

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

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

Plaintiffs – Appellees,

v.

G. STEVEN ROWE, in his official capacity as Attorney General of the State of
Maine,

Defendant – Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE, CASE NUMBER 03-178-B-H

**BRIEF OF THE AMERICAN TRUCKING ASSOCIATIONS, INC. and THE
CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA
AS *AMICI CURIAE* IN SUPPORT OF APPELLEES NEW HAMPSHIRE
MOTOR TRANSPORT ASSOCIATION ET AL.**

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IDENTITY AND INTEREST OF THE *AMICI CURIAE*¹

The American Trucking Associations, Inc. (“ATA”) is a trade association of motor carriers, state trucking associations (including the plaintiffs in this case), and national trucking conferences created to promote and protect the interests of the trucking industry. Directly and through its affiliated organizations, ATA represents over 30,000 companies and every type and class of motor carrier operation in the United States, including parcel delivery companies, companies whose operations are categorized as less-than-truckload (“LTL”), and companies that primarily haul truckload quantities of freight. ATA regularly advocates the trucking industry’s common interests before both state and federal courts. ATA and its members have a critical interest in the permissible scope of state regulation of motor carrier activities. ATA actively participated in the formulation of federal motor carrier deregulation policy and of the Federal Aviation Administration Authorization Act of 1994, Pub. L. No. 103-305, tit. VI, § 601 (“FAAAA”), which is the subject of this litigation.

The Chamber of Commerce of the United States of America (the “Chamber”) is the world’s largest business federation. The Chamber represents an underlying membership of more than three million businesses, state and local chambers of commerce, and professional organizations. Chamber members,

¹ All parties have consented to the filing of this brief.

including its motor carrier members, operate in every sector of the economy and transact business throughout the United States, as well as in a large number of countries around the world. The Chamber regularly represents the interest of the business community in courts across the nation by filing *amicus* briefs in cases involving issues of national concern to the American business community. The Chamber has filed *amicus* briefs in hundreds of cases before the United States Supreme Court and the federal courts of appeals.

The national trucking industry is of massive size and scope and is an essential pillar of the American economy and lifestyle. As of July 2004, the U.S. Department of Transportation's Federal Motor Carrier Safety Administration ("FMCSA") had on file 524,309 registered interstate motor carriers. In 2002, nearly 8 billion tons of freight (over 2/3 of domestic tonnage shipped) with a value of over \$6 trillion moved by truck. U.S. Census Bureau, U.S. Dep't of Commerce, 2002 Commodity Flow Survey, Table 1a (2004). To efficiently and competitively undertake the more than 6 million estimated daily shipments needed to move this volume of freight, trucking companies need to employ uniform procedures free of individualized state regulatory requirements that impede the free flow of trucking commerce. An overarching federal regulatory network accompanied by strong preemption allows the trucking industry to meet the needs of the American economy.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Federal Aviation Administration Authorization Act (FAAAA) broadly preempts any state “law related to a price, route, or service of any motor carrier.” 49 U.S.C. § 14501(c)(1); *see id.* § 41713(b)(4)(a).² This provision has been interpreted consistently to preempt any state law that expressly references or significantly affects a price, route, or service of any motor carrier. The district court held that the FAAAA preempts title 22, sections 1555-D and 1555-C(3)(C) of the Maine Revised Statutes and, therefore, enjoined their enforcement against any covered carrier. Section 1555-D prohibits motor carriers from transporting or delivering any “tobacco product purchased from a person who is not licensed as a tobacco retailer” by the State of Maine. The District Court held that this provision is preempted because it both expressly references and significantly affects motor carriers’ services. Section 1555-C(3)(C) requires tobacco retailers to utilize a delivery service that will (1) ensure that the purchaser of any tobacco product is also the addressee; (2) require the addressee to sign for the delivery; and (3) check the addressee’s identification upon delivery to ensure that he or she is of legal age

² Section 41713(b)(4)(a) preempts any law that relates to a price, route, or service of any air carrier or any motor carrier affiliated with an air carrier. Section 14501(c)(1) has the same preemptive effect with respect to all other motor carriers (*i.e.*, all motor carriers *not* affiliated with air carriers). These two provisions are substantively identical, and the district court’s decision, therefore, applies equally to motor carriers and air carriers. However, for the sake of readability, we sometimes refer simply to “motor carriers.”

to purchase tobacco products. The District Court held that this provision is preempted because it significantly affects motor carriers' services.

