

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 G. STEVEN ROWE, ATTORNEY :

4 GENERAL OF MAINE, :

5 Petitioner :

6 v. : No. 06-457

7 NEW HAMPSHIRE MOTOR :

8 TRANSPORT ASSOCIATION, :

9 ET AL. :

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11 Washington, D.C.

12 Wednesday, November 28, 2007

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14 The above-entitled matter came on for oral
15 argument before the Supreme Court of the United States
16 at 10:03 a.m.

17 APPEARANCES:

18 PAUL STERN, ESQ., Deputy Attorney General, Augusta,
19 Maine; on behalf of the Petitioner.

20 BETH S. BRINKMANN, ESQ., Washington, D.C.; on behalf of
21 the Respondents.

22 DOUGLAS HALLWARD-DRIEMEIER, ESQ., Assistant to the
23 Solicitor General, Department of Justice, Washington,
24 D.C.; on behalf of the United States, as amicus
25 curiae, supporting the Respondents.

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P R O C E E D I N G S

(10:03 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument this morning in case 06-457, Rowe v. New Hampshire Motor Transport Association.

Mr. Stern.

ORAL ARGUMENT OF PAUL STERN

ON BEHALF OF THE PETITIONER

MR. STERN: Chief Justice, and may it please the Court:

Congress has left to the States and encouraged them to deal with the significant public health problem of youth access to tobacco. The question presented is whether the FAAA Act nonetheless preempts the two State laws before the Court and those laws that ensure that tobacco shipped into the State of Maine does not end up in the hands of our children.

It is not contested that Maine can and, in fact, has banned the retail sale of tobacco unless the seller verifies the age of the buyer. Section 1555-C(3)(C) regulates the seller and not a carrier. It requires that a -- in the context of a delivery sale, a seller cannot engage in that sale in the State of Maine unless the seller ensures that the person delivering the tobacco actually verifies the age of the buyer. This

1 law does not relate to the services of a carrier, but
2 rather relates to a dangerous substance that Congress
3 has asked the States and left to the States and
4 encouraged the States to deal with.

5 CHIEF JUSTICE ROBERTS: Well, it certainly
6 -- that may be true, but it certainly relates to the
7 service of a carrier. I understood your argument to be
8 that we can't read that language literally.

9 MR. STERN: Exactly --

10 CHIEF JUSTICE ROBERTS: It talks about what
11 carriers have to do, so in connection with delivery,
12 so it relates to the service of a motor carrier.

13 MR. STERN: Well, Your Honor, section 1555-C
14 (3)(C) does not dictate at all what a carrier has to do.
15 It is an incentive that permits a carrier, if the
16 carrier wishes to compete on a level playing field for
17 the legal tobacco delivery market --

18 CHIEF JUSTICE ROBERTS: It doesn't dictate
19 what they have to do. They can get out of the business.

20 MR. STERN: They can get out of the business
21 or compete for the business, Your Honor. But the point
22 is that the law regulates the retailer and not the
23 carrier and, in doing so, similar to the situation in
24 Travelers, allows for a market to be created.

25 In particular, however, with respect to this

1 particular situation, Congress has spoken directly to it
2 and this Court has considered in the context of its
3 ERISA cases how Congress has dealt specifically with the
4 problem before the Court.

5 JUSTICE GINSBURG: Mr. Stern --

6 CHIEF JUSTICE ROBERTS: Well, we also
7 considered it in Morales, and I thought this law was
8 enacted in the immediate wake of Morales, which adopted
9 a much broader reading of "relates to" than the
10 subsequent ERISA cases.

11 MR. STERN: We don't agree that it adopted
12 such a broad view because in Morales the Court was very
13 careful, towards the end of the opinion, to make clear
14 that it was not drawing a line which would bring
15 potentially such laws dealing with gambling or
16 prostitution within the preemptive ambit of the ADA.
17 Similarly, in -- with respect to the FAA Act,
18 particularly looking at the legislative history, there
19 is no indication that Congress intended in any way to
20 deal with the State's controlling and regulating
21 dangerous substances such as tobacco.

22 JUSTICE SOUTER: But isn't that answering
23 the wrong question? I'll be candid with you. I'm not
24 sure that whatever Morales-Travelers distinction there
25 is really counts here, because the issue here is

1 different from the issue in some of the -- in most of
2 the preemption cases, because the issue here starts with
3 the, I think, the agreed assumption that Congress wanted
4 to end a certain category of regulation.

5 And the question is would Congress have
6 wanted, in effect, to permit a degree of State
7 regulation when it was for a particular purpose?

8 And the question then is not whether
9 Congress intended or had as an object when it passed
10 this statute an interference with the State's regulation
11 of juvenile contraband. The question is whether it
12 intended to permit any regulation with respect to
13 delivery services to survive; and isn't that the tough
14 question that you've got to face?

15 MR. STERN: Your Honor, looking at the
16 objectives of Congress as explained by Congress in the
17 legislative record, it's very clear that Congress was
18 concerned, the committee was concerned with, the
19 proponents such as the Federal Department of
20 Transportation, were concerned with the effects of the
21 particular category of regulation, State economic
22 regulation. The committee mentioned that nine times.
23 The United States in its brief --

24 JUSTICE SOUTER: Well, that's because most
25 regulation, you know, has an economic purpose involved.

1 But the ultimate object, it seems to me, was to end the
2 economic effects of State patchwork transportation
3 regulation.

4 And therefore I think the question you've
5 got to address is why would they have allowed a certain
6 category of regulation that clearly affects the way
7 these companies perform their services to survive solely
8 on the ground that the regulation was entailed at the
9 State level by the State's choice to go against youthful
10 tobacco use?

11 MR. STERN: Well, Your Honor, we suggest
12 that the Court looks at the FAA Act and its legislative
13 history, as well as what immediately preceded it, which
14 was the Synar Amendment. The Synar Amendment encouraged
15 the States to deal with this problem. The Federal
16 Government --

17 JUSTICE SOUTER: But the Synar -- I don't
18 have it in front of me, but the Synar Amendment refers
19 to -- to a number of objects of State legislation that
20 would be required, but it doesn't say anything about
21 regulating transportation.

22 MR. STERN: It states quite clearly that the
23 intent is to encourage the States to prohibit -- or to
24 enforce and enact laws that prohibit retailers and
25 distributors from getting tobacco to children.

1 JUSTICE SOUTER: Right. And we don't
2 normally think of a delivery service as a distributor of
3 goods. I mean, we -- in the sense, I think, that the
4 statute meant.

5 I -- I read the Synar Amendment reference to
6 distributors as being wholesalers, people within the
7 industry who get the cigarettes from, you know, the
8 manufacturing point to the corner store, as opposed
9 simply to a delivery service that delivers all kinds of
10 goods.

11 MR. STERN: Well, a sale consists of several
12 components, Your Honor: Order, payment, and delivery.
13 Handing it over, handing the tobacco over physically to
14 the buyer, from the standpoint of the buyer's standpoint
15 and from the standpoint of public health perspective, is
16 the most important aspect of the transaction.

17 It is the seller who has the responsibility
18 to comply with the law with respect to each one of those
19 steps.

20 JUSTICE GINSBURG: Mr. Stern, at the time
21 that the motor carrier deregulation came into effect,
22 were there any products where Maine told the retailer,
23 if you want to sell not face-to-face, you must choose a
24 carrier that will provide X, Y, and Z services? Was
25 there any -- is it tobacco alone or were there other

1 commodities?

