No. 12-52

IN THE
Supreme Court of the United States

DAN'S CITY USED CARS, INC. D/B/A
DAN'S CITY AUTO BODY,
Petitioner,

v.

ROBERT PELKEY,
Respondent.

On Writ of Certiorari To The
Supreme Court of New Hampshire

PETITIONER'S BRIEF ON THE MERITS

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QUESTIONS PRESENTED

The Federal Aviation Authorization Act of 1994 ("FAAAA") provides, with certain exceptions inapplicable here, that "a State . . . may not enact or enforce a law . . . related to a price, route or service of any motor carrier . . . with respect to the transportation of property." 49 U.S.C. § 14501(c)(1). Tow trucks are motor carriers within the meaning of § 14501(c)(1). *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 430 (2002). In this case, a vehicle owner whose car was towed from his apartment house's parking lot without his knowledge or consent to allow for snow removal, and disposed of several months later by the towing company after towing and storage charges were not paid, sued the towing company in state court for damages, alleging negligence and consumer fraud. The New Hampshire Supreme Court reversed a trial court ruling that the claims against the towing company were preempted by the FAAAA, and interpreted § 14501(c)(1) to permit the vehicle owner to pursue both a statutory consumer fraud claim and a negligence claim against the towing company. The questions presented are as follows:

1. Are the Respondent's state-law consumer-fraud and negligence claims preempted because they are "related to" the "service[s]" provided by the tow truck company?

2. Are the Respondent's state-law consumer-fraud and negligence claims preempted because they are made "with respect to the transportation of property"?

PARTIES TO PROCEEDINGS IN LOWER COURT

The Petitioner is Dan's City Used Cars. Inc. ("Dan's City"), a Defendant in the proceedings below.

The Respondent is Robert Pelkey, the Plaintiff in the proceedings below.

Colonial Village, Inc., is an additional Defendant in the proceedings below, but was not a party to the New Hampshire Supreme Court appeal. It is not a party to this appeal.

CORPORATE DISCLOSURE STATEMENT

Dan's City states that it has no parent corporation. No publicly held company owns any stock of Dan's City.

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The opinion of the New Hampshire Supreme Court (Petition for Writ of Certiorari, App. 1-22) is reported at 163 N.H. 483, 44 A.3d 480 (2012). The opinion of the Hillsborough County Superior Court North (Petition for Writ of Certiorari, App. 23-33) is unreported.

JURISDICTION

The New Hampshire Supreme Court issued its decision on April 10, 2012. The Petition for Writ of Certiorari was filed on July 9, 2012. The Petition for Writ of Certiorari was granted on December 7, 2012. The jurisdiction of the Court rests on 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

The pertinent parts of the FAAAA, 49 U.S.C. § 14501 *et seq*.; the federal law defining "transportation," 49 U.S.C. § 13102(23); the New Hampshire Abandoned Vehicles Law, N.H. Rev. Stat. Ann. § 262:1 *et seq*.; the New Hampshire Consumer Protection Act, N.H. Rev. Stat. Ann. § 358-A:1 *et seq*.; and the City of Manchester Code of Ordinances are reproduced in either the Appendix to

Petition for Writ of Certiorari, or the Appendix to this brief, as listed below:

Federal Statutes:

New Hampshire Revised Statutes Annotated (RSA):

STATEMENT OF THE CASE

A. Introduction

This case concerns the application of the preemption provisions of the FAAAA to state-law damages claims for negligence and consumer fraud against a tow truck company (Dan's City) that is alleged to have breached duties owed to a vehicle's owner when it towed his car from a parking lot to allow for snow removal, stored the car, and then

disposed of it several months later after its fees for towing and storage were not paid. The courts below reached different conclusions about preemption of these claims. The Hillsborough County Superior Court North granted summary judgment to Dan's City, holding that these claims are preempted. The New Hampshire Supreme Court reversed the grant of summary judgment, holding that neither claim is preempted. As the question of federal preemption in this case is predicated on the express language of § 14501(c)(1) of the FAAAA, the central question before the Court is whether the statutory language should be construed to encompass the Respondent's claims, such that they are preempted.

B. Statutory Background

Based on Congress's determination in 1978 that "maximum reliance on competitive market forces" would encourage lower airline fares and better airline service, it enacted the Airline Deregulation Act ("ADA"). *Morales v. Trans World Airlines*, 504 U.S. 374, 378 (1992)(quoting 49 U.S.C. App. § 1302(a)(4) (1988)). To "ensure that the States would not undo federal deregulation with regulation of their own," *id.* at 378, as well as to "prevent conflicts and inconsistent regulation," H.R. Rep. No. 95-1211, at 15 (1978), the ADA also included a preemption provision that forbade the enactment or enforcement of any State law "relating to rates,

routes, or services of any air carrier." 49 U.S.C. § 1305(a)(1). *Id*.[1]

In 1980, Congress deregulated trucking with the Motor Carrier Act of 1980. *Rowe v. N.H. Motor Transport Ass'n.,* 552 U.S. 364, 367 (2008). Fourteen years later, Congress decided to preempt state trucking regulation, as it had done with state air carrier regulation in 1978, by enacting the FAAAA. *Id*. In doing so, Congress borrowed the preemption language from the ADA, and wrote into the law the following:

> a State . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . with respect to the transportation of property.

49 U.S.C. § 14501(c)(1).[2]

Congress borrowed the ADA preemption language for the motor carrier deregulation statute to ensure that motor carriers would enjoy the "identical intrastate preemption of prices, routes and services as that originally contained in the ADA." *Rowe*, 552 U.S. at 370. In doing so, Congress took explicit notice of this Court's 1992 decision in *Morales*, in which this Court determined that the term "related to" was "conspicuous for its breadth."

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[1] The ADA's preemption provision is now codified at 49 U.S.C. § 41713.

[2] The statute was originally codified at 49 U.S.C. 11501(h), and recodified in 1995 as § 14501(c)(1), as discussed below.

Morales, 504 U.S. at 384. Congress enacted the FAAAA preemption statute with full awareness of the Court's interpretation of that language in *Morales*. *Rowe*, 552 U.S. at 370 (citing H.R. Conf. Rpt. No. 103-677, at 83 (1994)).

Despite Congress's use of the same preemption language in the ADA and FAAAA, there is an important difference between the laws in how Congress dealt with the issue of what aspects of state law would be preserved from preemption. When it enacted the ADA, Congress chose not to eliminate § 1506 of the Federal Aviation Act, 49 U.S.C. § 1506, which had been in effect since 1958, and provides that "[n]othing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." The FAAAA was enacted with no general "savings clause" akin to § 1506. It was originally enacted with only limited, specific exemptions for traditional state safety regulatory authority with respect to motor vehicles; highway route controls based on vehicle size, weight or the hazardous nature of cargo; and financial responsibility requirements. 49 U.S.C. § 14501(c)(2)(A)(B).

