Rowe v. New Hampshire Motor Transport Association: Federal Preemption of State Tobacco Shipment Laws

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Summary

Maine adopted two laws regarding shipping and delivery sales of tobacco products that were aimed at preventing minors from acquiring tobacco products. In *Rowe v. New Hampshire Motor Transport Association*, the Supreme Court held that the two Maine laws were preempted by the Federal Aviation Administration Authorization Act of 1994 (FAAAA). That law prohibited states from "enact[ing] or enforc[ing] a law ... related to a price, route, or service of any motor carrier ... with respect to the transportation of property." In finding that Maine's mail-order tobacco product delivery laws were preempted, the Court noted that federal preemption would occur if state laws had a "significant impact" on carrier rates, routes, or services and if the connection with motor carrier services is not "tenuous, remote, or peripheral." Legislation related to federal regulation of tobacco products, including shipment and delivery, has been introduced in the 110th Congress: H.R. 1108, H.R. 4081, S. 625, S. 1027.

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Maine's Tobacco Product Shipment and Delivery Laws

In 2003, Maine passed laws that instituted requirements for shipping and delivery sales of tobacco products that attempted to end sales to minors. The state argued that such laws helped the state "prevent minors from obtaining cigarettes."[1] The first law at issue, the "recipient-verification" provision, stated:

> The tobacco retailer shall utilize a delivery service that imposes the following requirements: 1) The purchaser must be the addressee; 2) The addressee must be of legal age to purchase tobacco products and must sign for the package; and 3) If the addressee is under 27 years of age, the addressee must show valid government-issued identification that contains a photograph of the addressee and indicates that the addressee is of legal age to purchase tobacco products.[2]

The second law, referred to as the "deemed to know" provision, stated:

> A person is deemed to know that a package contains a tobacco product if the package is marked in accordance with the requirements of section 1555-C, subsection 3, paragraph B ["The tobacco retailer shall clearly mark the outside of the package of tobacco products to be shipped to indicate that the contents are tobacco products and to show the name and State of Maine tobacco license number of the tobacco retailer."] or if the person receives the package from a person listed as an unlicensed tobacco retailer by the Attorney General under this section.[3]

Violators of either provision could be subject to civil penalties.[4]

The Supreme Court Decision

In *Rowe v. New Hampshire Motor Transport Association*, the Supreme Court held that the two Maine provisions were preempted by the Federal Aviation Administration Authorization Act of 1994 (FAAAA).[5] That law prohibited states from "enact[ing] or enforc[ing] a law ... related to a price, route, or service of any motor carrier ... with respect to the transportation of property."[6] This language was similar to language previously enacted in the 1978 Airline Deregulation Act, which included a preemption provision stating "no State ... shall enact or enforce any law ... relating to rates, routes, or services of any air carrier."[7] The Supreme Court had analyzed the air carrier preemption language in *Morales v. Trans World Airlines, Inc.*[8] and held that "federal law

[1] 552 U.S. __ (2008); No. 06-457, slip op. at 7 (February 20, 2008).

[2] Me. Rev. Stat. Ann. tit. 22, §§ 1555-C(3)(C).

[3] Me. Rev. Stat. Ann. tit. 22, §1555-D.

[4] No. 06-457, slip op. at 2-3 (February 20, 2008).

[5] 552 U.S. __ (2008); No. 06-457 (February 20, 2008).

[6] No. 06-457, slip op. at 2 (quoting 49 U.S.C. § 14501(c)(1)).

[7] 49 U.S.C. § 1305(a)(1) (1988 ed.).