2 MR. STERN: Interestingly, there -- Maine
3 being a hunting State, there was a law on the books
4 which required the common carrier -- it specifically
5 referred to the common carrier -- to verify that the
6 person shipping it was the hunter with the appropriate
7 license, required the common carrier to affix
8 identification tags to the hunting -- the hunting
9 reward, so to speak, and also to make a return or
10 provide notice to the Commissioner of Inland Fisheries
11 and Wildlife.

12 So Maine had a variety of those sorts of
13 laws on the books that required carriers to actually do
14 something with respect to a particular type of
15 commodity.

16 JUSTICE GINSBURG: Does the Postal Service
17 adhere to -- or I don't know if the Postal Service is
18 used to ship cigarettes and tobacco products -- but if it
19 is, does the Postal Service adhere to Maine's
20 requirement?

21 MR. STERN: Two points, Your Honor. First,
22 the Postal Service has immunity from Maine laws. And
23 second, the Postal Service, interestingly, does have an
24 addressee verification service for \$4.10.

25 JUSTICE SCALIA: Why does the Post Office

1 have immunity from Maine laws? Really?

2 MR. STERN: I believe there --

3 JUSTICE SCALIA: You could kill people and
4 all sorts of stuff. I mean --

5 (Laughter.)

6 MR. STERN: I hope not, Your Honor. But
7 with respect to a variety of civil regulatory matters, I
8 believe the courts have concluded that the United States
9 Postal Service has immunity from Maine -- from Maine and
10 other State laws.

11 JUSTICE GINSBURG: But it does -- you say
12 the Postal Service provides something that conforms.
13 Does it have the -- you must deliver it to the person,
14 to the addressee herself?

15 MR. STERN: Yes, Your Honor. It is not
16 exactly conforming because -- it's sort of interesting.
17 Different carrier services or the Postal Service have
18 different sort of options that seem to make clear that
19 this is not a real problem to provide. The U.S. Postal
20 Service provides an addressee verification service, but
21 not an age verification service. UPS provides an age
22 verification service, but not an addressee verification
23 service.

24 Since one costs \$2.75 and the other one
25 costs \$4.10, this does not seem to be an acute problem

1 to -- for a carrier, if it wishes to compete for the
2 market, to actually compete for it and price it
3 appropriately.

4 JUSTICE SCALIA: Why aren't you just
5 driving all this business to the Postal Service? I
6 mean, you know, what have you accomplished? You'd drive
7 FedEx out of the business if they choose not to incur
8 the additional expense. And so, you know, all these
9 people just ship it through the Postal Service.

10 MR. STERN: There have been efforts to deal
11 with the Postal Service loophole, Your Honor, and --

12 JUSTICE SCALIA: You can't do it. I mean,
13 they're exempt from Maine laws. Didn't you know that?

14 (Laughter.)

15 MR. STERN: I think I heard somebody mention
16 that, Your Honor.

17 (Laughter.)

18 MR. STERN: Certainly, in another branch of
19 government, that -- there's an effort to deal with that
20 problem. But, with respect to the suggestion we've
21 driven FedEx out of business, there's no suggestion --
22 well, first of all, we have no evidence with respect to
23 what this effect has had on FedEx. With respect to UPS,
24 UPS continues to ship tobacco to licensees and has not
25 shown in the record that they lost any business, that

1 any of their customers obtained licenses from the State
2 of Maine, and therefore it could actually ship into the
3 State of Maine.

4 JUSTICE ALITO: But what if every -- what if
5 every State enacted a slightly different law relating to
6 this and a slightly different law relating to every
7 other product that they might want to restrict for a
8 health-or-safety reason? Would you -- would you agree
9 then with the Respondent that there would be just the
10 kind of patchwork of regulation at the State level that
11 this statute was intended to stop?

12 MR. STERN: Well, Your Honor, the
13 Respondent's arguments do not guarantee uniform
14 regulation. In fact, they guarantee exactly the
15 opposite. They don't dispute that Maine and other
16 States can ban the transport and delivery of what we can
17 call unlicensed tobacco, tobacco from unlicensed
18 retailers to unlicensed entities. Different States can
19 have different licensing requirements and certainly
20 different licensees. So a patchwork is created.

21 In addition, Respondents agree that States
22 can outright ban the furnishing of a variety of
23 commodities or contraband, including in particular
24 tobacco or alcohol --

25 JUSTICE GINSBURG: I thought that wasn't

1 clear from their brief. I thought they had a footnote
2 that said they weren't arguing the point in this case,
3 but I thought they didn't concede the total ban.

4 MR. STERN: I believe if one looks at --
5 it's either page 24 or 44 of the brief -- they concede
6 that Maine and other States can ban the furnishing of
7 tobacco.

8 JUSTICE SCALIA: Well, they concede that
9 they can do it beyond the requirement, beyond the force
10 of the statute that precludes the knowing distribution.
11 In other words, they -- they're not appealing the one
12 provision of subsection D that makes it a crime
13 knowingly to get the tobacco into the hands of minors
14 and so on, but do they concede anything beyond that?

15 MR. STERN: I believe they do, Your Honor.
16 I believe -- I think it's at page 44 -- they concede
17 that Maine can ban the furnishing of tobacco by anyone,
18 including a carrier.

19 JUSTICE SCALIA: Yes, but I think that the
20 reason they make that concession is that they say you
21 must prove knowledge, and they're -- they're not
22 concerned about the -- about intentionally transgressing
23 Maine's law. What they're concerned about is the
24 additional steps that you require them to go through to
25 make sure that there is no tobacco.

1 So they're not really worried about it so
2 long as you have a knowledge requirement.

3 MR. STERN: Well, there is a knowledge
4 requirement in the first part of section 1555-D. And
5 Your Honor's question gets right to the nub of the
6 problem with respect to the lower court's decision on
7 1555-D, which is: How does Maine or any other State go
8 about proving knowing delivery of an unlicensed product
9 such as this?

10 JUSTICE SOUTER: Well, you prove it without
11 a presumption to start with. That's what the -- that's
12 the way the issue was left by the district court.

13 JUSTICE SCALIA: And that's why they're not
14 worried about it, because it's hard to prove.

15 MR. STERN: Without the evidentiary
16 assumption, it's very difficult, if not impossible, to
17 prove, which essentially makes the first part of the
18 court's decision with respect to 1555 --

19 JUSTICE BREYER: I think the answer to that
20 is it may be a very good idea, so convince Congress to
21 pass a law. It's just that if every State does it
22 differently it's going to be a nightmare. And I don't
23 know what the answer to that point is.

24 And I don't know what the answer to the
25 point is about banning things. I'm amazed if that's

1 what you mean. I'm not sure what you mean. I mean,
2 North Carolina could pass a statute that says the
3 following: Everybody in North Carolina over the age of
4 16, say, or maybe everybody including small children --
5 I don't know what they want to pass -- can smoke to
6 their heart's delight, can buy as many cigarettes as
7 they like, but you can't ship in a single cigarette
8 from out of State.

9 You think that wouldn't cause -- raise a
10 Commerce Clause problem?

11 MR. STERN: A Commerce Clause problem?

12 JUSTICE BREYER: Yes.

13 MR. STERN: It depends upon how the statute
14 is written. If it banned --

15 JUSTICE BREYER: Well, that's why I'm just
16 not certain about bans that forbid people to ship things
17 inside from outside the State, while allowing people to
18 buy those things produced by people inside the State.
19 That's why I'm uncertain about the concession you're
20 talking about.