Congress amended and recodified the FAAAA as part of the Interstate Commerce Commission Termination Act of 1995 ("ICCTA"), P.L. 104-88. The ICCTA added another specific exemption to the FAAAA's general preemption rule, allowing states and their political subdivisions to regulate the price

of non-consensual towing of motor vehicles.[3] 49 U.S.C. § 14501(c)(2)(C). The House Report accompanying the proposed version of 49 U.S.C. § 14501(c)(2)(C) stated that the proposed amendment "is only intended to permit States or political subdivisions thereof to set maximum prices for non-consensual tows, and is not intended to permit reregulation of any other aspect of tow truck operations." H.R. Rep. No. 104-311, at 119-120 (1995) reprinted in 1996 U.S.C.C.A.N. 793, at 831-32. Congress subsequently adopted the House version of this bill, and in doing so rejected a Senate amendment that would have exempted "the price and related conditions" of non-consensual towing from federal preemption. *Harris County Wrecker Owners for Equal Opportunity v. City of Houston*, 943 F. Supp. 711, 723 (S.D. Tex. 1996) (citing S. Rep. No. 104-176, at 27-28, 108 (1995)).

In 2005, Congress amended 49 U.S.C. § 14501(c) for a second time to adopt another specific exception focused solely on non-consensual tows, i.e. tows made without the knowledge or consent of the vehicle owner from private property. That amendment, 49 U.S.C. § 14501(c)(5), entitled "Limitation on Statutory Construction," provides that 49 U.S.C. § 14501(c) is not to be construed to prevent a State from requiring that the person towing a vehicle from private property have prior

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[3] By specifically employing the term "tow truck" in § 14501(c)(2)(C), the ICCTA clarified the issue of whether tow trucks are considered motor carriers for purposes of the statute. *City of Columbus v. Our's Garage & Wreckerserv., Inc.*, 536 U.S. at 424, 430 (2002).

written authorization from the private property owner, or from requiring that the private property owner be present at the time the vehicle is towed from the property, or both.

C. Decisions On Express Preemption Under the ADA and FAAAA

In *Morales v. Trans World Airlines,* the Court first interpreted the preemption provisions of the ADA. The issue was whether the ADA preempted state efforts to regulate allegedly deceptive airline advertisements through guidelines adopted by the National Association of Attorneys General (NAAG). *Id.* at 378. Numerous states had threatened to try to enforce these guidelines through their general consumer protection statutes. *Id.* The Court construed § 1305(a)(1) of the ADA broadly, based on the breadth and plain meaning of the statute's language. With regard to the intended meaning of the words "relating to" in § 1305(a)(1), the Court reasoned that "the ordinary meaning of these words is a broad one – 'to stand in some relation; to have bearing or concern; to pertain; refer; to bring in association with or connection with.'" *Id*. at 383 (citing to *Black's Law Dictionary* 1158 (5th ed. 1979)). The Court also relied on and cited prior decisions recognizing the broad sweep of the term "related to" in the preemption provision in the Employment Retirement Income Security Act of 1974 ("ERISA"). *Id*. at 384 (describing the ERISA preemption provision as having a broad scope, an expansive

sweep, broadly worded, deliberately expansive, and conspicuous for its breadth).[4]

The *Morales* Court expressly rejected the argument by the petitioners in that case that the ADA preemption provision should be construed to apply only to laws "specifically addressed to the airline industry," but not to "laws of general applicability." *Id.* at 386. The Court viewed this argument as "creating an utterly irrational loophole," since state laws could impair a federal scheme through "particularized application of general laws," contrary to the "sweep of the 'relating to' language." *Id.* Since many aspects of the NAAG guidelines were related to airline rates, they clearly fell within the preemptive scope of the law. The Court found that the NAAG guidelines would also have a "forbidden significant effect upon fares," by restricting the airlines' ability to market their product, and hence the price of the product. *Id.* at 388-390. Finally, the Court dealt with the argument that its decision might open the public to rampant deceptive advertising by airlines by noting that the Department of Transportation retained the power to prohibit such activity under federal law. *Id.* at 391.

The Court revisited the ADA preemption issue in *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 224-225 (1995). The issue was whether claims by members of an airline's frequent flyer program for breach of contract and alleged violations of the

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[4] *See also Altria Group, Inc. v. Good*, 555 U.S. 70, 85 (2008) (recognizing that the term "relating to" in the ADA "indicates Congress's intent to preempt a large area of state law to further its purpose of deregulating the airline industry").

Illinois Consumer Fraud and Deceptive Business Practices Act were preempted by the ADA. Plaintiffs challenged the retroactive application of modifications to the frequent flyer program, asserting that the changes reduced the utility of the credits plaintiffs had already accumulated. *Id.* at 225.

Based on the holding in *Morales*, the Court rejected the conclusion of the Illinois Supreme Court that the plaintiffs' claims were not preempted because a frequent flyer program is not "essential" to airline operations, and therefore not "related to" the price of an airline service. *Id.* at 226. The Court stated that *Morales* does not countenance a distinction between matters essential or non-essential to airline operations, and held that the plaintiffs' claims were clearly related to the price of airline tickets, as well as access to airline services. *Id*. The Court went on to consider whether plaintiffs' consumer protection act claims involved the enforcement of state law. The Court held that this claim was preempted, reasoning that state consumer protection act legislation is inherently intrusive because it "serves as a means to guide and police the marketing practices of airlines," and is based on state policies for consumer protection, as distinct

from the bargain between an airline and a consumer. *Id*. at 228.[5]

Rowe v. New Hampshire Motor Transport Ass'n was the Court's first chance to interpret the scope of preemption under the language of the FAAAA. The Court did so in the context of a trucking industry challenge to a Maine law requiring motor carriers to provide special delivery services designed to ensure that cigarettes were not being sold to minors. *Rowe*, 552 U.S. at 371. The Court re-affirmed its holding in *Morales* that a state law falls within the preemptive scope of the language "related to" [the price, route, or service of a motor carrier] if the state law has "a connection with, or reference to, carrier "rates, routes or services." *Id.* at 370. Following *Morales,* the Court held that the Maine law was preempted because: (i) the law was focused on trucking and other motor carrier services, thereby creating a "direct connection" with those services, and (ii) the law had a significant and adverse impact on the delivery of motor services by substituting Maine's policy commands for "competitive market forces." *Id*. at 372.