The Attorney General (“AG”) and his *amici* attack the district court’s preemption decision, seeking to characterize the Maine statutes as mere “public health” or “health and safety” regulations. However, this argument misses the point of FAAAA preemption. Although the Maine statutes may be *motivated* by health or safety concerns, they undoubtedly *regulate* motor carrier services covered by the FAAAA. And in so doing, they hamper the efficient delivery of goods by truck, a problem that is exacerbated by the fact that other states impose different tobacco delivery regulations. Under the theory advanced by the AG and his *amici*, national and regional motor carriers would be subject to a “patchwork” of all sorts of varying regulations, covering not only tobacco deliveries but also deliveries of any other commodity that a state might deem “unsafe” or “unhealthy.” *See* Part II, *infra*. That the FAAAA was intended to avoid precisely this sort of inefficient regulatory scheme is evident from the Act’s legislative history and the overarching structure of federal trucking regulation. *See* Parts I & III, *infra*. Recognizing that the Maine statutes thus fall squarely within the FAAAA’s preemption provision, the AG and his *amici* fall back on the “presumption against preemption.” As explained below, however, the presumption does not apply when, as here, a state seeks to intrude upon an area in which there is a longstanding tradition of federal

regulation. *See* Part IV, *infra*. Accordingly, the judgment of the district court should be affirmed.

The AG also argues that the Plaintiffs (“associations”) lack standing because they challenge the Maine statutes “as applied” to only one of their members — United Parcel Service, Inc. (“UPS”). The AG also makes a related argument that the injunction should be limited to UPS because the associations chose to rely solely on evidence related to UPS. As explained below in Part V, both arguments are rooted in a fundamental misunderstanding of the preemptive effect of the FAAAA and the associations’ claims. Under the FAAAA, any law that impermissibly relates to a price, route, or service of *any* carrier is preempted and cannot be enforced against that carrier *or any other*. Accordingly, the district court properly enjoined enforcement of the invalid statutes in their entirety. And because no individualized relief was sought or granted, the associations were appropriate representatives of their members’ interests.

I. TO PROTECT FEDERAL DEREGULATION EFFORTS, CONGRESS GAVE THE FAAAA A BROAD PREEMPTIVE SCOPE.

Beginning with the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793, Congress made a commitment to deregulate the motor carrier industry. At that time, Congress found that “[t]he existing [federal] regulatory structure ha[d] tended in certain circumstances to inhibit innovation and growth and has failed, in some cases, to sufficiently encourage operating efficiencies and competition.”

H.R. Rep. No. 96-1069, 96th Cong., 2d Sess. (1980), *reprinted in* 1980 U.S.C.C.A.N. 2283, 2292. It soon became clear, however, that federal deregulation could not serve its purposes as long as burdensome and inconsistent state regulation persisted. In 1994, Congress found that state regulation of motor carriers continued to “impose[] an unreasonable burden on interstate commerce,” “impede[] the free flow of trade, traffic, and transportation of interstate commerce,” and “place[] an unreasonable cost on the American consumers.” FAAAA, Pub. L. No. 103-305, tit. VI, § 601(a)(1), 108 Stat. 1569, 1605 (1994). Accordingly, “[t]o ensure that the States would not undo federal deregulation with regulation of their own” (*Morales v. TransWorld Airlines, Inc.*, 504 U.S. 374, 378 (1992)), Congress enacted a broad preemption provision in Section 601 of the FAAAA.³ Under the FAAAA, any “law related to a price, route, or service of any motor carrier” is preempted. 49 U.S.C. §§ 14501(c)(1), 41713(b)(4)(A). FAAAA preemption thus completes a federal transportation policy that promotes uniformity by preempting a wide range of potentially burdensome state regulation.

³ *Morales* addressed the substantively identical preemption provision of the Airline Deregulation Act of 1978 (“ADA”). In enacting the FAAAA, Congress’s “central purpose” was “to extend to all affected carriers,” including motor carriers, “the identical intrastate preemption of prices, routes, and services as that originally contained” in the ADA provision, including the “broad preemption interpretation adopted by the United States Supreme Court in [*Morales*].” H.R. Conf. Rep. No. 103-677, at 83, *reprinted in* 1994 U.S.C.C.A.N. at 1755.

II. THE FAAAA PROTECTS AGAINST A PATCHWORK OF BURDENSOME STATE REGULATIONS.

The central purpose of the FAAAA motor carrier preemption provision was to free motor carriers from the “patchwork” of state regulatory requirements that had developed prior to the FAAAA’s enactment. H.R. Conf. Rep. No. 103-677, at 87, *reprinted in* 1994 U.S.C.C.A.N. at 1759. Congress concluded that such inconsistent regulation “causes significant inefficiencies, increased costs, reduction of competition, inhibition of innovation and technology and curtails the expansion of markets.” *Id.* Congress further explained that “[t]he sheer diversity of these regulatory schemes is a huge problem for national and regional carriers attempting to conduct a standard way of doing business” (*id.*) and identified regulation of “types of commodities carried” (*id.* at 86) as a particular problem area.⁴

A. Varying State Tobacco Delivery Regulation Disrupts Motor Carrier Operations.

The varying state tobacco delivery regulations currently in effect are a significant obstacle to national and regional motor carriers who seek to maximize operating efficiencies through uniform handling and transportation procedures.