21 MR. STERN: Well --

22 JUSTICE BREYER: I mean, what is this New
23 York law that does this?

24 MR. STERN: The New York law bans the
25 delivery and sale of tobacco -- delivery and sale of

1 cigarettes to consumers --

2 JUSTICE GINSBURG: But isn't that the result
3 of a settlement?

4 MR. STERN: The -- the law was -- existed
5 before the settlement, and the settlement which we have
6 referred to is a situation where UPS and a number of
7 other carriers have agreed to conform with it, Your
8 Honor.

9 JUSTICE GINSBURG: And nationwide, not just
10 for New York; isn't that so?

11 MR. STERN: Yes, Your Honor. And it -- it
12 reveals, we think, that the -- that the nature of the
13 laws here are not so burdensome as to run afoul of this
14 Court's concerns --

15 JUSTICE GINSBURG: So, then, practically,
16 you don't have a problem with cigarettes because the New
17 York settlement takes care of it. You're just talking
18 about other tobacco products?

19 MR. STERN: Well, there are other tobacco
20 products, but in the New York settlement -- we can't
21 enforce the New York settlement, Your Honor. We have
22 our own separate law, particularly section --

23 JUSTICE GINSBURG: But I thought, as a
24 result of the New York settlement, carriers are no
25 longer shipping directly to consumers anyplace

1 cigarettes.

2 MR. STERN: That is the intent of that, Your
3 Honor. I'm not sure how effective it has been. But by
4 doing that, they have agreed and put in place a system
5 where tobacco products can only be shipped from a
6 licensee.

7 JUSTICE BREYER: But the thing I'm concerned
8 about is -- is assume it's perfectly legal to do what
9 you said. I guess it still wouldn't be legal for Maine
10 or New York to say the following: We really want to
11 discourage people from smoking, a noble goal. And,
12 therefore, whenever an interstate shipper ships tobacco
13 into the State, he has to charge double the price, just
14 double the shipment price or ten times the shipment
15 price. Could they say that?

16 MR. STERN: That would seem to clearly run
17 afoul of the --

18 JUSTICE BREYER: All right.

19 MR. STERN: -- Commerce Clause.

20 JUSTICE BREYER: All right. But could they
21 say you have to carry it in special packages which the
22 sticker -- which maybe he should do -- but which the
23 sticker puts skull and crossbones on each of the
24 packages? Could they say that?

25 MR. STERN: I don't think --

1 JUSTICE BREYER: No. All right.

2 MR. STERN: -- they necessarily could, Your
3 Honor.

4 JUDGE BREYER: If they cannot say either of
5 those things because of the statute, why can they say:
6 What you have to do is you have to ship it in a way that
7 makes certain that the person who receives it, the
8 addressee, is the person who bought it?

9 MR. STERN: The reason, Your Honor, is the
10 difference between the hypothetical you proposed at the
11 beginning of your question and what's going on in Maine
12 with respect to 1555-C(3)(C), which is a mouthful.

13 At the time the FAAA Act was enacted, it was
14 illegal for anyone to -- an unlicensed retailer, to sell
15 tobacco in the State of Maine, and it was illegal to
16 sell tobacco without verifying the age of the buyer.
17 That's a generally applicable law that was -- a
18 judicial sort of law that was on the books in 1994.

19 The skull-and-crossbones requirement is not
20 a judicial type of law, and what this Court has done in
21 the ERISA cases is look to see the -- the purpose and
22 type of law that is before it to determine whether it
23 was a type of law that was in existence and whether
24 there was any positive indication that -- that that sort
25 of law was supposed to be preempted or not.

1 Here these sorts of age verification laws
2 were on the books. We have identified a problem and
3 everybody understands it's a problem with respect to
4 delivery and sales.

5 It would be absurd for an over-the-counter
6 clerk to take money from someone --

7 JUSTICE STEVENS: Mr. Stern, can I ask you
8 this question: To what extent are we dealing with a
9 tobacco problem or a broader problem? Do you have other
10 products that are contraband such as -- or have special
11 restrictions on who can ship wild animals, prescription
12 drugs, firearms; or are there other products that you
13 regulate in the same way?

14 MR. STERN: There are no -- I'm not aware of
15 any that we -- we regulate in the same way. In similar
16 --

17 JUSTICE STEVENS: You allow shippers to ship
18 firearms and poisonous substances without having this
19 kind of restriction on it, do you?

20 MR. STERN: There are not exactly the same
21 restrictions. But, with respect to alcohol, we have a
22 law on the books which prohibits the knowing sale or
23 transfer of alcohol to somebody who is underage.

24 Because of the -- the unique situation we
25 found with respect to delivery and sales of tobacco,

1 we've put this in place to make it clear how a seller
2 goes about conforming with Maine's generally applicable
3 law.

4 JUSTICE STEVENS: But I don't really see why
5 the States have -- have a different interest in
6 regulating shipment of tobacco to minors than they would
7 a variety of other substances that could be harmful to
8 minors or contraband in general. And you don't try to
9 regulate any of those?

10 MR. STERN: No, Your Honor, we do try to
11 regulate those. I misunderstood your question.

12 JUSTICE STEVENS: By -- by regulating how
13 they may be shipped, I mean.

14 MR. STERN: There is no law exactly like
15 this one with respect to the other types of -- of
16 dangerous substances. There is --

17 JUSTICE GINSBURG: Mr. Stern, you told me in
18 -- in response to my question earlier, you mentioned
19 only, I think, game; and you said that those
20 prohibitions were directly on the carrier --

21 MR. STERN: That's correct.

22 JUSTICE GINSBURG: -- that is, prohibitions
23 and instructions for how you can ship game. And I don't
24 know if that -- if there are other food products. You
25 mentioned only that one.

1 And is it not the case that explosives --
2 that that's Federal regulation?

3 MR. STERN: The Federal Government has a
4 role with respect to the shipment of explosives, but it
5 has no role with respect to the shipment of tobacco.

6 JUSTICE GINSBURG: But is there -- in
7 addition to the Federal regulation, which I take it
8 would cover various dangerous substances, does Maine add
9 to what the Federal regulation is, say, for sending
10 fireworks, firearms?

11 MR. STERN: With respect to fireworks, Maine
12 in its discretion has adopted the Federal role -- the
13 Federal view, which, I think, emphasizes and -- and
14 highlights the different situation we have here.

15 When the Federal Government believes there
16 should be some sort of uniform regulation of a
17 particular dangerous item, be it fireworks, for example,
18 or hazardous material, it does so. Otherwise, it leaves
19 it to the States.

20 And this is a situation where if the State
21 doesn't act to deal with the problem of delivery and
22 sales, we have a regulatory void and nobody deals with
23 this problem.

24 JUSTICE SCALIA: Well, maybe because
25 Congress wanted the regulatory void. Maybe Congress

1 didn't want these things to be enforced by regulating
2 the transporter, as opposed to regulating the shipper
3 and the receiver.

4 As far as the game regulation is concerned,
5 isn't it the case that UPS won't carry any game now
6 because of the -- because of your game regulations?

7 MR. STERN: In their policies, they have
8 indicated that they do not carry game, Your Honor.

9 JUSTICE SCALIA: It's too onerous.

10 MR. STERN: Well --

11 JUSTICE SCALIA: So you've sort of driven
12 them out of the business.

13 MR. STERN: No. Your Honor, UPS has a
14 variety of options such as a cash-on-delivery option
15 which requires them to run around and find somebody with
16 a check, money order, or credit card. So they can price
17 these. It's just a matter of whether they want to
18 compete for them.