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[5] The *Wolens* Court concluded that the plaintiffs' state-law breach of contract claims were not preempted because, unlike consumer fraud act claims, they do not depend on state policies independent of the bargain struck by the parties, which cannot be enforced by private action under the ADA's preemption provision. *Id*. at 233. This case does not involve any breach of contract claim against Dan's City.

D. Proceedings Below

1. The Hillsborough County Superior Court North made its rulings based upon those facts it determined to be undisputed, as set forth in its decision. Pet. App. 23-24. The facts are taken largely from Mr. Pelkey's writ of summons,[6] J.A. 5-17, since he never submitted any affidavits or other evidence in opposition to Dan's City's motion for summary judgment. Some facts are also taken from two affidavits and other documents filed by Dan's City in connection with a series of partial summary judgment motions (described further below).[7] The New Hampshire Supreme Court's decision relies on additional facts not found by the trial court to be undisputed. In particular, the court recited as a fact "of record" that Dan's City falsely told Mr. Pelkey's lawyer that the vehicle had been sold at public auction. Pet. App. 3. However, this alleged falsehood

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[6] In New Hampshire parlance, a complaint is denominated a "writ of summons."

[7] Dan's City's summary judgment affidavits and documents are at Appellee's Appendix in the New Hampshire Supreme Court appeal (hereinafter NH App.), at 5-7; 64-76.

is not in the record.[8] The New Hampshire Supreme Court also recited as a fact "of record" that Mr. Pelkey "received no remuneration for his loss," despite the fact that the trial court made no determination whether any financial loss had occurred, since the evidence on this score was in conflict.[9]

2. The undisputed facts of record are as follows. On February 3, 2007, Dan's City towed Mr. Pelkey's car from the parking lot of a multi-family property owned by Colonial Village ("Colonial") in

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[8] Mr. Pelkey's complaint does not allege any false statement by Dan's City regarding the auction of the car. J.A. 5-17. In response to the summary judgment motions filed by Dan's City as well as his landlord, NH App. 1-8; 27-37; 48-66, Mr. Pelkey filed no affidavits to verify any of his allegations. Neither of the two trial court decisions on the parties' summary judgment motions refer to any allegation or evidence of false statements about the auction sale of the car. It is not clear where in the trial court record the New Hampshire Supreme Court may have found a basis for its unsupported statement that it was an undisputed fact that Dan's City lied to Mr. Pelkey's lawyer about the sale.

[9] Mr. Pelkey's complaint alleges a financial loss, but he never supported his complaint with any evidence of a loss, despite the provisions of New Hampshire law, which parallel the language of Rule 56 of the Federal Rules of Civil Procedure, providing that a party opposing summary judgment may not rely on the "bare allegations" of a complaint in opposing summary judgment. N.H. Rev. Stat. Ann. 491:8-a(IV). Moreover, the facts set forth in the Dan's City affidavits were deemed admitted by Mr. Pelkey's failure to rebut them in any way. *Id*. at 491:8-a(II). One of Dan's City's affidavits stated that when the Pelkey car was towed, it was locked, had significant pre-existing damage, had a flat tire, and appeared to be used for storage. NH App. 65.

Manchester, New Hampshire, where Mr. Pelkey lived. Pet. App. 24.[10] As Mr. Pelkey's landlord, Colonial had established a policy requiring tenants to move their vehicles to accommodate snow removal from the parking lots. NH App. 9. Under this policy, a tenant's vehicle can be towed at the tenant's expense if not moved by a tenant when necessary. NH App. 10. Mr. Pelkey was aware of the Colonial snow policy, and had complied with it in the past. J.A. 8, ¶ 8.

It snowed on February 3, 2007. Mr. Pelkey's vehicle was one of a number of vehicles towed by Dan's City from the Colonial parking lot that day. NH App. 5, ¶4. When Mr. Pelkey's vehicle was towed, it was damaged and had a flat tire. NH App. 65, ¶3. The vehicle looked like it was being used for storage, and Dan's City had no way to determine if the vehicle even ran, as it was locked. *Id.*

When it towed the vehicle, Dan's City did not know the identity of the vehicle owner. This information was not publicly available to tow truck operators at the time of the towing.[11] NH App. 65, ¶2-4. When the vehicle had not been claimed within 30 days, Dan's City, as required by New Hampshire

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[10] Citations to "Pet. App." are to the Appendix to Dan's City's Petition for Writ of Certiorari.

[11] The statute was later amended in 2010 to allow a custodian of a towed vehicle to obtain the name and last known mailing address of the last registered owner from a law enforcement officer. 2010 N.H. Laws, Ch. 262 (eff. Sept 18, 2010)(current N.H. Rev. Stat. Ann. § 262:37-a).

law regulating abandoned motor vehicles,[12] submitted a TDMV 71 form to New Hampshire's Division of Motor Vehicles. NH App. 65. The TDMV 71 form is completed by a garage owner when a towed vehicle is considered abandoned or unclaimed. NH App. 65, ¶4. Dan's City knew that it's submission of the TDMV 71 form would provide it with the name of the vehicle's last registered owner. NH App. 65, ¶4. The report to DMV stated that the vehicle's market value was less than $500 and that it was not in a condition for legal public way use. NH App. 65.

On March 29, 2007, the New Hampshire Division of Motor Vehicles notified Dan's City that Mr. Pelkey was the vehicle's last registered owner and that notice of the sale should be sent to him by mail at least 14 days before the sale. NH App. 67. Dan's City sent Mr. Pelkey a certified letter stating that his vehicle had been towed and that Dan's City considered it abandoned. NH App. 6, ¶9; 11. The Post Office returned this letter to Dan's City as undeliverable because the addressee had "moved, left no address." *Id*. Not having received any claim for the car, Dan's City proceeded with its plans to auction the vehicle on April 19, 2007, for the unpaid towing and storing charges. Unbeknownst to Dan's City, Mr. Pelkey had been hospitalized on February 12, 2007, and had remained so until April 9, 2007. During the hospitalization his left foot was amputated, and he suffered a heart attack. J.A. 8-9, ¶ 10.

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[12] N.H. Rev. Stat. Ann. § 262:2(III) is the source of this reporting requirement. App. 7.