⁴ Although much of the FAAAA’s legislative history focuses on state regulation of intrastate motor carrier activity, the application of the FAAAA to regulations that are “related to a price, route, or service” of any motor carrier’s interstate operations has never been questioned. *See, e.g., United Parcel Serv., Inc. v. Flores-Galarza*, 318 F.3d 323, 325-26, 336 (1st Cir. 2003) (holding that the FAAAA preempted a Puerto Rico regulation that fell exclusively on the interstate operations of the plaintiff-air carrier and its affiliated motor carriers).

For example, while the Maine statutes apply to all tobacco products, laws in Alaska, Connecticut, Louisiana, New York, Texas, Virginia, and Washington apply to cigarettes only. *See* Alaska Stat. § 43.50.105(c); Conn. Gen. Stat. § 12-285c; La. Rev. Stat. Ann. §47:871-878; N.Y. Pub. Health Law § 1399-ll(2); Tex. Health & Safety Code Ann. § 161.451; Va. Code Ann. § 18.2-246.7; Wash. Rev. Code § 70.155.105(4)(b).

The diversity of addressee signature requirements is especially burdensome. Maine requires carriers to obtain a signature from the addressee (who must also be the purchaser). In contrast, Arizona and Indiana permit any adult designated by the purchaser to sign for delivery (*see* Ariz. Rev. Stat. § 42-3225(A)(2); Ind. Code Ann. § 24-3-5-5(a)(1)(A)), Delaware and Oklahoma allow delivery to any adult residing at the purchaser's address (*see* Del. Code Ann. Tit. 30, § 5365(a)(2); Okla. Stat. tit. 68, § 317.4(A)(2)(a)), and Nevada and West Virginia permit any adult to accept delivery (*see* Nev. Rev. Stat. § 202.24935(3); W. Va. Code Ann. § 16-9E-4(a)(2)(i)).

Additionally, Maine prohibits tobacco deliveries from persons who are not licensed tobacco retailers to any person other than a licensed tobacco distributor or tobacco retailer. In contrast, Alaska permits cigarette shipments from unlicensed persons to be delivered to persons licensed by the state, operators of customs bonded warehouses, and certain authorized federal or tribal agencies. *See* Alaska

Stat. § 43.50.105(a). Alaska also prohibits deliveries from licensed persons to any unlicensed individual unless the individual is “19 years of age or older[,] receiving the cigarettes for personal consumption[,] and the tax imposed on the cigarettes ... has been paid.” *See id.* § 43.50.105(b). New York prohibits all cigarette deliveries unless the recipient is a registered or licensed person, an export warehouse proprietor, or a federal or state government agency. *See* N.Y. Pub. Health Law § 1399-11(1).

A national or regional carrier simply cannot establish efficient, uniform handling and transportation practices and still comply with the patchwork of state regulation governing tobacco deliveries. Such regulations require the carrier to ascertain whether a package contains tobacco products and the relevant characteristics of both the shipper and the recipient, including whether they are licensed by the relevant states. The carrier must then evaluate this information against state law to determine whether delivery can be made and what, if any, identification check must be performed on delivery. This patchwork increases carriers’ costs, thereby affecting carriers’ “prices.” It also affects carrier “services” by preventing deliveries and creating delays. Finally, by disrupting the orderly flow of packages — and requiring return of noncompliant packages — these varying state regulations impact carrier “routes.” *See United Parcel Serv., Inc. v.*

Flores-Galarza, 318 F.3d 323, 327 (1st Cir. 2003). This is precisely the sort of inconsistent regulation that the FAAAA was intended to preempt.

B. Varying State Regulation Of Transportation Of Other Commodities Exacerbates Disruption To Carrier Operations.

Although the instant case involves tobacco delivery laws, the argument advanced by the AG and his *amici* would open the door to state regulation of the delivery of numerous commodities. Such regulation would increase the problems outlined above exponentially. As then-ATA President (and now-Chamber President) Thomas Donohue explained when testifying in support of the inclusion of a broad preemption provision in the FAAAA:

A single shipment may begin in one state and pass through several other states on the way to its destination. The shipper and receiver of the goods may be located in different states. Without uniform federal laws and regulations governing the provision of such services, the potential conflicts and confusion between and among state laws is beyond comprehension.

Hearing Before the Subcomm. on Surface Transportation of the S. Comm. on Commerce, Science, and Transportation, 103d Cong., 2d Sess. (July 12, 1994) (statement of Thomas J. Donohue), 1994 WL 369290. In the inherently interstate environment in which national and regional motor carriers operate, delivery requirements that vary from state-to-state and commodity-to-commodity would prove completely unworkable.