[8] 504 U.S. 374 (1992).

pre-empts States from enforcing their consumer-fraud statutes against deceptive airline-fare advertisements."[9]

In finding that Maine's mail-order tobacco product delivery laws were preempted, the Court relied on its interpretation of the preemption language at issue in *Morales*. The Court indicated that passage of the FAAAA motor carrier preemption language took into account its previous interpretation of the air carrier preemption language in *Morales*.[10] The *Morales* Court found that preemption could occur even if the state law only had an indirect effect on carrier rates, routes, or services and that preemption did occur if "state laws have a 'significant impact' related to Congress's deregulatory and pre-emption-related objectives."[11] However, the *Morales* Court effectively said that preemption may not occur if the state law affects carrier rates, routes, or services "in only a 'tenuous, remote, or peripheral ... manner."[12]

The *Rowe* Court first held that Maine's recipient-verification provision had a "direct 'connection with' motor carrier services" because "it focuse[d] on trucking and other motor carrier services" and that the Maine law had "a 'significant' and adverse 'impact' in respect to the federal Act's ability to achieve its pre-emption-related objectives."[13] Therefore, the *Rowe* Court found that federal law preempted Maine's recipient-verification provision.[14] The Court reasoned that Maine's law had the effect of substituting "government commands for 'competitive market forces' in determining ... the services that motor carriers will provide."[15]

The *Rowe* Court next held that Maine's "deemed to know" provision "applies yet more directly to motor carrier services" because the provision would "impose[] civil liability upon the carrier" if the carrier did not check each tobacco shipment "for certain markings and ... compare it against the Maine attorney general's list of proscribed shippers."[16] As a result, the Court found that Maine's law would affect "Congress' major legislative effort to leave ... decisions, where federally unregulated, to the competitive marketplace," because if the Court allowed Maine's shipment checking system, then other states could impose their own shipment checking systems.[17] This would appear to result in a "significant impact" on Congress's deregulatory objectives. Thus, the *Rowe* Court held that federal law preempts Maine's regulation "of the essential details of a motor carrier's system for picking-up, sorting, and carrying goods—essential details of the carriage itself."[18]

In making this determination, the Court rejected Maine's argument that federal law did not "preempt a State's efforts to protect its citizens' public health" and its assertion that its laws should not be preempted because they helped prevent underage smoking.[19] Maine based its

[9] No. 06-457, slip op. at 5.
[10] *Id.* at 4.
[11] *Id.*
[12] *Id.* at 5.
[13] *Id.*
[14] *Id.* at 6.
[15] *Id.*
[16] *Id.* at 6-7.
[17] *Id.* at 7.
[18] *Id.*
[19] *Id.* at 7-8.

argument on the legislative history of the FAAAA and the Synar Amendment.[20] The legislative history reference was to a conference report "containing a list of nine States, with laws resembling Maine's, that Congress thought did not regulate 'intrastate prices, routes and services of motor carriers.'"[21]

The Court held that the FAAAA did not include a public health exception for preemption of state laws.[22] First, the Court stated that the legislative history did not indicate that Congress made a determination on or "focused upon" the delivery regulation issue.[23] Second, the Court discounted Maine's reliance on the Synar Amendment, which "does not mention specific state enforcement methods."[24] The Court further referenced the potentially broad nature of a "public health" exception to federal preemption of state laws related to carriers, noting "the number of products, the variety of potential adverse public health effects, ... and the difficulty of finding a legal criterion for separating permissible public-health-oriented regulations" and found that Congress did not likely intend to create a public health exception that could potentially affect tobacco shipments.[25] However, the *Rowe* Court stated that general state public health laws would not always be preempted by federal law and that federal law would not preempt state laws with a "tenuous, remote, or peripheral" connection to carrier rates, routes, or services.[26]

Maine had further argued that because it could legally ban tobacco shipments "from entering into or moving within the State," it had the power "to regulate the *manner* of tobacco shipments."[27] The Court also rejected this argument, noting that such regulation would allow the state to regulate carrier rates, routes, and services, and that federal law preempts such state laws that have a "significant impact" and more than a "tenuous, remote, or peripheral" effect.[28] The Court also found that Maine's laws would be preempted for these reasons, regardless of whether, as Maine alleged, the overturning of Maine's laws would hurt its efforts to stop underage smoking.[29]