In his complaint, Mr. Pelkey alleges that he was bedridden at the time his vehicle was towed and did not become aware of its towing until after he was released from the hospital in April of 2007. J.A. 10, ¶12. About a week later, in response to an inquiry from Pelkey's counsel about the whereabouts of his client's car, Colonial's counsel told Mr. Pelkey's counsel that the vehicle had been towed and was scheduled to be sold at public auction on April 19, 2007. Pet. App. 24-25. Mr. Pelkey's counsel then sent a letter to Dan's City advising that Mr. Pelkey had not abandoned his vehicle, and wanted to "arrange for its return as expeditiously as possible." J.A. 9, ¶12. Mr. Pelkey does not allege in his pleadings that he offered, before the auction date, to pay the towing and over two months of storage charges incurred, or that he tendered the unpaid towing and storage fees.[13]

It is undisputed that neither Mr. Pelkey nor his counsel attended the April 19, 2007 auction. No third parties bid on Mr. Pelkey's damaged and locked car. NH App. 6, ¶7. Mr. Pelkey's vehicle remained

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[13] Despite Mr. Pelkey's failure to allege any offer or tender of the fees due, and his allegation instead that his counsel sent a letter denying abandonment and seeking "to arrange for the return of the vehicle as expeditiously as possible," J.A. 9, ¶12, the trial court mistakenly stated as a fact that Mr. Pelkey's counsel had informed Dan's City that his client wanted to pay any charges owed and reclaim his vehicle. Pet. App. 25. There is no evidence in the record of any offer by Mr. Pelkey to pay all the towing and storage charges, nor of any tender of payment for those charges. The only evidence in the record on this point is Mr. Pelkey's offer, made after the car had already been stored for close to four months, to pay towing charges *only*. NH App. 86-87.

at Dan's City for weeks following the failed auction. NH App. 6, ¶7. During this period of time, Mr. Pelkey could still have paid all of the towing and storage charges and claimed his car. Several weeks after the failed auction, however, Mr. Pelkey's counsel sent a letter to Dan's City disputing Pelkey's obligation to pay any storage charges because of the circumstances surrounding the tow. NH App. 86-87.

Dan's City ultimately disposed of the vehicle through a trade, after spending $2,700 to repair it to make it roadworthy. Pet. App. 25; NH App. 54. The parties dispute whether Dan's City obtained any value from the trade in excess of the unpaid towing and storage charges, the costs of the failed auction sale and the repairs.

3. The dispute between Mr. Pelkey and Dan's City was one part of a larger dispute that also involved Colonial's alleged liability to Mr. Pelkey for having his car towed, failing to provide him with notice of the towing and failing to arrange for the return of his car to him. J.A. 5-11.

Mr. Pelkey filed suit against Colonial and Dan's City, alleging that Colonial knew about his health problems and his related absences from his apartment; that Colonial had a duty to tell him that his car was towed during the February 3 snow event; that Dan's City could have identified him as the owner of the car because of a Colonial parking sticker on the car; and that Colonial was liable to him under the consumer protection act as an alleged agent of Dan's City, as well as in its own right. J.A. 13, ¶29-31.

The complaint contains six counts: two against Dan's City alone (Counts I-II), two against Colonial

alone (Counts III-IV), and two against both Colonial and Dan's City (Counts V-VI). Count I alleges Dan's City violated New Hampshire's Consumer Protection Act, N.H. Rev. Stat. Ann. § 358:A-2, for allegedly making false statements to the N.H. Department of Motor Vehicles relating to his vehicle, and allegedly failing to follow unspecified procedures set forth in N.H. Rev. Stat. Ann. 262, a portion of which regulates the towing and disposal of vehicles towed at the request of a private party without the knowledge and consent of their owners.[14] J.A. 12-13. In Count II, Mr. Pelkey claimed that Dan's City breached common law and statutory duties under Chapter 262 to use reasonable care to ascertain the identity of a vehicle's owner, to return it to him and to use reasonable care in disposing of the vehicle. Counts III and IV against Colonial are claims for violation of the N.H. consumer protection act and breach of contract. Counts V and VI are claims

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[14] Mr. Pelkey did not identify any specific statutory procedures Dan's City allegedly failed to follow. The New Hampshire statute that authorizes the towing and removal of a vehicle from private property by its owner, and puts the responsibility for paying towing and storage charges incurred on the owner of the vehicle, is N.H. Rev. Stat. Ann. § 262:40-a(I)(IV). Section 262:36-a of the law establishes procedures for disposal of such vehicles by a storage company if it is not timely claimed; § 262:37 authorizes sale at public auction; § 262:38 governs notice of sale; and § 262:39 governs application of the proceeds of the sale. In its Order, the New Hampshire Supreme Court incorrectly referenced N.H. Stat. Ann. § 262:32 and § 262:33, Pet. App. 12, both of which are applicable only in situations where an authorized official, defined in N.H. Stat. Ann. § 259:4 as a police employee, is involved in the tow. App. 4. There is no allegation in this case that a police employee was involved in the towing of Mr. Pelkey's vehicle.

against both defendants for breach of New Hampshire statutes prohibiting the seizure or withholding by a landlord of a tenant's property, without judicial process, and for violation of the federal Fair Housing Act, 42 U.S.C. § 3602.

4. Initially, both defendants moved for partial summary judgment on Counts III, V and VI. The trial court granted these motions in all respects, except as to Mr. Pelkey's claim alleging that Colonial is liable for the acts of its alleged agent (Dan's City) for consumer fraud, and the claim against Colonial for violation of the landlord-tenant law prohibiting the seizure and withholding of tenant property by a landlord. N.H. App. 9-26.

5. Dan's City thereafter moved for summary judgment on all remaining counts against it (I and II), asserting (among other grounds for summary judgment) that it was a motor carrier of property, that Mr. Pelkey's claims arose out of towing and storage services provided by Dan's City, and that all of these claims were preempted by 49 U.S.C. § 14501(c)(1). NH App. 38, 48. On December 17, 2010, the trial court granted Dan's City's motion for partial summary judgment, holding that the consumer protection act and negligence claims asserted in Counts I and II are preempted because the claims "relate specifically to Dan's City's handling of the vehicles it tows, i.e., its service regarding the property it transports, and expressly seek the enforcement of state laws related to duties owed stemming from the transportation of property." J.A. 32.

6. In its decision, the New Hampshire Supreme Court reversed, holding that Mr. Pelkey's consumer protection act and negligence claims are

not preempted. Pet. App. 22. The court reasoned that despite the broad preemptive reach of the language of § 14501(c)(1) of the FAAAA, Congress did not intend to displace the state-law causes of action asserted by Mr. Pelkey because such claims are not "sufficiently 'related to' a towing company's 'service' to be preempted." Pet. App. 16. The court also concluded that Mr. Pelkey's claims do not constitute state claims "with respect to the transportation of property." Pet. App. 13. In the court's view, Mr. Pelkey's claims "have nothing to do with the transportation of property; they involve the balance of rights between a lien creditor . . . and the owner of a vehicle." Pet. App. 14. The court also opined "that the absence of any federal remedy for private injuries of the kind allegedly suffered by the plaintiff also supports the inference that Congress did not intend to displace the operation of state-laws in this context." Pet. App. 20.[15]

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[15] In reaching this decision, the New Hampshire Supreme Court rejected contrary decisions from the Alabama Supreme Court and the Sixth Circuit Court of Appeals, essentially adopting the position of the dissent in both of those cases. *See Weatherspoon v. Tillery Body Shop, Inc.*, 44 So. 3d 447, 459 - 463 (Ala.2010) (Murdock, J. dissenting); *Ware v. Tow Pro Custom Towing and Hauling, Inc.*, 289 Fed. Appx. 852, 858-860 (6th Cir. 2008) (Griffin, J. dissenting)(not selected for publication).