19 And, again, with respect to C(3)(C), which
20 I'd like to focus on for a moment, it would be absurd,
21 we think, to have a situation where a clerk in an
22 over-the-counter sale could accept money from a buyer,
23 verify the age of the buyer, and then turn to a third
24 person and hand the tobacco to that person without the
25 buyer being present.

1 That is exactly the situation that
2 Respondents ask this Court to embrace as the intent of
3 Congress. And with respect to Your Honor's--

4 JUSTICE SCALIA: Well, so long as the buyer
5 is not an interstate carrier, there is really no -- no
6 problem of conflicting with Federal law.

7 MR. STERN: Well, there is no conflict with
8 Federal law under our reading of the FAAA Act and the
9 Synar Amendment because the -- the intent of Congress
10 has to be one which does not end up in an absurd result.
11 And we suggest that having this gaping conduit of
12 tobacco to children is just such an absurd result.

13 If the Court has no further questions now,
14 I'd like to reserve my time.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 Mr. Stern.

17 Ms. Brinkmann.

18 ORAL ARGUMENT OF BETH S. BRINKMANN

19 ON BEHALF OF THE RESPONDENTS

20 MS. BRINKMANN: Mr. Chief Justice, and may
21 it please the Court:

22 If Maine's tobacco delivery law is not
23 preempted, Congress's core purpose for the FAAAA will be
24 defeated. There will be different delivery laws in
25 States across the country, and that patchwork will

1 eliminate the efficiency and the cost savings that was
2 Congress's intent in the FAAAA when it enacted it to
3 deregulate the industry.

4 If I could, I'd like to try and quantify for
5 you the enormous impact and effect that these two
6 provisions have on carrier services.

7 JUSTICE GINSBURG: Before you do that,
8 Ms. Brinkmann, would you tell us how alcohol is handled,
9 because that is, as I understand it, that's, by virtue of
10 the 21st Amendment, State regulation. Does UPS carry
11 alcohol packages from one State to another?

12 MS. BRINKMANN: Yes, alcohol is, of course,
13 governed by a different legal regime because of the 21st
14 Amendment. And yes, they do provide services for wine
15 and beer only, and that service has to be pursuant to a
16 contract. It is a special contract with the shipper,
17 and the shipper has to be licensed.

18 And UPS and the other carriers have uniform
19 procedures for doing that, so they are not subject to a
20 patchwork of regulation, unless there are laws in the
21 States that are allowed because of the 21st Amendment.

22 JUSTICE GINSBURG: But I asked the question
23 only in response to your impossibility argument that you
24 couldn't cope with such State regulations with respect
25 to tobacco, when it seems you are with respect to

1 alcohol.

2 MS. BRINKMANN: I think it would be useful
3 to give the quantification, I think, about the impact of
4 these provisions. I would first point out that the
5 services that are provided right now are in response to
6 the market and market competition, which was Congress's
7 intent. And these, of course, would be services that
8 were created in response to a State dictate, which is at
9 the core of the problem.

10 But just to give you an idea about the
11 C(3)(C), which is the delivery confirmation --

12 JUSTICE STEVENS: Before you leave the
13 alcohol point, I don't quite understand the relevance of
14 the 21st Amendment. It seems to me if you can
15 pre-empt -- if Federal law can pre-empt State laws that
16 are authorized by the 21st Amendment, I don't understand
17 how that has anything to do with the preemption issue.

18 MS. BRINKMANN: I think it involves much
19 more complicated constitutional issues of reach of the
20 21st Amendment. I think even in light of this Court's
21 opinion in *Granholm v. Heald*, there would be more
22 complex issues to analyze --

23 JUSTICE STEVENS: Why isn't it still a State
24 regulation of shipping, even if it's a law that's
25 authorized by the 21st Amendment? I don't see the

1 difference.

2 MS. BRINKMANN: Well, it may be not be, Your
3 Honor. The problem has been taken care of by this
4 uniform service, and I have to say that is at the age of
5 21. That is an adult confirmation. And that is not an
6 addressee-specific requirement.

7 Here under C(3)(C), it would be a new
8 service that required the actual addressee to sign for
9 it. And I should comment, my understanding of U.S.
10 Postal Service is it doesn't have to be the addressee
11 who signs. They can designate someone else to sign for
12 it, and there is no age verification. But here it has
13 to be the addressee, and there has to be photo
14 government ID for anyone between 18 and 27. And if I
15 could just for --

16 JUSTICE STEVENS: What if a new carrier
17 said, well, I'd like to get into the business of
18 shipping tobacco products, none of the other companies
19 want to do it, I want to form -- I'll form my own
20 company. It will meet all these requirements. Would it
21 -- would it then be preempted?

22 MS. BRINKMANN: If the State was dictating a
23 service that made --

24 JUSTICE STEVENS: Well, they're saying the
25 retailer must use a service that fulfills these

1 qualifications. And if there are services out there,
2 why would the law be preempted?

3 MS. BRINKMANN: It would depend on the
4 effect on the carriers. And if I could --

5 JUSTICE SCALIA: I assume that the purpose
6 of the Federal law was not to enable services which
7 would not otherwise be provided at all, but rather to
8 enable services to be provided more economically, to
9 reduce the cost, the cost of interstate transportation.

10 MS. BRINKMANN: Driven by market
11 competition, Your Honor. The evidence --

12 JUSTICE SCALIA: Sure. Somebody would come
13 in to occupy the void, but he would charge a heck of a
14 lot more.

15 MS. BRINKMANN: Your Honor, in this case the
16 evidence demonstrates -- in the court of appeals
17 appendix there's the deposition by Ms. Meisel, which
18 explains on pages 163 and 189 that it's not flipping a
19 switch to create a new service like this. Many systems
20 would have to be completely reengineered to take in new
21 data about age and addressee. There would have to be a
22 new system for the alert. There would have to be a new
23 system for reading the alert. That takes one
24 and-a-half years, 18 months, for that modification to
25 occur. That's an enormous effect.

1 And I would also like just to look at --

2 JUSTICE STEVENS: But that's the effect on
3 UPS; is that not right?

4 MS. BRINKMANN: On the carrier services.

5 JUSTICE STEVENS: Does that foreclose the
6 possibility that somebody else might just specialize in
7 delivering tobacco products, for example?

8 MS. BRINKMANN: Your Honor, if there were a
9 requirement or Maine law, for example, for a widely
10 already established adult signature requirement, that
11 may have a different preemption analysis. There
12 certainly would not be the problems of uniformity. But
13 I don't think it could be something that's dictated.
14 And if a carrier --

15 JUSTICE SCALIA: Why wouldn't there would be
16 a problem? I don't understand that. There would still
17 be a problem with uniformity from State to State.

18 MS. BRINKMANN: Yes, Your Honor --

19 JUSTICE SCALIA: Do you think if Maine did
20 it for all products it would be okay? It's only they're
21 doing it for tobacco that makes it bad?

22 MS. BRINKMANN: No, Your Honor.

23 JUSTICE SCALIA: I didn't think so.

24 MS. BRINKMANN: That cost that I just
25 described has to be multiplied for 50 States and many

1 commodities.

2 And also, if you look at the 1555-D, the
3 prohibition on unlicensed tobacco retailers sending to a
4 consumer and the imputed knowledge, the law that has
5 strict liability on the carrier, if there is a box that
6 has a shipper's name from the attorney general's list,
7 that imputed knowledge would require that every one of
8 the 65,000 or 16 million packages going to Maine every
9 year be examined for the shipper identification.