The breadth of the argument advanced by the AG and his *amici* underscores this concern. The AG and his *amici* broadly claim that the FAAAA should not be construed to preempt any state transportation requirements that can be characterized as health and safety regulations. They then argue that preemption of the Maine tobacco delivery laws would call into question the legitimacy of many other transportation-related “health and safety” provisions. *See* Appellant’s Brief (“AG’s Brief”) at 41 n.10 (citing Maine statutes governing, *inter alia*, the shipment and delivery of animals, plants and trees, fireworks, etc.); Brief for the State of New York et al. as *Amici Curiae* In Support of Def.-Appellant (“*Amici* Brief”) at 29 nn. 14 (citing New York statutes governing, *inter alia*, the shipment and delivery of prescription medication, gambling devices, certain animals, etc.). In fact, these other statutes could prove to be only the tip of the iceberg. Potentially, a countless number of “unhealthy” or “unsafe” commodities (*e.g.*, soft drinks, snacks, cosmetic contact lenses, herbal remedies, diet aids, graphic magazines, and violent video games) could be identified by various states as targets for particularized transportation regulations. Allowing piecemeal, non-uniform state regulation of the delivery of such commodities would open motor carriers to crippling burdens and destroy the efficiencies and free flow of trade Congress envisioned when enacting the FAAAA.

Motor carriers rely on uniform procedures to handle vast numbers of shipments in efficient and cost-effective ways. Parcel carriers, such as United Parcel Service and Federal Express, handle millions of packages each day. *See Fed. Express Corp. v. Cal. Pub. Util. Comm'n*, 936 F.2d 1075, 1076 (9th Cir. 1991) (noting that Federal Express handles 700,000 packages each day at its Memphis facility alone). Similarly, motor carriers classified as LTL operations (*e.g.*, Yellow-Roadway Corp.) handle tens of thousands of shipments daily. Each of these motor carriers must employ carefully developed procedures that minimize handling and individual processing of shipments. *See* Plaintiffs' Statement of Undisputed Materials Facts ¶¶ 6-17 (describing UPS operational procedures). Allowing states to establish a patchwork of transportation regulations loosely associated with health and safety goals would destroy the efficiencies that the FAAAA was intended to protect and place an unreasonable cost on American consumers and the national economy.

III. FAAAA PREEMPTION IS AN ESSENTIAL ELEMENT OF FEDERAL REGULATORY POLICY.

The operating efficiencies Congress sought to protect can be achieved only through uniform motor carrier regulation. Congress's goal of uniformity and its desire to enable motor carriers to have "a standard way of doing business" are apparent both in the legislative history of the FAAAA (H.R. Conf. Rep. No. 103-677, at 87, *reprinted in* 1994 US.C.C.A.N. at 1759) and in the structure of federal

motor carrier regulation as a whole. While other federal statutes promoted uniformity in areas such as vehicle safety and highway route controls based on vehicle size and weight and the hazardous nature of cargo, inconsistent state regulations in other areas continued to affect motor carriers' prices, routes, and services. Congress recognized that this void "cause[d] significant inefficiencies, increased costs, reduction of competition, inhibition of innovation and technology and curtail[ed] the expansion of markets." *Id.* In enacting the FAAAA, Congress filled this void by broadly preempting all state laws relating to any motor carrier's price, route, or service. The FAAAA thus filled a gap in federal policy by preempting state and local laws that threatened the free movement of goods and necessary uniformity of motor carrier regulation.

While the plain language of the FAAAA broadly preempts laws or regulations related to a price, route, or service of a motor carrier, it exempts state laws that regulate motor vehicle safety, limit or control highway routes based on a vehicle's size or weight or the hazardous nature of its cargo, or impose insurance or financial responsibility requirements. 49 U.S.C. §§ 14501(c)(1), 41713(b)(4)(A). However, consistent with the underlying goal of facilitating interstate commerce and promoting efficiency through uniformity, each of these "saved" areas is subject to a separate federal regulatory scheme — each with its own preemptive effect.