SUMMARY OF ARGUMENT

1. a. This Court's jurisprudence on the scope of express preemption under § 14501(c)(1) recognizes the broad sweep of the statutory language. That language is not ambiguous, nor unclear. The Court has stated repeatedly that the ordinary, expansive meaning of the phrase "related to" is to be respected, bringing any state-law that has "an association with, or connection" to the price, route or service of a motor carrier within the preemptive scope of the law. The relationship between Mr. Pelkey's state tort claims and the services provided by Dan's City is easily strong enough to bring those claims within the broad preemptive scope of the law.

b. Mr. Pelkey's damages claims are "related to" the "services" provided by Dan's City, in both a logical and practical sense. Dan's City legally towed Mr. Pelkey's vehicle, and stored it, expecting to be paid for services rendered. Due to unfortunate circumstances unknown to Dan's City and not of its making, the vehicle remained unclaimed for more than two months, triggering the normal process for sale and disposition of abandoned vehicles. This process exists to ensure payment to tow truckers for their towing and storage of vehicles that are never claimed. Whenever a vehicle is towed, stored and not claimed for an extended period, the potential arises for the vehicle owner to dispute liability to pay all charges. Disputes are inevitable and almost inherent in the process. It defies logic to suggest that the actions of the tow trucker in connection with disposition of the vehicle are not associated or connected with the towing and storage services in the first instance. And as a practical matter, it is

self-evident that tow truckers would not provide the essential service of towing vehicles (when necessary for public safety or otherwise) if there were no assurance of payment if the vehicle is abandoned. This assurance is provided by the statutory sale process available under New Hampshire law. As is the case with any service provider, payment for services is an integral and indispensable element of any service transaction.

c. The New Hampshire Supreme Court ruled that Mr. Pelkey's claims are not preempted based on facts not in the record, and an artificial distinction between the towing and storage services rendered by Dan's City and the process involved in disposing of abandoned vehicles. The court also erred by failing to recognize that a core aspect of Mr. Pelkey's claims - the assertion that Dan's City had a duty to attempt to locate him when he did not claim his vehicle - was directed at conduct before sale. Allowing such a claim to avoid preemption would result in a large expansion, mandated by state tort law, of the scope of services that a tow trucker must provide whenever a towed vehicle is unclaimed.

d. Upholding preemption of Mr. Pelkey's damages claims does not open New Hampshire citizens to unfettered abuse by unscrupulous towing companies, as the New Hampshire Supreme Court decision suggests. Although inapplicable here, the criminal law exists to deter conversion and theft of consumer property, including non-consensually towed vehicles. Violation of the New Hampshire statute on handling abandoned motor vehicles subjects tow truckers to misdemeanor and possible felony charges if fraud is involved in registering a vehicle after it is towed. A consumer report of

conversion of a towed vehicle can prevent a purchaser's registration of the vehicle. The Court's decisions also leave room for intentional and outrageous actions by tow truckers to be found beyond the scope of FAAAA preemption as too far removed from the scope of services ordinarily provided by tow truckers. As no such conduct is involved in this case, the Court need not decide where precisely to draw this line.

2. a. Congress defined the term "transportation" broadly to encompass towing, storage of towed vehicles and any duties owed stemming from these activities. That broad definition must be given effect.

b. The New Hampshire Supreme Court focused incorrectly on whether the New Hampshire statutory scheme for handling abandoned vehicles is a state-law "with respect to the transportation of property." That focus was misplaced because no party challenges the enforcement of the New Hampshire statutory scheme in this case; in fact, Mr. Pelkey seeks to enforce parts of it privately via a negligence *per se* claim. The relevant question not addressed by the court below is whether Mr. Pelkey's state-law tort claims are based on alleged conduct that falls within the statutory definition of "transportation." The answer to this question is that the tort claims are sufficiently connected to the transportation of property to be preempted.

3. a. None of the statutory exceptions to preemption apply in this case.

b. To the extent it is relevant to this Court's determination whether Congress intended to preempt the specific types of tort claims made by him, Mr. Pelkey is not left without a remedy for the

harm he alleges to have suffered. He retains all available remedies against his landlord. Preemption of his triple damages claims against Dan's City in this action would not limit any of his claims against his landlord based on the landlord's alleged breaches of duties owed to him, who as the party that initiated the towing of the vehicle was in the best position to give Mr. Pelkey notice of the towing.

ARGUMENT

I. MR. PELKEY'S CLAIMS ARE PREEMPTED BECAUSE THEY RELATE TO THE TOWING AND STORAGE SERVICES PROVIDED BY DAN'S CITY.

The language used by Congress in § 14501(c)(1) of the FAAAA expresses a "broad preemptive purpose," *Morales*, 504 U.S. at 383; *Rowe*, 552 U.S. at 370, as the Court has repeatedly emphasized. *See Wolens*, 513 U.S. at 225-26; *id.* at 235 (Stevens, J., concurring in part and dissenting in part); *Morales*, 504 U.S. at 383-84; *see also Rowe*, 552 U.S. at 377 (Ginsburg, J., concurring) (noting the "breadth of [the] preemption language" in the FAAAA). This understanding is shared by Congress, as reflected in the FAAAA's legislative history. H.R. Conf. Rep. No. 103-677, at 85 (1994)(expressing agreement with the "broad preemption interpretation adopted by the United States Supreme Court in *Morales*").

Tellingly, Congress has enacted five specific exceptions to the broad general rule of preemption in § 14501(c)(1). This is a clear indicator of its intent to

allow states to regulate motor carriers of property only in the areas delineated in these express exceptions (two of which specifically apply to tow truckers). *See* 49 U.S.C. § 14501(c)(2)(A) (safety regulatory authority); § 14501(c)(2)(B) (intrastate transportation of household goods); § 14501(c)(2)(C) (regulation of prices charged for non-consensual tows); § 14501(c)(3) (intrastate transportation of property related to uniform liability rules and other matters); and § 14501(c)(5) (other permitted state regulation of non-consensual tows).[16] This statutory history reflects that Congress has purposefully established a broad general rule of preemption, while at the same time recognizing that the general rule must give way in discrete areas where it has deemed state regulation appropriate. *See, e.g.,* H.R. Rep. 104-311, at 120 (1995)(explaining that the exception for regulation of the price of non-consensual towing "struck a balance between the need to protect consumers from exorbitant towing fees and the need for a free market in towing services"). When a statutory provision sets forth a general rule followed by specific exceptions to that rule, one must assume – absent other evidence – that no further exceptions are intended. *Pauley v. Bethenergy Mines, Inc.*, 501 U.S. 680, 719 (1991). (Scalia, J. dissenting).

