terms and Conditions and the UPS Settlement.

146. *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 388 (1992); *United Parcel Serv., Inc. v. Flores-Galarza*, 318 F.3d 323, 334 (1st Cir. 2003).

that half of the Proscribed Delivery Provision is preempted neither facially nor as-applied,¹⁴⁷ readers are left to ponder the true remaining stake the associations have with regard to the Proscribed Delivery Provision.

Having thus disposed of the two threshold jurisdictional issues of mootness and standing, the court proceeded to the merits of the Attorney General's appeal. The Attorney General articulated two principal arguments for reversal.¹⁴⁸ Concentrating first on the FAAAA itself, the Attorney General argued that the FAAAA "preempts only state laws that impose traditional economic regulation on carriers."¹⁴⁹ Although the court acknowledged that the legislative history of the FAAAA supported this argument,¹⁵⁰ the Attorney General was reminded that "the legislative history cannot trump the statute's text."¹⁵¹ Although this may be true, or at least comport with the *Morales* majority's remarks on the subject,¹⁵² there is a significant passage in the legislative history that the *N.H. Motor Transport IV* court partially ignored. In a section entitled "Background and statement of purpose," the House Conference Report on the FAAAA explains:

Currently, 41 jurisdictions regulate, in varying degrees, intrastate prices, routes and services of motor carriers. The jurisdictions which do not regulate are: Alaska, Arizona, Delaware, District of Columbia, Florida, Maine, Maryland, New Jersey, Vermont and Wisconsin.

Typical forms of regulation include entry controls, tariff filing and price regulation, and types of commodities carried.¹⁵³

147. *N.H. Motor Transport IV*, 448 F.3d 66, 81 (1st Cir. 2006) ("[W]hile Maine may ban a carrier from knowingly transporting contraband tobacco products, it may not dictate the procedures that a carrier should employ to locate these products in its delivery chain.>").

148. *Id.* at 74-78.

149. *Id.* at 74. See also Brief of Defendant-Appellant at 39-41 & n.10, *N.H. Motor Transport IV*, 448 F.3d 66 (1st Cir. 2006) (No. 05-2136).

150. *N.H. Motor Transport IV*, 448 F.3d at 77.

151. *Id.*

152. See *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 385 n.2 (1992) ("[L]egislative history need not confirm the details of changes in the law effected by statutory language before we will interpret that language according to its natural meaning.>").

153. H.R. REP. NO. 103-677, at 86 (1994) (Conf. Rep.), as reprinted in 1994 U.S.C.C.A.N. 1715, 1758. The *N.H. Motor Transport IV* cited the last sentence but not the first two. *N.H. Motor Transport IV*, 448 F.3d at 77. Taking the conferees' remarks to indicate that then-existing Maine laws were not the sort Congress sought to preempt, the Attorney General provided the *N.H. Motor Transport IV* court with a list of such laws:

7 M.R.S.A. § 3981, enacted at Maine P.L. 1987, c. 383, § 3 (regulating period of confinement and conditions for transportation of animals); 8 M.R.S.A. §§ 221, et seq., enacted at Maine P.L. 1985, c. 23, § 2 (prohibiting possession, sale or transport "in any conveyance" of fireworks "except as permitted by" state regulations); 12 M.R.S.A. §§ 8305-06, originally enacted Maine P.L. 1979, c. 545, § 3 (prohibiting and regulating shipment of plants and trees); 17-A M.R.S.A. § 1118 (transporting scheduled drugs); 17-A M.R.S.A. § 554-B(2) (transferring handgun to minor); 17-A M.R.S.A. § 1001(1)(B), enacted at Maine P.L. 1975, c. 499, § 1 (prohibiting transport or sale of explosives without a permit); 28-A M.R.S.A. § 2081, enacted at Maine P.L. 1987, c. 45, § A, 4 (prohibiting furnishing, delivering, or giving liquor to a minor).

Brief of Defendant-Appellant at 41 & n.10, *N.H. Motor Transport IV*, 448 F.3d 66 (1st Cir. 2006) (No. 05-2136).