For example, the Motor Carrier Safety Act of 1984, Pub. L. No. 98-554, 98 Stat. 2832, provides for review by the Secretary of Transportation (the “Secretary”) of state laws and regulations concerning commercial motor vehicle safety. The Secretary may declare any such state law preempted if he determines that it is more stringent than the federal law and has “no safety benefit,” is “incompatible” with federal law, or “would cause an unreasonable burden on interstate commerce.” 49 U.S.C. § 31141(c)(4). Additionally, the Surface Transportation Assistance Act of 1982, Pub. L. No. 97-424, §§ 401-404, 96 Stat. 2154-2157, authorized the Motor Carrier Safety Assistance Program (“MCSAP”). Under MCSAP, the Secretary is directed to prescribe guidelines and standards “for ensuring compatibility of intrastate commercial motor vehicle safety laws” with federal laws. 49 U.S.C. § 31104(h). Congress directed that the guidelines and standards shall be flexible “while ensuring the degree of uniformity that will not diminish transportation safety.” *Id.*

With respect to highway route controls based on vehicle size and weight, state laws and regulations must conform to federal guidelines concerning vehicle length (49 U.S.C. § 31111), vehicle width (49 U.S.C. § 31113), and access to interstate and federally funded highways (49 U.S.C. § 31114). Highway route controls based on the hazardous nature of cargo are also subject to a preexisting federal regulatory scheme that promotes uniformity. The Hazardous Materials

Transportation Uniform Safety Act of 1990, Pub. L. No. 101-615, 104 Stat. 3244 (1990), authorizes the Secretary to establish standards and guidelines for state laws governing the highway routing of hazardous materials. 49 U.S.C. § 5112. Such laws can be enforced only if they comply with the Secretary’s standards (49 U.S.C. § 5125(c)), and directly affected parties may apply to the Secretary for a determination as to whether a state law is compliant or preempted (49 U.S.C. § 5125(d)).

Thus, even though Congress saved certain types of state laws from FAAAA preemption, it did so with the knowledge that other federal statutes and regulations already provided a substantial degree of uniformity in those areas. As such, even with respect to these issues, Congress did not stray from its goal of promoting uniformity to “encourage operating efficiencies” and facilitate interstate commerce. Accordingly, the absence of a similar, preexisting federal regulatory structure governing tobacco deliveries (or deliveries of other commodities that might be deemed health risks) is further evidence that Congress did not intend to permit states to impose varying delivery requirements on motor carriers.⁵

⁵ Congress is certainly aware of the issues that the Maine statutes sought to address. The Tobacco Free Internet for Kids Act of 2003 (H.R. 3047), the Internet Tobacco Sales Enforcement Act (H.R. 2824), and the Prevent All Cigarette Trafficking Act (S. 1177) were all introduced during the 108th Congress. Although none of these bills became law, their introduction confirms that Congress can regulate in this area should it deem it appropriate to do so.

IV. THE PRESUMPTION AGAINST PREEMPTION DOES NOT APPLY.

The AG also argues that a presumption against preemption of a state's historic police powers should apply (AG's Brief at 27-28). However, the Supreme Court has recently reaffirmed that this presumption does not apply when a State seeks to regulate in an area that is historically the subject of federal regulation. Here, there is a long history of federal regulation of the trucking industry. And although the Maine statutes may be *motivated* by health or safety concerns, they undoubtedly *regulate* transportation and motor carriers. Accordingly, the "presumption against preemption" does not apply.

A. The AG's Argument Fails Under *United States v. Locke*.

The AG's argument for a presumption against preemption is based on the Supreme Court's decision in *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947), and its progeny. However, as the Supreme Court recently explained, the *Rice* presumption does not arise simply because federal regulation would intrude upon the traditional scope of a State's police power. *United States v. Locke*, 529 U.S. 89, 107-08 (2000). In relevant part, *Rice* stated:

The question in each case is what the purpose of Congress was. Congress legislated here in a field which the States have traditionally occupied. So we start 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.

Rice, 331 U.S. at 230 (citations omitted). Thus, “[a]s *Rice* indicates, an ‘assumption’ of nonpre-emption is not triggered when the State regulates in an area where there has been a history of significant federal presence.” *Locke*, 529 U.S. 108. That is, when a State extends its “police power” into an area of traditional federal regulation — rather than vice versa — there is no *Rice* presumption. That is precisely the case here: Congress enacted the FAAAA to create uniformity in an area that is unquestionably within its commerce power, and the Maine statutes have undermined that uniformity. Accordingly, the *Rice* presumption is inapplicable.⁶

B. There Is A Long History of Federal Regulation of Motor Carriers.

There is a long history of a significant federal presence in motor carrier regulation. As intra- and inter-city roads improved in the early 1900s, the trucking

⁶ The AG argues that the legislative history’s references to economic regulation imply that Congress intended a narrow scope of preemption. However, the legislative history’s specific reference to the decision in *Federal Express Corp. v. California Public Utilities Commission*, 936 F.2d 1075 (9th Cir. 1991), and that decision’s broad definition of economic regulation, suggest otherwise. In *Federal Express*, the Ninth Circuit broadly stated:

Most of the regulations challenged here are obviously economic — they bear on price. Those regulations which are not patently economic — the rules on claims and bills of lading, for example — relate to the terms on which the air carrier offers its services. Terms of service determine cost. To regulate them is to affect the price. The terms of service are as much protected from state intrusion as are the air carrier’s rates.