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[16] Section 14501(c)(5) is denominated in the statute as a "limitation on statutory construction," but is worded in such a way as to operate like all the other exceptions to the pre-emptive scope of the general rule in § 14501(c)(1). It allows states to require that, in the case of non-consensual tows from private property, the towing company have prior written authorization from the property owner, that the owner be present at the time of the tow, or both.

Although Congress specifically preserved the safety regulatory authority of states with respect to motor vehicles when it enacted the FAAAA, there is otherwise no general "savings clause" preserving any general state remedies or regulatory authority, as is the case in the ADA. To the extent the Court has interpreted the preemptive scope of the ADA with reference to its general savings clause,[17] that authority should have no bearing on the proper interpretation of the preemptive scope of the FAAAA.

This Court's decisions in *Morales* and *Wolens* establish two distinct requirements for a law to be expressly preempted under the ADA: (1) a state must "enact or enforce" a law, regulation or other provision that (2) "relates to" motor carrier prices, routes, or services *either* (i) by expressly referring to them *or* (ii) by having a significant economic effect upon them. *See S.C. Johnson & Son v. Transport Corp. of America*, 697 F.3d 544, 553 (7th Cir. 2012)(applying similar analysis to preemption of state-law tort claims under ADA). Under the FAAAA, there is a third requirement: the state

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[17] In *Wolens*, the Court's holding – that breach of contract claims such as those asserted in that case were not preempted by the ADA – was based upon the ADA's preemption clause "read together with the FAA's savings clause." *Wolens*, 513 U.S. at 232-233. The *Wolens* Court did not attempt to reconcile this ruling with the Court's analysis of the effect of the ADA savings clause in *Morales*, which treated the ADA savings clause as a "relic of the pre-ADA/no preemption regime," 504 U.S. at 385, and concluded that such a general savings clause did not indicate that "Congress intended to undermine this carefully drawn statute through a general savings clause." *Id*.

enforcement action must be "with respect to transportation."[18]

The first requirement is not at issue in this case as Mr. Pelkey's claims are no doubt the type of state actions that can be preempted under the FAAAA. State consumer fraud actions and tort actions constitute enforcement of state-laws for purposes of the ADA and FAAAA. *Wolens*, 513 U.S. at 227-228.

The second requirement is met in this case because Mr. Pelkey's claims *both* expressly refer to the services provided by Dan's City, and have a significant economic effect upon services delivered by tow truck companies.

A. Mr. Pelkey's Negligence and Consumer Fraud Claims Are Directed At Services Provided By Dan's City.

As the New Hampshire Supreme Court stated, "[f]airly read, the theories upon which the plaintiff's claims rest advance the right of a person whose vehicle has been towed to retrieve it upon payment of towing and storage charges." Pet. App. 20. The court described the focus of the claims to be the "management and disposition of a towed vehicle." *Id*.

The gravamen of Mr. Pelkey's negligence claim, as pleaded, was that Dan's City breached duties under New Hampshire statutes (N.H. Rev.

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[18] This requirement of the law is discussed in Section II, *infra*.

Stat. Ann. Ch. 262) governing abandoned motor vehicles, as well as the common law, "to use reasonable care to ascertain the identity of the owner of [Mr. Pelkey's vehicle], . . . to use reasonable care in disposing of the vehicle . . . . and to make reasonable efforts to return the vehicle to Mr. Pelkey." J.A. 12-13, ¶25, 26.

The focus of the consumer protection act claim was allegedly deceptive and false statements to the New Hampshire DMV regarding the vehicle's value, its condition, whether it was abandoned, and whether any inquiry had been made to identify its owner. *Id*. ¶19. Dan's City also allegedly committed a deceptive act by "failing to cancel a scheduled auction when the identity of the owner and the circumstances of the delay in recovering the vehicle were made known to Dan's City." *Id*. This count of the complaint also alleged unspecified violations by Dan's City of the abandoned motor vehicle statute (N.H. Rev. Stat. Ann. Ch. 262). *Id*.

Although both the consumer protection act and negligence counts of the complaint alleged violations of Ch. 262 by Dan's City, that law provides no private right of action to consumers, nor has one been recognized. Thus Mr. Pelkey could assert no cause of action directly under Ch. 262, nor did his complaint purport to do so. J.A. 11-13. New Hampshire does recognize the negligence *per se* doctrine, under which the standard of conduct to which a defendant is held may be defined by an applicable statute, rather than the common-law reasonable-person standard. *Marquay v. Eno*, 662 A.2d 272, 277 (N.H. 1995). To the extent the complaint relies on Ch. 262 as the basis for any alleged duty owed by Dan's City, it has to be treated

as asserting a negligence *per se* claim, not a statutory claim under Ch. 262.[19]

The negligence claim is specifically directed at Dan's City's obligations as a provider of towing services, in particular, the legal duties owed by a towing company that has towed and stored a vehicle, and has reason to believe it is abandoned. The negligence claim seeks to impose a duty on Dan's City to protect Mr. Pelkey's interests, by undertaking to locate him after mail sent to him was returned as undeliverable, and to negotiate with him over payment of towing and storage fees due on account of his personal circumstances that led to his long delay in claiming his vehicle. These are all duties the marketplace does not recognize, but which Mr. Pelkey seeks to impose on Dan's City via New Hampshire negligence law. This brings the negligence claim squarely within the FAAAA's preemptive scope. *S.C. Johnson & Son*, 697 F.3d at 557 (Congress decided that it did not want states to displace the market by permitting claims against motor carriers for fraudulent misrepresentation and conspiracy to commit fraud, which substitute state

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[19] One of the issues discussed in the New Hampshire Supreme Court's decision is whether the provisions of Ch. 262 are preempted by the FAAAA. Pet. App. 12-14. This discussion is presumably based on the incorrect premise that Mr. Pelkey could assert a statutory claim under Ch. 262, even though no private right of action exists under that law, either expressly or by implication. But since Mr. Pelkey only asserts consumer protection act and common law negligence claims, and could not assert a private right of action under Ch. 262 (which does not exist under New Hampshire law), any discussion of whether the FAAAA preempts Ch. 262 is unnecessary.

policy (embodied in law) for duties created by the market).