[20] *Id.* at 8. The Public Health Service Act authorizes the Secretary to "make an allotment each fiscal year for each state" to be used for "activities to prevent and treat substance abuse." 42 U.S.C. § 300x-21. Under a 1992 amendment to this statute, sponsored by Representative Michael Synar and known as the Synar Amendment, the Secretary may make such grants "only if the State has in effect a law providing that it is unlawful for any manufacturer, retailer, or distributor of tobacco products to sell or distribute such product to any individual under the age of 18." *Id.* at § 300x-26(a)(1). The Synar Amendment was enacted as § 1926 of the Alcohol, Drug Abuse, and Mental Health Administration Reorganization Act, P.L. 102-321 (1992). Under the Synar Amendment, states must enforce their bans through annual random, unannounced inspections. 42 U.S.C. § 300x-26(b)(2)(A). If a state fails to comply with the federal enforcement provisions and reporting requirements on its enforcement activities, the federal government may reduce that state's federal funding for substance abuse treatment. *Id.* at § 300x-26(c). According to the HHS regulations, the goal of the Synar Amendment's random inspections requirement is to achieve 80% or higher compliance with laws prohibiting tobacco sales and the distribution of tobacco products to individuals under 18. 45 C.F.R. § 96-130(g).

[21] No. 06-457, slip op. at 8 (quoting H.Rept. 103-677 (1994), at 86).

[22] *Id.* at 8.

[23] *Id.*

[24] *Id.* at 8-9.

[25] *Id.* at 9.

[26] *Id.*

[27] *Id.* at 10.

[28] *Id.* at 9-10.

[29] *Id.* at 10-11.

Justice Ginsburg's Concurrence

Justice Ginsburg "wr[o]te separately to emphasize the large regulatory gap left by an application of the FAAAA perhaps overlooked by Congress, and the urgent need ... to fill that gap."[30] In particular, she restated the concerns of Maine and others that age verification methods for mail-order sales of tobacco products could be used as an enforcement strategy to prevent tobacco sales to minors but noted that the FAAAA preemption provisions block states from enacting such methods. She stated that there is a lack of federal tobacco laws aimed at preventing tobacco sales to minors. Her concurrence then stated that state tobacco control measures, such as those that resulted from the Synar Amendment, "are increasingly thwarted by the ease with which tobacco products can be purchased through the Internet."[31] Legislation has been introduced in the 110th Congress, including H.R. 4081 and S. 1027, the Prevent All Cigarette Trafficking Act, that would address sales of tobacco products over the internet.

Justice Scalia's Concurrence

Justice Scalia, who is well-known for not favoring the use of legislative history as a method of interpreting congressional intent, issued a one sentence concurrence.[32] He joined the Court's opinion except where it relied on congressional committee reports to demonstrate congressional intent "with regard to propositions that are apparent from the text of the law, unnecessary to the disposition of the case, or both."[33]

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[30] 552 U.S. __ (2008) (Ginsburg, J. concurring).

[31] *Id.*

[32] *See, e.g.*, Green v. Bock Laundry Mach. Co., 490 U.S. 504, 528 (1989) (Scalia, J. concurring) ("The meaning of terms on the statute books ought to be determined, not on the basis of which meaning can be shown to have been understood by a larger handful of the Members of Congress; but rather on the basis of which meaning is (1) most in accord with context and ordinary usage, and thus most likely to have been understood by the *whole* Congress which voted on the words of the statute (not to mention the citizens subject to it), and (2) most compatible with the surrounding body of law into which the provision must be integrated—a compatibility which, by a benign fiction, we assume Congress always has in mind. I would not permit any of the historical and legislative material discussed by the Court, or all of it combined, to lead me to a result different from the one that these factors suggest.").

[33] 552 U.S. __ (2008) (Scalia, J. concurring in part).