10 And in the record, there is -- the State has
11 admitted at JA-96 -- that that kind of research to look
12 into -- in this case it was looking at the sender, but
13 it would be the same for the shipper -- I mean, it was
14 looking for the addressee; this would be for the shipper
15 -- is two dollars per package.

16 JUSTICE GINSBURG: How did they deal with
17 under the New York settlement? I take it this would be
18 a problem under that settlement, because it doesn't
19 touch selling from -- to a licensed dealer. And so,
20 under the New York settlement, which operates
21 nationwide, what does the carrier do to make sure that
22 the recipient is a licensed dealer?

23 MS. BRINKMANN: Under the New York
24 settlement there's a very complex structure that the
25 carriers have agreed to, first of all forbidding all

1 delivery of cigarettes to consumers.

2 JUSTICE SCALIA: Where does that appear in
3 the materials? Do you remember where it is?

4 MS. BRINKMANN: There is a citation to it in
5 the Petitioner's brief, Your Honor.

6 JUSTICE SCALIA: But no text, though?

7 MS. BRINKMANN: It's available, I believe,
8 on the attorney general of New York's website. There's
9 a very -- for example, in the UPS assurance of
10 discontinuance, there's a three-tier disciplinary scheme
11 against shippers that are found to violate that.

12 And the carriers entered into these
13 agreements under threat of criminal sanctions. The New
14 York statute made one offense a misdemeanor and a second
15 offense a felony. And the carriers, who had been trying
16 to abide by those laws, were faced with subpoenas and
17 the threat of prosecution. And so their solution was a
18 uniform nationwide policy, no cigarettes to consumers.
19 But of course --

20 JUSTICE KENNEDY: Ms. Brinkmann, I'm
21 interested in two things. Number one, I want to make
22 sure you completed the quantification point that you
23 made, and you pointed us to someplace in the record,
24 because the Petitioner said, oh, it just costs a penny a
25 package or something like that.

1 And then the second point, I think probably
2 not related, is the question of knowledge. I take it
3 you're not contesting if there's actual knowledge that
4 it's a minor that there can be a prosecution. I'm not
5 sure how that works if the company -- because of the
6 imputed knowledge. Suppose the officer of the company or
7 some shipping clerk knows it. Wouldn't the company be
8 liable if the company were subject to -- those are two
9 different questions.

10 MS. BRINKMANN: To your first question, just
11 to complete it, Your Honor, at JA-96 there's an
12 admission that it's a two-dollar cost to research a
13 package. There it's for the addressee, but it would be
14 the same for the shipper. And if you had to do that for
15 the 16 million packages going to Maine a year just
16 through UPS, it would be \$32 million a year.

17 Turning to your knowledge point, I think
18 this is a very important point that the Court was
19 discussing earlier and, Justice Scalia, I think you were
20 discussing about the general ban. Justice Ginsburg, you
21 mentioned our footnote.

22 You have to know what the details of the ban
23 are to figure out whether or not it is preempted. In
24 this case, the First Circuit at Pet. App. 29 explains
25 why its construction of the first sentence of 1555-D,

1 which prohibits any person from knowingly transporting
2 contraband tobacco, is not preempted. But it makes
3 very clear that the State law is preempted, Pet. App.
4 29, "to the extent that Maine's Tobacco Delivery Law
5 requires (or has the effect of requiring) carriers to
6 implement State-mandated procedures in the processing or
7 delivery of packages" as preempted by the FAAAA.

8 So to the extent there is a general ban
9 against knowing transportation that does not require --
10 that does not impose a strict liability requirement --
11 it's the strict liability requirement that says it's
12 not just knowing, you have to look at every shipper's
13 name. You have to look at every side of that box. And
14 then you have to decide who the recipient is.

15 JUSTICE SCALIA: Ms. Brinkmann, I'm
16 fascinated by this New York settlement. You -- you say
17 that -- that Maine can't do this. But you say if a
18 bunch of States do it, and they twist the carriers' arms
19 hard enough by threatening criminal penalties, so that
20 the carriers say, okay, I give up; and then they agree
21 to limit their transport, that's okay?

22 MS. BRINKMANN: No, Your Honor. I'm sorry
23 if I gave that impression. That was a --

24 JUSTICE SCALIA: Well, I mean you're
25 speaking about the New York settlement as though that's

1 hunky-dory.

2 MS. BRINKMANN: No, it isn't. This --

3 JUSTICE SCALIA: I'm not sure that if this
4 -- if this Federal Act means what it says, that that
5 kind of settlement isn't the kind of thing the Act did
6 not want to happen.

7 MS. BRINKMANN: Well, it's a voluntary
8 agreement in which --

9 JUSTICE SCALIA: Voluntary under threat of
10 criminal penalty.

11 MS. BRINKMANN: -- in which the carriers
12 adopted a uniform approach.

13 JUSTICE SCALIA: Well, that's -- that's
14 nice. But what about the consumer? The Act was not
15 just for the convenience of the carriers. It was meant
16 to -- to serve the convenience and the economic benefit
17 of the consumer.

18 I -- I expect a consumer might be able to
19 challenge that -- that New York settlement. I'm just
20 surprised you accepted it as, well, you know, so long as
21 the carrier coughs it up, it's okay.

22 MS. BRINKMANN: No, the assurances of
23 discontinuance -- specifically, I know that Federal
24 Express and UPS have reserved the right and do not
25 concede that the New York law is not preempted under

1 FAAAA. There is no concession there, Your Honor. I
2 want to make that abundantly clear.

3 I also wanted to address the --

4 JUSTICE KENNEDY: Just on the knowledge
5 point, I'm still not sure. I don't want to ask you if
6 you concede that knowing delivery would make you liable.
7 That's what the First Circuit said. I suppose that's
8 not before us, so I have to take that as a premise, as a
9 given.

10 MS. BRINKMANN: I think, though, if I could
11 --

12 JUSTICE KENNEDY: It's a little bit hard to
13 write the opinion your way with that, with that
14 concession. That's my problem. Or with that premise.

15 MS. BRINKMANN: I think if you understand
16 what the First Circuit was saying, this is a total ban
17 on knowing delivery. It doesn't require the carrier to
18 change their services. So we -- the carriers don't have
19 to go out and in the hundreds of countries that they
20 operate change the intake procedure for shipments to be
21 able to have all the data and all the systems you would
22 need to have to --

23 JUSTICE STEVENS: No, but they are presumed
24 to have read the label, the stamp on the label; isn't
25 that correct?

1 MS. BRINKMANN: You go to the end of the
2 system, is where the knowledge would come into place.
3 In reality, under the current operating services that
4 are provided --

5 JUSTICE STEVENS: Would you answer my
6 question? May they presume that if the package is
7 labeled cigarettes, that the delivery -- the delivery
8 person knows that?

9 MS. BRINKMANN: I wouldn't necessarily say a
10 presumption, Your Honor. It is evidence that can be
11 used.

12 That -- we recognize that. I think some of
13 the amici suggest that we say it does not. It can be
14 used. It's not a presumption. It cannot be something
15 that deems knowledge. I can just give you some examples
16 of practicality.