Mr. Pelkey's consumer fraud claim is similarly focused on Dan's City's conduct as a motor carrier involved in towing and storing motor vehicles, i.e., the alleged deceptive statements made by Dan's City in the course of reporting to state authorities its possession of an abandoned vehicle, and seeking permission to sell it as such.

To the extent Mr. Pelkey's claims are predicated on actions taken by Dan's City with respect to the disposition of the vehicle, after receiving notice from him that he claimed it and wished to arrange for its return, those claims still fall within the preemptive scope of the law. These actions were taken by Dan's City to obtain payment for services rendered. Mr. Pelkey's position is that Dan's City had a legal duty to refrain from disposing of the vehicle and negotiate with him over the fees he would have to pay, due to the circumstances surrounding the tow and the long delay in his claim for the vehicle. This aspect of the dispute is no less directed at Dan's City's services because it relates to payment for Dan's City services, as opposed to actual delivery of the services. Ruling on FAAAA preemption of a similar claim directed at an alleged fraudulent billing charge by a motor carrier, the Eighth Circuit held in *Data Manufacturing v. United Parcel*, 557 F.3d 849, 852 (8th Cir. 2009), that the billing charges involved in the dispute were part of the defendant's operations, and that it was "disingenuous to suggest that UPS' billing procedures were not a necessary component of its business operations." Because the various tort claims challenging the billing practice in question

were all based on state-law policies, the court found them all preempted. *Id*. at 853-54.

The same conclusion is warranted here. Mr. Pelkey's claims were all directed at the normal daily activities of a tow truck operator that comes into possession of a vehicle that appears to be abandoned because it is not claimed for more than 30 days. It is disingenuous to suggest that these activities are not part of the everyday business conducted by tow truck operators and are not "related to" Dan's City's services as such.

The New Hampshire Supreme Court, without any discussion of the series of specific exemptions to the broad general rule of preemption enacted by Congress (including the two specifically directed at non-consensual towing of motor vehicles), concluded that Congress did not intend § 14501(c)(1) to apply to the claims in this case. To support its conclusion, the court relied upon the presumption that "the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." Pet. App. 10 (citing *Wyeth v. Levine*, 555 U.S. 555, 565 (2009)).

The New Hampshire Supreme Court's invocation of the "presumption against preemption" was unfounded and not consistent with this Court's decisions. First, as explained by the Court in *Medtronic v. Lohr*, 518 U.S. 470, 485 (1996), this presumption has been invoked as an aid to interpretation of express preemption statutes to give proper respect to "federalism concerns and the historic primacy of state regulation of matters of *health and safety*." (emphasis added). Unlike cases involving regulation of medical equipment and tobacco, this case does not involve any health or

safety concerns. Second, it is questionable whether this presumption applies at all to the question whether a federal law is intended to preempt a specific state-law or cause of action, as opposed to the question of whether Congress intended any preemption at all. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 545-546 (1992)(Scalia, J., concurring in judgment in part and dissenting in part). Third, even in cases involving the intended scope of an express preemption statute, there is no room for operation of the presumption unless the language used by Congress is ambiguous. *Id*. at 533 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part). In cases of express preemption, especially those like this case that do not involve health and safety, the "presumption against preemption" should carry little or no weight. *Wyeth*, 555 U.S. at 566 (2009)(Alito, J. dissenting)(no presumption against preemption should obtain where federalism concerns arising out of the historic primacy of state regulation of matters of health and safety are not present).

The New Hampshire Supreme Court's analysis in this regard is a classic example of the deployment of questionable aids to interpretation as a way to avoid results mandated by the text of the law. While some disagreement may exist as to the appropriate means for ascertaining Congressional intent on the precise scope of preemption from broadly worded preemption language, there is no disagreement on one fundamental proposition: The starting point is always the explicit statutory language and the structure and purpose of the law. *Morales*, 504 U.S. at 383. If intent to preempt broadly is evident from the text of the law, broad

preemption follows, even if it leaves a "large regulatory gap" or forecloses certain categories of private liability claims. *Rowe*, 552 U.S. at 377 (Ginsburg, J., concurring)(finding preemption of Maine Tobacco Delivery Law based on clear FAAAA language, despite the "large regulatory gap" left by the decision).

The language of the FAAAA is clear. Congress intended to broadly preempt all state laws or state-law claims within the language of the law. *Cippollone*, 505 U.S. at 548 (Scalia, J., concurring in judgment in part and dissenting in part)(where preemption language indicates it is "intended to sweep broadly, our construction must sweep broadly as well"). The FAAAA is structured with a series of specific exemptions, none applicable here, by which Congress has permitted state regulation of tow truck companies where it has deemed appropriate. Congress has also explicitly permitted states to regulate the conduct of owners of private property who order the towing of a vehicle without the owner's consent. This exception indicates explicit Congressional intent to protect tow truck companies from the types of claims involved in this case, while allowing states to require a greater level of responsibility for those parties that initiate non-consensual tows of vehicles from private property.

Because the New Hampshire Supreme Court's conclusions as to the FAAAA's intended scope, as applied to tow truck companies, is (i) inconsistent with the text of the law, its structure, and this Court's precedents interpreting the law, and (ii) do not follow the accepted methodology for analyzing express preemption, they should be rejected.

B. The Term "Services" In Section 14501(c)(1) Includes The Activities Of Dan's City That Mr. Pelkey Alleges To Be Actionable.

Alternatively, the New Hampshire Supreme Court ruled that the claims in this case are not preempted on the theory that the activities of Dan's City that are the subject of Mr. Pelkey's claims are not "services" within the meaning of § 14501(c)(1). Pet. App. 16-17. This Court has not had occasion to interpret the meaning of this term, although the majority of the Circuit Courts that have done so (in both ADA and FAAAA cases) hold that it encompasses not only the activities involved in the actual delivery of an airline or motor carrier's service, but also the activities that are incidental to and distinct from the actual transportation services provided. *See Data Manufacturing*, 557 F.3d at 852; *Air Transport v. Cuomo*, 520 F.3d 218, 223 (2d Cir. 2008); *Travel All Over the World, Inc. v. Kingdom of Saudi Arabia*, 73 F.3d 1423, 1433 (7th Cir. 1996); *Hodges v. Delta Airlines, Inc.*, 44 F.3d 334, 336-39 (5th Cir. 1995) (en banc); *see also Branche v. Airtran Airways, Inc.*, 342 F.3d 1248, 1257 (11th Cir. 2003) (referring to the *Hodges* definition as the "more compelling" of the alternative definitions that have been adopted); *Smith v. Comair, Inc.*, 134 F.3d 254, 259 (4th Cir. 1998); *Chukuru v. Bd. of Dirs. British Airways*, 889 F. Supp. 12, 13 (D. Mass. 1995) (adopting the *Hodges* definition), *aff'd mem. sub nom. Azubuko v. Bd. of Dirs. British Airways*, 101 F.3d 106 (1st Cir. 1996); *contra Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259-1263 (9th Cir. 1998) (en banc); *accord Taj Mahal Travel, Inc. v.*

Delta Airlines, Inc., 164 F.3d 186, 193-94 (3d Cir. 1998).