Although it cannot be assumed that the conferees knew of all laws then in effect in Maine, this statement nonetheless suggests that there existed a class of state laws that did not contribute to the pernicious “patchwork of regulation”¹⁵⁴ for which the FAAAA was the remedy. As noted above, the court refused to credit this suggestion. Indeed, were the court to have done so, it would arguably amount to a revision of the *Morales* test for FAAAA preemption. Not unlike the Secretary’s argument in *United Parcel Service*, the Attorney General urged that such revision of *Morales* was not only permissible, but required by changes in the Supreme Court’s ERISA jurisprudence that occurred subsequent to the Court’s interpretation of ADA preemption in *Morales*.¹⁵⁵ Again, not unlike the *United Parcel Service* court’s response to the Secretary’s arguments there made,¹⁵⁶ the *N.H. Motor Transport IV* court rejected the Attorney General’s proposal that *Morales* had been overruled by implication.¹⁵⁷

The Attorney General’s second argument for reversal was that neither the Age Verification Provision nor the Proscribed Delivery Provision was preempted by the FAAAA because neither “related to” carrier services.¹⁵⁸ As a point of departure for its analysis, the court cited the *United Parcel Service* court’s definition of UPS’s services¹⁵⁹ and characterization of the FAAAA’s preemptive reach.¹⁶⁰ Operating under the *Morales-United Parcel Service* framework, the court found the Age Verification Provision “expressly references a carrier’s service of providing the timely delivery of packages,”¹⁶¹ and is preempted by the FAAAA even though, as the Attorney General argued, only retailers are subject to liability for failing to abide its requirements.¹⁶² The

154. H.R. REP. NO. 103-677, at 87 (1994) (Conf. Rep.), as reprinted in 1994 U.S.C.C.A.N. 1715, 1759.

155. *N.H. Motor Transport IV*, 448 F.3d at 76; see also *supra* note 71. Perhaps the most notable post-*Morales* pronouncement with respect to ERISA preemption was written by Justice Scalia in *California Division of Labor Standards v. Dillingham Construction, Inc.*:

[A]pplying the “relate to” provision according to its terms was a project doomed to failure, since, as many a curbstome philosopher has observed, everything is related to everything else. The statutory text provides an illusory test, unless the Court is willing to decree a degree of pre-emption that no sensible person could have intended—which it is not.

I think it would greatly assist our function of clarifying the law if we simply acknowledged that our first take on [ERISA] was wrong; that the “relate to” clause of the pre-emption provision is meant, not to set forth a *test* for pre-emption, but rather to identify the field in which ordinary *field pre-emption* applies—namely, the field of laws regulating “employee benefit plan[s]”

519 U.S. 316, 335-36 (1997) (Scalia, J., concurring). It should also be noted that three FAAAA preemption cases, cited by the *N.H. Motor Transport IV* court and referenced *infra*, notes 173 and 174, saw fit to rely on *Dillingham: Californians for Safe and Competitive Dump Truck Transport v. Mendonca*, 152 F.3d 1184, 1189 (9th Cir. 1998); *Robertson v. Liquor Control Board*, 10 P.3d 1079, 1082-83 (Wash. Ct. App. 2000); and *Ward v. New York*, 291 F. Supp. 2d 188, 208 (S.D.N.Y. 2003).

156. See *supra* note 72.

157. *N.H. Motor Transport IV*, 448 F.3d at 76.

158. *Id.* at 74.

159. *Id.* at 78.

160. *Id.* at 78-79 (“State laws and regulations having a connection with or reference to a . . . carrier’s . . . services are preempted under the [FAAAA]. A sufficient nexus exists if the law expressly references the . . . carriers’ . . . services or has a forbidden significant effect on the same.”) (quoting *United Parcel Service v. Flores-Galarza*, 318 F.3d 323, 335 (1st Cir. 2003)).

161. *Id.* at 79.

162. Brief of Defendant-Appellant at 57, *N.H. Motor Transport IV*, 448 F.3d 66 (1st Cir. 2006) (No. 05-2136).

court's analysis of the Age Verification Provision represents a reasoned hybrid of the awkward "facial" and "as-applied" labels deployed in the *N.H. Motor Transport III* court; indeed, neither label is referenced at all. The court not only focused on the Age Verification Provision's express reference to UPS's delivery services, but also on the resulting delays their implementation would inevitably cause.¹⁶³ In response to the Attorney General's argument that the FAAAA does not preempt a state law that does not regulate carriers, but instead their delivery clients, the court noted that "[e]ither way[,] the state is employing its coercive power to police the method by which carriers provide services in [Maine]."¹⁶⁴ The court also rejected the Attorney General's argument that FAAAA preemption cannot occur under circumstances that are essentially created by a carrier's election to deal in contraband goods subject to the strictures of state law.¹⁶⁵ According to the court, carrier business decisions are immaterial in analysis of FAAAA preemption; to hold otherwise would be to run afoul of "the FAAAA's goal of creating an environment in which '[s]ervice options will be dictated by the marketplace,' and not by state regulatory regimes."¹⁶⁶