Id. at 1078. The First Circuit quoted this language approvingly in *Flores-Galarza*. 318 F.3d at 336.

industry became a viable competitor to the railroads. *See* WILLIAM R. CHILDS, TRUCKING AND THE PUBLIC INTEREST: THE EMERGENCE OF FEDERAL REGULATION 1914-1940, at 14 (1985). In order to fend off this competition, the railroads successfully lobbied for state regulation of motor carriers. *See* LAWRENCE S. ROTHENBERG, REGULATION, ORGANIZATION, AND POLITICS: MOTOR FREIGHT POLICY AT THE INTERSTATE COMMERCE COMMISSION 44 (1994). A patchwork of state regulations resulted and wreaked havoc on the nascent motor carrier industry.

The first proposal in Congress for federal motor carrier regulation was introduced in 1925. *See* ROTHENBERG, *supra*, at 45. The efforts toward federal regulation first began to take hold with passage of the National Industrial Recovery Act, Pub. L. No. 73-67, 48 Stat. 195 (1933), which empowered the National Recovery Administration to oversee a system of industry self-regulation. However, self-regulation proved unworkable and was ultimately invalidated by the Supreme Court in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

These events led to passage of the Motor Carrier Act of 1935 (the “1935 Act”), Pub. L. No. 74-255, 49 Stat. 543. The 1935 Act brought about comprehensive federal regulation of the motor carrier industry by giving the Interstate Commerce Commission broad regulatory control over, among other things, motor carrier rates, routes, and services. This comprehensive regulatory

scheme remained virtually unchanged until Congress began deregulating the industry with passage of the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793. Thus, there can be little argument that there has been a long history of significant federal motor carrier regulation. And, again, an “assumption of nonpreemption is not triggered when the State regulates in an area where there has been a history of significant federal presence.” *Locke*, 529 U.S. at 108 (citation omitted).

C. Maine’s Provisions Are Transportation Regulations.

Although the AG attempts to characterize the Maine statutes as “state public health laws” (AG’s Brief at 18), the undeniable subject of the statutes is the delivery of packages by motor carriers covered by the FAAAA. Thus, just as this Court properly focused its analysis on the preemptive effect of the FAAAA within the field of air transportation rather than the artificially narrow field of “state taxation” (*Flores-Galarza*, 318 F.3d at 336), the focus in this case must be on the field of motor carrier transportation. The Maine provisions directly and indirectly regulate motor carrier transportation. The remainder of Maine’s statutory framework for addressing the public health issue of smoking is not being challenged. This challenge is limited to those provisions that interfere with motor carrier transportation.

V. THE ATTORNEY GENERAL’S ARGUMENTS CONTESTING ASSOCIATIONAL STANDING AND THE SCOPE OF THE INJUNCTION ARE PREMISED ON A FLAWED UNDERSTANDING OF FAAAA PREEMPTION.

The Attorney General argues that “associational standing is inappropriate” in this case because “[t]he very nature of the as-applied challenge here ... requir[es] assessment of the actual effects [of the Maine statutes] on the carrier.” AG’s Brief at 48. He also advances a related argument that “the injunction ... should be vacated and amended to apply only to UPS.” *Id.* at 49. Both arguments are rooted in a fundamental misunderstanding of the preemptive effect of the FAAAA and the associations’ claims. Under the FAAAA, any law that impermissibly relates to a price, route, or service of *any* carrier is preempted and cannot be enforced against that carrier *or any other*. Accordingly, the district court properly enjoined enforcement of the invalid statutes across the board. And because no individualized relief was granted, the presence of individual carriers was unnecessary, and the associations were appropriate representatives of their members’ interests.

The AG’s confusion regarding the FAAAA and its preemptive effect apparently stems from the district court’s parsing of the associations’ claims into “facial” and “as-applied” challenges. Citing *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992), the district court “use[d] the term ‘facial’ to refer to the [associations’] challenge based solely on the words of the Maine statute and ‘as-

applied’ to refer to the challenge based solely on the actual effect of the law.” *N.H. Motor Transp. Ass’n v. Rowe*, 377 F. Supp. 2d 197, 201 n.9 (D. Me. 2005). *Morales* held that the parallel preemption provision of the Airline Deregulation Act preempted any state law that (a) expressly refers to rates, routes, or services or (b) has a “forbidden significant effect upon” the same. 504 U.S. at 388. *Morales* did not, however, use the terms “facial” and “as-applied,” and their use in this context is mistaken. As a substantive matter, this misunderstanding is harmless. Unfortunately, it has given the AG a toehold from which to mount challenges to the associations’ standing and the scope of the injunction entered. That toehold is far too tenuous, however, to support his arguments.