17 The two employees who actually see the box,
18 loaders and sorters, it's going by so fast, they don't
19 -- aren't reading anything. The preloader who puts it
20 into the truck --

21 JUSTICE STEVENS: When they pick up the
22 package, they don't look at the labels?

23 MS. BRINKMANN: -- and the driver.

24 But what you have to understand is sometimes
25 they're packed four high. Some deliveries are ten to

1 one business and each side of each box is not viewed.
2 Oftentimes the scan on the bar code is done from a
3 distance. They don't -- what the loaders look at is the
4 ZIP code, and actually with increased automation -- and
5 Mr. Butler's deposition, which was filed on -- back in
6 June of 2004, he talked about even greater automation
7 where they won't even be reading the ZIP code.

8 JUSTICE KENNEDY: Well, but the way -- I'm
9 telling you I assume the way it works is that the UPS
10 truck goes out to the tobacco warehouse and picks up
11 4,000 boxes, all registered tobacco. He certainly knows
12 it's tobacco at that point.

13 MS. BRINKMANN: That's not my understanding.
14 That's not the evidence in this case. There are many
15 ways in which the system comes in; and I certainly think
16 that could be a different question of knowing and that
17 would be a question of proof.

18 And it can be evidence. But I'll tell you,
19 if there was a driver who for the past month had found
20 three boxes of tobacco and turned them in and said, you
21 know, these can't be delivered, and one day one box got
22 through and he didn't see it written, or it was written
23 in light marker or it had, you know, bled, because they
24 used the wrong thing -- there's no uniformity of size or
25 anything -- no, I think that would be a question for a

1 jury to decide about knowledge, and it can't be a
2 presumption and it can't be deemed. It is a question of
3 knowledge.

4 JUSTICE BREYER: May I ask you this
5 question, which is where I'm having a little trouble on
6 your side. I think I would agree and you would agree
7 that if a State were to say, to protect the consumers
8 in our State, anyone who ships in goods must do so in
9 special padded cars -- use whatever shipper you want,
10 but you have to have special -- that would be illegal.

11 MS. BRINKMANN: Yes.

12 JUSTICE BREYER: Can California say, anybody
13 who ships lettuces into our State has to use
14 refrigerated equipment? One product, not all products,
15 and a good public health reason?

16 MS. BRINKMANN: Your Honor, that would be
17 for Congress, and it would have --

18 JUSTICE BREYER: So you'd say that would
19 also be preempted?

20 MS. BRINKMANN: I think you have to look at
21 the specific statute. And we went through and really
22 looked at the statutes that the State cited, and you can
23 see in our brief we set out, a third of them have
24 knowledge requirements. Another group -- for example
25 Maine's fireworks, when you trace it down, it looks like

1 a local commissioner does it, and then they adopt these
2 standards for an association. And what is it? It's the
3 Federal standard. So I think you really have to bore
4 into that.

5 JUSTICE KENNEDY: Why is it that knowledge
6 requirements have a different preemption analysis?
7 That's what I'm finding difficult to understand.

8 MS. BRINKMANN: Because the way in which the
9 First Circuit construed the first sentence is just to be
10 a ban on knowing transportation delivery, and said it
11 can't require -- on pages 26 and 27, it says it
12 different ways -- that if a liability standard of a
13 State is preempted, if, for example, it required
14 modification of the delivery methods, other than
15 declining the package; it's in the normal course of the
16 services that are already provided, if there is
17 knowledge that is evidence --

18 JUSTICE STEVENS: Then there's clear
19 preemption in Justice Breyer's example. If California
20 says you must ship certain products in refrigerated
21 containers, that is definitely preempted under your
22 analysis.

23 MS. BRINKMANN: If there was no Federal
24 regulatory -- yes.

25 JUSTICE STEVENS: That statute is definitely

1 preemptive. A State cannot insist on that. Could they
2 insist on firearms being shipped only in labeled
3 packages?

4 MS. BRINKMANN: There are many Federal
5 regulations about the transportation --

6 JUSTICE STEVENS: Could a State do it
7 beyond the Federal requirement?

8 MS. BRINKMANN: No, Your Honor, it would
9 have to be uniform, and I think that's a great example.
10 The -- the Federal scheme for hazardous materials are
11 extensive, and that is what carriers are focused on, on
12 uniformity, on the best way in which to provide these
13 services.

14 If I could, I just wanted to discuss for a
15 moment why we really would urge that there is no
16 health-and-safety exception or that this can be read to
17 be limited to economics. First of all --

18 JUSTICE SCALIA: Before you get into that,
19 do we have to hold -- assuming we agree with you -- do
20 we have to hold that the knowing requirement of the
21 first sentence is okay?

22 MS. BRINKMANN: No, I don't --

23 JUSTICE SCALIA: -- even though the other
24 provisions are not okay?

25 MS. BRINKMANN: We did not --

1 JUSTICE SCALIA: Okay. I have a lot of
2 trouble with the knowing requirement.

3 MS. BRINKMANN: We did not cross-petition
4 on that --

5 JUSTICE SCALIA: Fifty different States
6 having a knowing requirement for a hundred different
7 products -- I don't know that that complies with the
8 Federal law.

9 MS. BRINKMANN: What we are responding to is
10 the cert petition from the State here. I would point
11 out that -- an example that the Court itself gave is
12 under their health-and-safety exemption, that means that
13 the State could come and just put a surcharge, whether
14 it would be on tobacco or junk food. There is no line
15 to draw between the position they take here and that
16 kind of situation. We point to the text of the statute,
17 of course, and the findings about the burdens on
18 interstate commerce of the interstate regulation. The
19 structure -- there is a safety exemption for motor
20 vehicles and even that has a Department of
21 Transportation Federal backdrop against it. And in the
22 Morales opinion from this Court, they pointed to the
23 Airline Deregulation Act, which is very important here
24 because that statute is construed just as this is. And
25 in the Morales the Court pointed out that an earlier

1 bill had had the kind of economic regulation that the
2 State here seeks and it was rejected. Then of course
3 in this very case, the Congress -- the conference report
4 embraced the Morales standard and in fact described it
5 as a broad preemptive standard that they intended to
6 apply here. So we believe that that is the standard
7 that should really apply, but in light of the effect
8 that this has on the carrier services, we suggest it
9 meets any standard of "are related to."

10 There's certainly an immediate connection
11 with -- and there are express references in these
12 provisions that we suggest meets any preemption
13 standard.

14 If there's -- one other thing I would say,
15 under the C(3)(C), the provision which the State
16 suggests does not directly dictate services, first of
17 all the Solicitor General reads the statute anew and
18 suggests that there may be direct enforcement against
19 the carriers, which certainly would changes our view of
20 that, because there is an instruction requirement that
21 the shipper give to the carrier and say, State law
22 mandates this.

23 Moreover, we would like to point out, for
24 example, in the Wolens case, the frequent flyers program
25 that was at issue there was not a mandatory aspect of

1 the services, and also in the Court's own recent Clean
2 Air Act case, where there's also the "relating to"
3 language used. Engine manufacturers realize this, that
4 you can't regulate the seller through the purchaser.

5 Thank you, Your Honor.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 Ms. Brinkmann.

8 Mr. Hallward-Driemeier.

9 ORAL ARGUMENT OF DOUGLAS HALLWARD-DRIEMEIER,
10 ON BEHALF OF UNITED STATES,
11 AS AMICUS CURIAE,
12 SUPPORTING THE RESPONDENTS

13 MR. HALLWARD-DRIEMEIER: Thank you,
14 Mr. Chief Justice and may it please the Court:

15 I think there's no question that the
16 State of Maine could not require carriers to obtain a
17 license to deliver tobacco products and condition that
18 upon the carrier's service complying with the mandates
19 of State law, that that would be a law that relates to
20 the carrier's service.