The court's analysis of the Proscribed Delivery Provision, though not markedly different, was substantially informed by the Supreme Court's instruction that "courts should 'not nullify more of a legislature's work than is necessary, for . . . a ruling of unconstitutionality frustrates the intent of the elected representatives of the people.'"¹⁶⁷ Accordingly, the court parsed the Proscribed Delivery Provision and found both a "ban [on] primary conduct"¹⁶⁸ and a method of proving violation thereof by imposition of "constructive knowledge"¹⁶⁹ upon a carrier under certain circumstances.¹⁷⁰ Citing the *Morales* Court's assurance that a broad interpretation of FAAAA preemption does not foreclose all state actions that might apply to carriers,¹⁷¹ the *N.H. Motor Transport IV*

163. *N.H. Motor Transport IV*, 448 F.3d at 79 ("Delays 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 all could affect timely deliveries.")

164. *Id.* (citing *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 230 (1963)).

165. *Id.* at 80; *see also* Brief of Defendant-Appellant at 57, *N.H. Motor Transport IV*, 448 F.3d 66 (1st Cir. 2006) (No. 05-2136).

166. *N.H. Motor Transport IV*, 448 F.3d at 80 (quoting H.R. REP. 103-677 at 88 (1994) (Conf. Rep.), as reprinted in 1994 U.S.C.C.A.N. 1715, 1760).

167. *Id.* (quoting *Ayotte v. Planned Parenthood of N. New England*, 126 S. Ct. 961, 967 (2006)).

168. *Id.*

169. *Id.* at 81.

170. *See* ME. REV. STAT. ANN. tit. 22, § 1555-D (West 2004):

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

Id. (emphasis added to indicate the "constructive knowledge" component—the "second sentence"—of the Proscribed Delivery Provision).

171. *N.H. Motor Transport IV*, 448 F.3d at 80 ("[T]he Supreme Court explained that its broad interpretation of the statute's preemption provision did not place it 'on a road that leads to preemption of gambling and prostitution as applied to airlines.'" (quoting *Morales v. Trans World Airlines, Inc.*, 504 U.S.

court decided Maine's requirement that carriers not "act as *knowing* accomplices in the illegal sale of tobacco products"¹⁷² affects carrier services in a manner "too tenuous" to warrant preemption.¹⁷³ In reaching this conclusion, the court aligned itself with three other courts that have upheld other state laws proscribing transport of contraband cigarettes.¹⁷⁴

Turning its attention to the "second sentence" of the Proscribed Delivery Provision, the court found it impermissibly "dictate[d] the procedures that a carrier should employ" to determine whether or not it was violating Maine's permissible ban on transport of contraband products.¹⁷⁵ The "second sentence" automatically subjects a carrier to liability for violation of the Proscribed Delivery Provision if it can be shown in an enforcement action that the carrier either (1) transported a package duly labeled¹⁷⁶ to contain tobacco products, or (2) serviced a retailer included on a list of unlicensed retailers maintained by the Attorney General and provided to carriers.¹⁷⁷ Accordingly, the court found that a carrier wishing to avoid a finding of constructive knowledge under the statute "must specially inspect every package destined for delivery in Maine," and make sure to segregate and return all offending packages.¹⁷⁸ The court decided that although the "second sentence" does "not expressly reference carrier services," it nevertheless "has the effect of forcing UPS to change its uniform package-processing procedures," and is therefore preempted by the FAAAA.¹⁷⁹

Although the court was content to separate the Proscribed Delivery Provision into its constituent parts in an effort to save the first from preemption, it is reasonably clear that the Tobacco Delivery Law requires both to be in force if its overall goals are to be accomplished. After all, it is arguably impossible to prove that a carrier like UPS, "which delivers approximately 65,000 packages per day in Maine,"¹⁸⁰ ever transports a package with knowledge of its contents. The "constructive knowledge" component is therefore essential to enforcement of the Proscribed Delivery Provision.¹⁸¹ As

374, 390 (1992))).

172. *Id.* at 80.

173. *Id.* (quoting *Californians for Safe and Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184, 1189 (9th Cir. 1998)). *But see supra* text accompanying note 155.