When a court determines that a statute is invalid “as applied,” it is merely “holding that [the] statute cannot be enforced against a particular litigant.” Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1327 (2000). The statute then remains presumptively valid as applied to other persons under other circumstances. In contrast, a statute is facially invalid if “no set of circumstances exists under which [it] would be valid.” *United States v. Salerno*, 481 U.S. 739, 745 (1987). Such a statute can never be enforced. Under the FAAAA, however, there is no room for an as-applied challenge in the ordinary sense of that term because the Act provides that no state “may ... enact or enforce a law ... related to a price, route, or service of any motor carrier” or “an air

carrier” or affiliated carrier. 49 U.S.C. §§ 14501(c)(1), 41713(b)(4)(A) (emphases added). Put simply, whenever a law impermissibly relates to *a* price, route, or service of *any one* carrier there is perforce “no set of circumstances under which” the law can be enforced against that carrier or any other. The law is either invalid or it is not. Thus, if the term “as applied” is to be used at all in this setting, it must be understood to mean that the Maine statutes cannot be enforced against *any* carrier *because of* their demonstrated effect “as applied” to UPS. Accordingly, the district correctly barred the invalid statutes’ enforcement against any carrier.

Once the confusion concerning “as-applied” challenges is resolved, the error in the AG’s standing argument also becomes clear. The AG argues that associational standing is inappropriate because the “claim asserted” and “relief requested” require individual members’ participation. *See* AG’s Brief at 47.⁷ This argument is one of “prudential” standing “and is best seen as focusing on ... matters of administrative convenience and efficiency, not on elements of a case or controversy within the meaning of the Constitution.” *United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 557 (1996). For

⁷ In *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977), the Supreme Court held “that an 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.” The AG concedes that the associations’ members could sue in their own right and that the lawsuit is germane to the associations’ purpose.

that reason, district courts are afforded “some latitude in case-by-case judgments.” *Pharm. Care Mgmt. Ass’n v. Rowe* (“PCMA”), 429 F.3d 294, 314 (1st Cir. 2005). The gist of the AG’s argument is that the associations are not proper plaintiffs because their evidence establishes only that UPS — and not all members — is entitled to an injunction. Once again, however, the AG misunderstands the FAAAA: as explained above, proof that the state law impermissibly impacts the routes, services, or prices of any member *is* proof that the law is invalid as to all members and hence that all members are entitled to an injunction. Because no individualized remedy was sought or granted, individual members’ participation was not required for a proper resolution of the case. When an “association seeks a declaration, injunction, or some other form of prospective relief, it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured,” and the association is, therefore, an appropriate representative of its members’ interests. *Warth v. Selden*, 422 U.S. 490, 515 (1975).

There still remains some suggestion that the associations were not proper plaintiffs simply because they chose to rely on evidence specific to UPS. This Court already has squarely rejected that notion, explaining that “just because a claim may require proof specific to individual members of an association does not mean the members are required to participate *as parties* in the lawsuit.” *Playboy*

Enters., Inc. v. Pub. Serv. Comm'n of P.R., 906 F.2d 25, 32-33 (1st Cir. 1990) (emphasis in the original).⁸ The relevant question is whether “the nature of the claim [or] the relief sought ... make[s] the individual participation of *each* injured party *indispensable* to proper resolution of the cause” (*Warth*, 422 U.S. at 511 (emphases added)), not whether the association voluntarily *chooses* to rest its case on the experience of a single member. Here, the associations’ choice was entirely permissible — and, indeed, eminently sensible — given that (a) evidence of a forbidden effect upon a price, route, or service of *any* injured carrier is sufficient to establish preemption under the FAAAA and (b) all carriers will benefit from the injunction just as if they had been parties. Thus, far from being “indispensable,” the participation of individual members was wholly unnecessary.

This Court recently reaffirmed the *Playboy* decision, noting that, “[i]n that case, ... the impact on individual members necessary for injunctive relief was readily established as to at least one member.” *PCMA*, 429 F.3d at 314. The Court did caution, however, that “*Playboy* is not an open door for association standing in all injunction cases where member circumstances differ *and proof of them is important.*” *Id.* (emphasis added). In *PCMA*, the Court concluded that the “district court acted reasonably” in denying associational standing because the claim

⁸ *Accord Pa. Pscyh. Soc’y v. Green Spring Health Servs.*, 280 F.3d 278, 284-87 (3d Cir. 2002); *Retired Chicago Police Ass’n v. Chicago*, 7 F.3d 584, 600-03 (7th Cir. 1993); *Hosp. Council of W. Pa. v. City of Pittsburgh*, 949 F.2d 83, 89-90 (3d Cir. 1991).