21 Now, Maine maintains that its law is
22 saved from preemption because of two distinctions: One,
23 that it is adopted with a health rather than economic
24 purpose, and because it operates directly on the shipper
25 rather than the carrier.

1 And we don't think that either of those
2 arguments is consistent with the text, structure, or
3 legislative history of the Act. But I would want to
4 point --

5 CHIEF JUSTICE ROBERTS: You're talking about
6 the Federal act or the Maine Act?

7 MR. HALLWARD-DRIEMEIER: The Federal Act.
8 That's right. But it's worth noting that those
9 arguments, in any event, only go to the provision in
10 C(3)(C). The provision that is under dispute in section
11 D does not have either of those characteristics. It
12 operates directly on the carrier, and it is not adopted
13 for the health concern but rather to support the State's
14 licensing and tax purposes.

15 But if I could go back to the reasons why
16 their argument is inconsistent with the text, structure,
17 and history of the Federal Act, as Respondents' counsel
18 noted, Congress did consider an alternative version of
19 this bill, one that was limited to economic regulation,
20 and the Congress rejected the Senate version and adopted
21 instead the House version that much more broadly
22 preempted State regulation related to carrier services.
23 It added the provision of services and adopted the
24 "related to" standard rather than regulation.

25 And so it has rejected this limitation that

1 Petitioners urge. Moreover, the argument that there is
2 a general health exception to the preemptive force of
3 the FAAAA is inconsistent with the structure of the Act.
4 There are specific exceptions in the Act related, for
5 example, to motor carrier safety, but those exceptions
6 correspond to other grants of authority to the Secretary
7 of Transportation to adopt regulations and to pre-empt
8 State regulations that would interfere with interstate
9 commerce or impose too much of a burden on interstate
10 commerce.

11 There is no similar backstop, if the Court
12 reads into the FAAAA an atextual, general exception for
13 any act adopted with a health purpose by the States.

14 JUSTICE ALITO: If one of the big carriers
15 decided for its own business purposes to offer a service
16 that complied with the Maine law, would that have the
17 effect of "un-pre-empting" the Maine law?

18 MR. HALLWARD-DRIEMEIER: Well, what Congress
19 -- what Congress had in mind in the Act was that
20 carriers would respond to the marketplace, not State
21 regulation. And where a service is widely available in
22 response to the marketplace, for a State to dictate to
23 shippers that they should use one service as opposed to
24 another, we think would have -- it would be a different
25 analysis under Morales. The Court in Morales said that

1 the test was whether there was a significant effect on
2 the carriers.

3 And where, as here, we have the three major
4 carriers all providing, for example, an
5 adult-signature-required service, for the -- for a State
6 to say, well, when you ship alcohol, you have to use
7 that available service, that would not have much of an
8 effect at all on the carriers.

9 JUSTICE ALITO: Even if the law --

10 MR. HALLWARD-DRIEMEIER: In fact, the
11 Federal law --

12 JUSTICE ALITO: Even if they all now decided
13 they wanted to go into this business, that would have no
14 effect because they would have done that to comply with
15 the Maine law rather than as -- in response to market
16 forces?

17 MR. HALLWARD-DRIEMEIER: That's right. We
18 don't think that the State can adopt a law and in a
19 sense force the carriers to conform their services to
20 the State law and then say, oh, but now they have it.
21 We don't think that would be conducive --

22 JUSTICE KENNEDY: It seems to me rather odd
23 that major carriers can determine the scope of
24 pre-emption. Suppose there are smaller carriers that
25 say we don't want to do this. Take the New York

1 settlement example. If the New York settlement example,
2 in effect, opens up a new kind of service, all other
3 carriers have to follow that? That's a -- there's no
4 authority in our cases for that kind of pre-emption
5 analysis, is there?

6 MR. HALLWARD-DRIEMEIER: I think with
7 respect to this particular example about the adult
8 signature required, the Court probably would need to go
9 no farther than the fact that the Federal government has
10 itself recognized the existence of that service and
11 required it in a law that relates to the shipping of
12 wine when one is prohibited by safety regulations from
13 taking it on the airplane with them. So the existence
14 in the marketplace of this service has already been
15 recognized in Federal law.

16 CHIEF JUSTICE ROBERTS: Could I follow up on
17 Justice Kennedy's question, though, and specifically, do
18 you think the New York settlement, if the carriers did
19 not agree to it, that they would nonetheless prevail
20 because the terms of it are preemptive?

21 MR. HALLWARD-DRIEMEIER: I have not studied
22 the New York statute sufficiently to speak to that, and
23 I don't think the government has a position about that.
24 We do believe -- the settlement agreement, though, is
25 distinct from the Maine law in some very significant

1 respects.

2 And the most important of those is that
3 under the settlement agreement, the carriers agree to
4 use reasonable best efforts; whereas the Maine
5 provision -- this is the second sentence of D -- deems
6 the carrier to have knowledge --

7 CHIEF JUSTICE ROBERTS: Well, you are -- so
8 you are -- you are pretty familiar with the New York
9 settlement then.

10 (Laughter.)

11 MR. HALLWARD-DRIEMEIER: I have some
12 familiarity with it.

13 CHIEF JUSTICE ROBERTS: Well, then I think
14 you ought to be able to tell me whether you think it's
15 preempted by the Federal law under your theory or not.

16 MR. HALLWARD-DRIEMEIER: Well, I -- Your
17 Honor, we have not taken a position on whether the
18 settlement is and, with respect -- although I have some
19 familiarity with the settlement, I have less familiarity
20 with the underlying New York statute that it was agreed
21 to, in response to --

22 CHIEF JUSTICE ROBERTS: Well, you have
23 familiarity with the knowing delivery requirement here.

24 MR. HALLWARD-DRIEMEIER: Yes.

25 CHIEF JUSTICE ROBERTS: Is that preemptive

1 under your view?

2 MR. HALLWARD-DRIEMEIER: In our view, where,
3 as construed by the First Circuit -- and we sort of
4 accept that view -- the First Circuit, on page 26 of the
5 Pet. App., construed the first sentence of D as
6 requiring that carriers do not act as knowing
7 accomplices in the illegal sale of tobacco products. So
8 construed, we don't believe that that provision is
9 preemptive. It is akin to the general prohibition on
10 furnishing tobacco to minors in 1555-B(2), and we don't
11 think that that provision is preemptive.

12 JUSTICE STEVENS: You mean it's akin to the
13 health exception.

14 MR. HALLWARD-DRIEMEIER: Excuse me.

15 JUSTICE STEVENS: You say it's akin to a
16 health exception.

17 MR. HALLWARD-DRIEMEIER: No. I -- I say
18 that it is a law of general applicability, and it does
19 not require any change in the carriers' practices. What
20 -- what the imputation of knowledge does, however, is
21 require the carriers to change their practices so that
22 they will get the knowledge when they can. For example,
23 take another example. If Maine said that it would
24 impute knowledge to the carriers of the tobacco contents
25 if an X-ray scan would reveal the cigarette contents, it

1 would in effect be requiring the carriers to install
2 X-ray machines and pass every package that they get
3 through those X-ray machines. That's how an imputation
4 of knowledge can be used to direct the conduct of the
5 carrier, and that's what is so problematic about the
6 second sentence of D. They impute knowledge based upon
7 whether the name of the shipper appears on a confidential
8 list that the attorney general has provided. In other
9 words, even though, in their normal practices, they don't
10 pay attention whatsoever to the shipper's name, they have
11 to incorporate that into their practices in order to
12 avoid the imputation of knowledge.