174. *Id.* at 81 (citing *N.Y. State Motor Truck Ass'n v. Pataki*, No. 03-CV-2386, 2004 WL 2937803, at *6 (S.D.N.Y. Dec. 16, 2004); *Ward v. New York*, 291 F. Supp. 2d 188, 210-11 (W.D.N.Y. 2003); *Robertson v. Liquor Control Bd.*, 10 P.3d 1079, 1084-85 (Wash. Ct. App. 2000)). *But see supra* text accompanying note 155.

175. *Id.* at 81.

176. *See* ME. REV. STAT. ANN. tit. 22, § 1555-C(3)(B) (West 2004) ("The tobacco retailer shall clearly mark the outside of the package of tobacco products to be shipped to indicate that the contents are tobacco products and to show the name and State of Maine tobacco license number of the tobacco retailer.").

177. *See supra* note 170.

178. *N.H. Motor Transport IV*, 448 F.3d at 81.

179. *Id.* at 81-82. The court excused UPS, as did the *N.H. Motor Transport III* court, from "present[ing] empirical evidence" on the extent of this effect. *Id.* at 82 n.14.

180. *Id.* at 70.

181. Aside from the "constructive knowledge" component itself, the term "knowingly," as used in the Proscribed Delivery Provision, is undefined by the Tobacco Delivery Law. *See generally* ME. REV. STAT. ANN. tit. 22, §§ 1551-59 (West 2004). Research uncovered only a single definition of "knowingly" in title 22: section 8705-A(1)(B), applicable to knowing violation of healthcare information reporting requirements, provides that "[a] person acts knowingly with respect to a result of that person's conduct when the person is aware that it is practically certain that that person's conduct will cause such a result."

previously noted, the effect of the *N.H. Motor Transport III* court's holding was to prevent enforcement of the Proscribed Delivery Provision against motor carriers and air/ground carriers. It is thus something of an open question whether the *N.H. Motor Transport IV* court's preemption decision with respect to the Proscribed Delivery Provision exalts form over substance: *N.H. Motor Transport III* barred all enforcement against carriers; *N.H. Motor Transport IV* allows enforcement against carriers, but without a provision for "constructive knowledge," the court candidly recognized that actual knowledge, "as a practical matter, may be difficult to prove."¹⁸²

V. IS THERE A WAY FORWARD IN THE FIRST CIRCUIT?

In one sense, Maine's Tobacco Delivery Law can be characterized as being too clever. No doubt cognizant of the threat posed by litigation under the FAAAA, the Maine Legislature chose an elaborate enforcement scheme in the form of the Age Verification Provision, which essentially was an attempt to mask police power regulation of carriers by exercising that power through the private proxy of retailers, licensed and unlicensed alike. Apparently optimistic that the First Circuit would not construe the Age Verification Provision as "relating to" carrier services under the FAAAA, but instead to tobacco retailers, the legislature opted for statutory complexity in an effort to disturb this flow of commerce.

The constructive knowledge component of the Proscribed Delivery Provision was no less complex: it depended upon a confluence—within carriers' parcel routing facilities and delivery trucks—of specific labels, presumably affixed by parties without concrete motivation to do so, and accurate lists of unlicensed retailers maintained by the Attorney General. That being said, there is little reason to think that either provision would have fared better in the First Circuit were it enacted without the other. Each provision operates independently and is grounded on a discrete, if not equally persuasive, rationale. That one overreached did not determine the fate of the other; that both overreached, however, is a sign that complexity and obfuscation is not a preferred strategy.

At first glance, New York's law, which forbids all cigarette deliveries to individual New York consumers,¹⁸³ appears to be an attractive model because of its simple, categorical nature. However, New York's law shares the defects of Maine's statutory scheme to the extent that its effectiveness against carriers depends on presumptions

ME. REV. STAT. ANN. tit. 22, § 8705-A(1)(B) (West Supp. 2006-2007). With only immaterial alteration, this definition is identical to that found in the Maine Criminal Code. See ME. REV. STAT. ANN. tit. 17-A, § 35(2)(A) (West 2006). It is unclear how the district court would interpret "knowingly" in the context of an enforcement action brought against a carrier pursuant to alleged violation of the Tobacco Delivery Law. See ME. REV. STAT. ANN. tit. 22, § 1556-A(2) (West 2004) (vesting jurisdiction over civil enforcement action in the district court).