asserted — that requiring pharmacy benefit managers to make certain disclosures constituted a “taking” of proprietary information — turned on individualized proof that was likely to vary considerably among members. *See id.*

Under the reasoning of *PCMA*, it is clear that *Playboy* controls the instant case. The standing problem in *PCMA* was that the association sought injunctive relief to which some of its members were not entitled, and there was no way to tell which members had viable claims without their direct participation in the case. There is no such difficulty here. In this case, as in *Playboy*, “the impact on individual members necessary for injunctive relief was readily established as to at least one member.” *PCMA*, 429 F.3d at 314. That is, once a forbidden impact was established as to UPS, an injunction was appropriate without regard to the statutes’ effect on other carriers. Thus, even assuming that “member circumstances differ” to some extent, “proof of them is [*not*] important” to the claims asserted or remedy granted. *Id.* The district court therefore “acted reasonably” in permitting the associations to assert claims on behalf of their members.

Finally, the AG alleges, without factual or legal support, that associational standing was used for improper purposes in this case. The AG complains first that “businesses are ... using associational standing to avoid *any direct party discovery.*” AG’s Brief at 50 (emphasis added). As the district court observed, however, UPS was subject to *third-party* discovery that “overall is fairly

comparable” to party discovery. *N.H. Motor Transp. Ass’n v. Rowe*, 324 F. Supp. 2d 231, 237 (D. Me. 2004). Moreover, the AG does not identify any specific piece of information that he was unable to obtain through discovery.⁹ The AG also takes a parting shot at the propriety of an association’s litigating on behalf of its members in order to shield them from bad publicity that may result from advancing a politically unpopular position. Yet a primary “justification [for associational standing] seems to be ... the possible reluctance of individuals to be named as

⁹ The AG cites two cases in support of his discovery argument. AG’s Brief at 50. One of them, *Maine State Building & Construction Council v. Chao*, 265 F. Supp. 2d 105 (D. Me. 2003), does not address the issue of discovery and associational standing, and the other, *Builders Association of Greater Chicago v. City of Chicago*, 2003 U.S. Dist. LEXIS 1896 (N.D. Ill. 2003), actually provides strong support for the associations’ position *if the relevant portion of the opinion is quoted in full*:

This does not, as defendant suggests, mean that we are allowing plaintiff to use associational standing as a sword to avoid defenses and shift the burden of production while hiding behind the standing as a way to evade discovery requests. As plaintiff states in its memorandum, the primary reason for filing suit as an association was allegedly to avoid potential retaliation against individual contractors. Defendant does not dispute the strategic value of this decision. This does not prevent the defendant from acquiring the relevant evidence that would be available to them, regardless of who actually files the suit.

Id. at *6. Thus, like the district court in this case, *Builders Association* explicitly recognizes that third-party discovery is an adequate substitute for party discovery and that “avoid[ing] potential retaliation against individual [members]” is a legitimate reason for an association to litigate on behalf of them.

plaintiffs even if the organization in fact bears the burden of litigating.”¹⁰ 13
WRIGHT, MILLER & COOPER, FEDERAL PRACTICE & PROCEDURE § 3531.9, at 615
(2d ed. 1984). In short, these final arguments against associational standing ignore
the availability of third-party discovery on one hand and ignore the very purpose of
associational standing on the other.

In sum, the AG’s challenges to the scope of the injunction and the
associations’ standing both stem from a faulty understanding of FAAAA
preemption. Any state law that relates to or significantly affects *a* price, route, or
service of *any* carrier is preempted. There is simply no room for the sort of “as-
applied” challenge the AG postulates. Accordingly, there is no basis for limiting
the injunction to UPS and, by extension, no reason to require the participation of
UPS or any other individual member. The district court’s decision was certainly
within the “latitude” permitted under the prudential standing doctrine.

¹⁰ Cf. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 459 (1958) (holding
that an association may assert its members’ rights against compelled disclosure of
their affiliation with the organization because “[t]o require that it be claimed by the
members themselves would result in nullification of the right at the very moment
of its assertion”); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123,
141 (1951) (Frankfurter, J., concurring) (reasoning that associations labeled
“communist” by executive order have standing to challenge the designation
because “it is at least doubtful that the members could or would adequately present
the organizations objections”).

CONCLUSION

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

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

I hereby certify that — according to the word-count facility in Microsoft Word — this brief, excluding those portions omitted under Federal Rule of Appellate Procedure 32(a)(7)(B)(iii), consists of 6,599 words, which is fewer than the number specified in Federal Rule of Appellate Procedure 29(d).

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of December 2005, I caused copies of the Brief of the American Trucking Associations, Inc. and The Chamber of Commerce of the United States of America as *Amici Curiae* in Support of Appellees New Hampshire Motor Transport Association et al. to be served by first class United States Mail, postage prepaid, on each of the following counsel:

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