13 JUSTICE GINSBURG: But the first condition,
14 and the package is clearly labeled, aren't there some
15 commodities where UPS does have to pay attention to the
16 label?

17 MR. HALLWARD-DRIEMEIER: Well, yes, Your
18 Honor. A Federal law -- there is Federal law with
19 respect to shipment of hazardous substances. There are
20 uniform requirements with respect to how one must label
21 hazardous substances, but --

22 JUSTICE GINSBURG: It can't be --
23 Ms. Brinkmann told us that they've got these -- so many
24 packages and it's going to cost millions. But they do
25 have to do it for a package that's labeled hazardous.

1 MR. HALLWARD-DRIEMEIER: Well, as I
2 understand it, the -- the uniformity of the symbol for
3 hazardous substance is something that the handlers are
4 trained to scan for.

5 JUSTICE ALITO: But won't the name of the
6 shipper be in their computer program? I mean, the
7 shipper has to pay, right? So they know the name of
8 the shipper --

9 MR. HALLWARD-DRIEMEIER: Well --

10 JUSTICE ALITO -- and they have a
11 supercomputer so I don't understand why that's so --

12 MR. HALLWARD-DRIEMEIER: Not necessarily, as
13 I understand the service. Some of -- many, many of the
14 packages are delivered to a company with which UPS has a
15 contract, such as a Staples or some other kind of store.
16 And it becomes -- the Staples store becomes the shipper.
17 They are the ones with the contract with UPS, not
18 whoever it was that brought to it Staples. So it is not
19 necessarily part of their practice that they would have
20 that information at all.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 Mr. Hallward-Driemeier.

23 Mr. Stern, you have five minutes left.

24 REBUTTAL ARGUMENT OF PAUL STERN

25 ON BEHALF OF THE PETITIONER

1 MR. STERN: Thank you, Your Honor.

2 Beginning with the last series of questions,
3 if the Court looks at pages 100 to 102 of the joint
4 appendix, the Court will see that UPS has a computer
5 dial-up system which allows it to keep track of, and
6 provide alerts for, shippers' addresses and consignees,
7 as well as they can keep track of what is called an SIC
8 code which is with respect to commodities. And they can
9 keep track of tobacco commodities.

10 There seems to be a misconception here, and
11 I apologize for that. Maine's law is not a criminal
12 law. It provides for civil violations between \$50 and,
13 I think it's \$1,500.

14 Regarding quantification, the only hard
15 evidence in the record is that it costs UPS less than
16 one cents a -- one cent a package to look at the label
17 to determine whether a -- a particular name is
18 problematic or not.

19 JUSTICE SCALIA: Times fifty.

20 MR. STERN: Excuse me.

21 JUSTICE SCALIA: Times fifty, because 49
22 other States could have different requirements, and all
23 those requirements might -- might cost only a penny to
24 comply with. But you add them all up, and it is half a
25 buck.

1 MR. STERN: No, it is not, Your Honor.
2 Because, as Ms. Brinkmann explained, the -- the looking
3 at the label is done usually in UPS's situation by a
4 preloader. And the preloader is in the particular
5 State. So it still would be less than one cent a State
6 for each State it happened to be in.

7 The \$2 a package is for the actual
8 intercepted packages. In a five-month period, there
9 were a total of 33 intercepted packages, and the
10 citation to the record is at page 106.

11 By no stretch of the imagination is there
12 any proof in this record that it costs \$32 million a
13 year to comply with Maine's law.

14 JUSTICE SOUTER: Mr. Stern, when you say
15 that it takes one second to -- I forget whether you said
16 scan or -- or examine a label, do you -- are you
17 describing simply the physical act of a human being
18 looking at the label?

19 MR. STERN: According to the testimony of
20 Mr. Butler, who provided a document on this, it is
21 looking at the label and determining whether it appears
22 to be from a tobacco retailer.

23 JUSTICE SOUTER: You can't tell unless you
24 have an extraordinary memory for all the names on the
25 attorney general's list. You can't do that simply by

1 looking at the label.

2 And I -- I thought maybe what you meant by
3 the one second was that the list was -- was in a
4 computer, and you had a mechanical device that scanned
5 the -- the name on the label and -- and it either
6 matched something in the computer, or it didn't.

7 But I take it you are talking about
8 physical, visual inspection.

9 MR. STERN: Yes. Your Honor's question
10 raises two points. First, with respect to the names,
11 if one goes and looks at the list of unlicensed tobacco
12 retailers, virtually all of them have something like
13 "tobacco" or "smokes" or something in it, because their
14 goal is to be picked up by a Google search for somebody
15 who is looking for cheap cigarettes or cheap tobacco.

16 With respect to the computer system -- and
17 the record is full of citations to it, for example, at
18 pages 92 and 95 -- they have done no study of their
19 computer system. They have not attempted in any way to
20 research whether any of the companies on the list of
21 unlicensed retailers is actually in their system so they
22 can be picked up by the system.

23 JUSTICE SOUTER: No, I -- I just wanted to
24 know what you meant by the "one second." I take it what
25 you mean is there is a physical, visual inspection of

1 the label. And in that one second, in practical terms,
2 the person looking can tell whether the name is on the
3 attorney general's list, because there will be some
4 tipoff in the -- in the name of the company that -- that
5 will alert him?

6 MR. STERN: Yes. And if it is, it is put
7 aside. And those are the 33 packages that were
8 intercepted in a five-month period that cost --

9 JUSTICE SOUTER: Okay. But --

10 MR. STERN: -- UPS \$2 a package.

11 JUSTICE SOUTER: If someone on the
12 unapproved list wants to -- for whatever reason, wants
13 to avoid a tipoff term like incorporating the term
14 "tobacco" on to their label, then the person making the
15 one-second inspection is not going to pick it up.

16 And the only way the company is going to be
17 able to protect itself against the imputed knowledge is
18 either by a visual inspection of the Attorney General's
19 list to see whether it matches what the person is
20 looking at or by some computer scan, right?

21 MR. STERN: The short answer is yes. If I
22 can explain?

23 CHIEF JUSTICE ROBERTS: Sure.

24 MR. STERN: The -- the way UPS went about
25 dealing with this law was to put together the system

1 which Ms. Brinkmann and I have described. They did not
2 study in any way, shape, or form how their computer
3 system could streamline this and make it effective.

4 JUSTICE SCALIA: Mr. Stern, I'd be
5 interested in whether you have any response to the
6 Government's point that, at least as far as 1555-D is
7 concerned, that is a direct regulation of -- of the --
8 the shipper -- not the shipper, of the transporter. So
9 that -- so that your point that this is not a regulation
10 of -- of transport is simply -- is simply wrong as far
11 as 1555-D is concerned. Do you acknowledge that?

12 MR. STERN: Yes. We made that point with
13 respect to 1555-C(3)(C).

14 JUSTICE SCALIA: Okay.

15 MR. STERN: With respect to 1555-D, it is a
16 direct regulation of the carrier services or any other
17 delivery service which we believe is called for and
18 permissible under the Synar Amendment, Your Honor.

19 CHIEF JUSTICE ROBERTS: Thank you,
20 Mr. Stern.

21 The case is submitted.

22 (Whereupon, at 11:05 a.m., the case in the
23 above-entitled matter was submitted.)

24

25

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