182. *N.H. Motor Transport IV*, 448 F.3d at 82. It should be noted, however, that in the court's view, the Proscribed Delivery Provision can only have survived FAAAA challenge without its teeth: the easier carrier violations are to prove, the greater the effect on carrier services.

183. See N.Y. PUB. HEALTH LAW § 1399-ll(2) (McKinney 2001), *supra* note 132.

relating to labeling and addressee information.¹⁸⁴ Nevertheless, litigation over the validity of New York's law resulted in a settlement on terms favorable to the state. Whether the UPS Settlement was a result of either (1) the New York law's three-stage trial by fire,¹⁸⁵ or (2) a split between the district courts of the Second Circuit and the Court of Appeals for the First Circuit over permissible interpretation of the FAAAA—and the continuing vitality of the ERISA-based *Morales* standard¹⁸⁶—is difficult to determine. However, it is relatively clear from the *N.H. Motor Transport IV* court's opinion that were Maine to enact a statute similar to New York's it would not pass muster if challenged under the FAAAA in the First Circuit.

A possible way forward for the Maine law is that it could, for the sake of simplicity, focus on cigarettes alone, and include language similar to the following: The cigarette retailer, in addition to complying with the "Requirements for accepting order for delivery sale," provided in section 1555-C(2),¹⁸⁷ shall:

(1) Use best efforts to ensure that the sole addressee of the package containing cigarettes is in fact the purchaser, whose legal age the retailer has previously verified; and

(2) Use best efforts to ensure that only the individual addressee will ultimately receive the package containing cigarettes. For purposes of this section, proof of best efforts includes evidence that a retailer ships all cigarette packages to individual consumers via Restricted Delivery, a contractual service provided by the United States Post Office;¹⁸⁸ and

(3) Include with each monthly delivery sales report filed with the Department of Administrative and Financial Services, Bureau of Revenue Services proof that best efforts, as described in subsections (1) and (2) above, were used in every transaction executed during the period covered by the corresponding delivery sales report.

In conjunction with age verification by the retailer at the time of purchase—a requirement that is currently in force and enjoying some measure of compliance¹⁸⁹—

184. See *id.* at § 1399-II(3) (requiring packages of cigarettes to be labeled as such, and presuming that a carrier knows the addressee of such a package is an individual consumer, to whom it is unlawful to deliver the package, if the delivery address is a home or residence).

185. See, e.g., *Brown & Williamson Tobacco Corp. v. Pataki*, 320 F.3d 200 (2d Cir. 2003) (rejecting plaintiffs' dormant commerce clause challenge to New York's law); *N.Y. State Motor Truck Ass'n v. Pataki*, No. 03-CV-2386, 2004 WL 2937803, at *9 (S.D.N.Y. Dec. 17, 2004) (holding New York's law not facially preempted by the FAAAA and denying summary judgment on "as applied" claim under the FAAAA because genuine issue of fact remains regarding the extent of the New York law's effect on carrier services); *Ward v. New York*, 291 F. Supp. 2d 188 (W.D.N.Y. 2003) (denying preliminary injunction because plaintiffs were found to be unlikely to prevail on merits of FAAAA challenge to New York's law).

186. See *supra* notes 155, 173 & 174.

187. ME. REV. STAT. ANN. tit. 22, § 1555-C(2) (West 2004). This section of the Tobacco Delivery Law, which requires that the retailer confirm the purchaser is of legal age to purchase tobacco products, was undisturbed by the *N.H. Motor Transport* litigation.

188. See U.S. POSTAL SERV., RATE INFORMATION AND EXTRA SERVICES (2007) (for a fee of \$3.70 in excess of postage, Restricted Delivery "[p]ermits a mailer to direct delivery only to the addressee . . . [who] must be an individual specified by name."), available at <http://www.usps.com/rates/extra-services-rates.htm#H10>.

189. See, e.g., <http://www.bigchiefcigarettes.com> (advertising use of "Age Alert/Equifax Age Verification Service"); <https://www.blackpawtobacco.com/intro.html> (requiring that purchaser provide a copy of photographic identification prior to processing tobacco sale).

Restricted Delivery would ensure that the individual purchaser, whose age the retailer has already confirmed, is the only addressee and thus the only person who can accept delivery of the package.

The new Cigarette Delivery Law, drafted along these lines, would presumably cut a very different profile in litigation under the FAAAA in the First Circuit for two reasons. First, instead of mandating the terms a retailer must demand of a delivery service, as did the preempted provisions of the Tobacco Delivery Law, the new provisions merely suggest that by choosing an option readily available in the marketplace, retailers will be in full compliance. The new law would have the virtue of facially allowing a retailer to adduce alternative proof that best efforts were made, even if the Postal Service's Restricted Delivery were not utilized. However, as is clear from the terms of Restricted Delivery, it is in fact the "best" option: it is currently available, and because it appears in the language of the statute, it is one of which retailers cannot claim to be unaware. Second, by lowering the bar for carriers from age verification on delivery to mere confirmation that the individual recipient is in fact the addressee,¹⁹⁰ it would be difficult for a private carrier like UPS—one that does not offer a service equivalent to the Postal Service's Restricted Delivery—to argue that the law has a "forbidden significant effect" on its service. The mere existence of a Restricted Delivery service option is *prima facie* evidence of its viability as part of an integrated parcel delivery business model. Indeed, if the Postal Service were unable to effectively pass on to its customers the additional costs associated with Restricted Delivery, it would no longer offer Restricted Delivery as a service option. Although UPS may well argue that the Postal Service's competitive services are cross-subsidized by its monopoly services, the issue would thus appear to be joined, in which case UPS would have to prove that fact to prevail on its FAAAA claim.

Furthermore, when viewed objectively, Restricted Delivery is an eminently reasonable service option. That UPS may feel pressure to adopt and offer it in order to compete with the Postal Service for this business would perhaps not inexorably lead to a finding of "significant forbidden effect" in the same way the Age Verification Provision of the Tobacco Delivery Law did. To the extent research has failed to uncover any indication that any major carrier offered the terms required by the preempted Age Verification Provision at the time of its adoption, that provision appears to qualify as artificial regulation rather than the FAAAA-preferred marketplace dictation. In contrast, Restricted Delivery is currently available in the marketplace and, if exclusively utilized by Internet retailers, would accomplish Maine's legitimate goal of restricting minors' access to cigarettes. In answer to a claim by UPS, or a similarly situated carrier, that the new law exerts a "forbidden significant effect" on its services, Maine could persuasively argue that not only does a competitor in the industry already offer the suggested service at a premium, but also that the complaining carrier's FAAAA challenge is in effect a plea for the protection of the court from a competitive marketplace—a plea no carrier should be heard to make under the pro-competitive FAAAA.¹⁹¹ Finally, given that free shipping often serves as an added incentive to

190. *Contra* ME. REV. STAT. ANN. tit. 22, § 1555-C(3)(C)(1) (West 2004) ("The tobacco retailer shall utilize a delivery service that imposes the . . . requirement [that] the purchaser . . . be the addressee.").

191. *See supra* text accompanying note 9.

purchase cigarettes over the Internet, retailers would have to raise their prices in order to remain profitable and comply with the revised statute at the same time, which would in turn gradually depress future demand for tax-free cigarettes.

VI. CONCLUSION

As this Note has attempted to show, the difficulty with which the district court and the First Circuit—operating under the ERISA-based *Morales* standard for FAAAA preemption—wrestled with the presumption against preemption, “facial” versus “as-applied” challenges to the Tobacco Delivery Law, and important jurisdictional issues, illustrates the towering aspect of federalism and the balance it forever demands.

In part, the *N.H. Motor Transport IV* court’s holding was based on the unavoidable acknowledgement that “Congress often acts to address a specific problem but ultimately settles on a broader remedy.”¹⁹² Here, that broader remedy, the FAAAA, as it is being interpreted and applied by the First Circuit, is clearly having an adverse effect on Maine’s ability to address yet another specific problem through legitimate, if perhaps too aggressive, police power enactments. Congress should recognize that in the present era of diffused commerce fostered by burgeoning Internet retail, interstate motor carriers of property should perhaps not, in all circumstances, be held harmless under our law. Once Congress determines which circumstances warrant conscription of interstate carriers to assist in furthering federal and state health policies, the reach of FAAAA preemption can be clarified and circumscribed, and the states thereby can be empowered to enact and enforce laws similar to Maine’s Tobacco Delivery Law, in either its original or a revised form.

192. *N.H. Motor Transport IV*, 448 F.3d 66, 77 (1st Cir. 2006) (citing *Penn. Dep’t of Corr. v. Yeskey*, 524 U.S. 206, 213 (1998)).