The New Hampshire Supreme Court followed the minority of courts that give a narrow scope to the meaning of the term "services," one that has not found favor with many other courts, and one that has been aptly described by the Second Circuit as "inconsistent with the Supreme Court's decision in *Rowe*." *Air Transport*, 520 F.3d at 223. Even though the Maine regulations at issue in *Rowe* were found by the Court to have a somewhat indirect effect on motor carriers, the Court nevertheless found the law to have a significant impact on the services of carriers because they would be required to deliver their services in a manner different from what the market would otherwise dictate. 552 U.S. at 371-72.[20]

The Court decided in *Morales* that the ADA preempts state efforts to regulate advertising *about* air carrier rates and services. *Rowe* ruled that Maine's effort to regulate the services themselves are preempted. *Id*. at 375. Most lower courts have found the term "services" to be broad enough to encompass matters incidental to and distinct from the actual transportation services themselves. Moreover, the Court in *Wolens* expressly rejected any distinction

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[20] In its brief as *amicus curiae* in *Rowe*, the United States advocated a broad interpretation of the term "services" as used in § 14501(c)(1), based upon Congress's broad definition of the term "transportation," which it pointed out encompasses "services" related to the movement of property, "including receipt, delivery, . . . and handling of property." Brief For The United States As Amicus Curiae Supporting Respondents, *Rowe* (No. 06-457), at 24-25.

between matters "essential" and "unessential" to a business's operations. *Wolens*, 513 U.S. at 226. Resolution of disputes over billing and payment for services is a core aspect of the mission of any service organization. As the Eight Circuit stated in *Data Manufacturing*, it would be disingenuous to suggest otherwise. 557 F.3d at 852.

For these reasons, the Court should reject the New Hampshire Supreme Court's conclusion that Mr. Pelkey's claims are not preempted because they do not relate to a motor carrier's "services."

C. Permitting Claims Like Those Asserted By Mr. Pelkey To Avoid Preemption Will Also Have A Significant Impact On Tow Truck Services.

Even if the effect of a state law on the price, route or services of motor carriers is indirect – in the sense that a law is not directed at or does not reference price, routes, or services – the law is still preempted if it has a significant impact on the services that motor carriers provide. *Morales*, 504 U.S. at 385-86, 390; *Rowe*, 552 U.S. at 372. In this case, the Court can readily conclude that allowing claims such as Mr. Pelkey's avoid preemption would directly impact the prices and services of tow truckers.

State and local governments can regulate the price of non-consensual towing and storage, and the City of Manchester, NH has done so. Manchester, NH, Code of Ordinances, ch. 70, § 70.40 (2011) (capping towing charges at $70 during regular hours

and $85 at other times, and $25/day for storage.) Price regulation such as this is permitted under 49 U.S.C. § 14501(c)(2)(C). Allowing negligence claims against tow truck drivers based on the premise that they have a state-law duty to use reasonable care to locate the owners of towed vehicles who do not claim their vehicles, where state juries will decide whether a reasonable level of effort is made in any given case, would subject tow truck drivers to the vagaries of each state's law. *See Reigel v. Medtronic*, 552 U.S. 312, 325 (2008)(state tort law, applied by juries, is less deserving of preservation from preemption because it is not subjected to cost–benefit analysis as applied by state legislators or regulators to statutes and regulations).

Who is to bear the cost and expense of such efforts, and how far must they extend? Would tow truck companies continue to tow apparently abandoned vehicles for a capped fee without knowing if they would be liable for not searching far and wide enough for the owner? The answers of course are a matter of state policy, which would likely be different in different states. This is precisely what Congress intended to prevent with § 14501(c)(1). *Wolens*, 513 U.S. at 232-233 (breach of contract claims, unlike consumer fraud claims, are not preempted because they do not dictate a state substantive standard of conduct for what the marketplace would dictate).

On this point, the argument for preemption of Mr. Pelkey's consumer fraud claim is even stronger than the argument as to his negligence claim. This claim seeks to impose a duty on tow truck drivers in New Hampshire, enforceable by an award of triple

damages and legal fees,[21] to cancel a scheduled sale of an abandoned vehicle if it is claimed by an owner before the scheduled sale, whether or not the owner has tendered towing and storage fees owing. J.A. 11-12, ¶¶19-23. The remedy sought goes far beyond any compensation for any loss that Mr. Pelkey may have suffered.

As one court of appeals has observed, intrusive regulation of business practices is inherent in state consumer protection laws. *S.C. Johnson & Son,* 697 F.3d at 559 (because "the amount (if any) of necessary regulation is hotly debated," there is a wide variance in these laws from state to state). "One state's deceptive practice might be another state's hard bargain." *Id*. at 557 (citing Chad DeVeaux, *Lost in the Dismal Swamp: Interstate Class Actions, False Federalism, and the Dormant Commerce Clause*, 79 Geo. Wash. L.R. 995, 1021 (2011) (state consumer protection laws "vary substantially, imposing myriad 'different . . . substantive elements, including differing requirements of privity, demand, scienter and reliance'")). Because state consumer protection laws containing well-meaning but widely varying provisions are designed to protect consumers from the rigors of the market, the Court had no difficulty finding them within the ADA's preemptive scope in *Morales* and *Wolens*. It should likewise do so here.

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[21] The availability of triple damages for a violation of the New Hampshire consumer protection act represents a clear state policy judgment that enhanced damages are needed to deter violations of the law in cases of willful conduct. That policy judgment is New Hampshire's to make; it simply cannot be imposed on motor carriers under the FAAAA in a case such as this one. *See* N.H. Rev. State. Ann. §358A-10.

D. The FAAAA Does Not Have To Be Interpreted Narrowly, Contrary To Existing Precedent, To Deal With Exceptional Cases Involving Outrageous Conduct By Motor Carriers.

The Court has more than once stated that the reach of preemption under the FAAAA is not unlimited, and will not extend to state actions that affect prices, routes, and services in a tenuous, remote, or peripheral manner. *Morales*, 504 U.S. at 390; *Wolens*, 513 U.S. at 224. However, it has also stated in these cases that Congress's primary purpose in enacting the FAAAA was to free motor carriers from any form of state or local regulation of their prices, routes, or services with respect to transportation, leaving to the free market (or federal law) the development of competitive standards of conduct and business practice, unless different duties are voluntarily undertaken by contract.

Lower court decisions, dealing with claims of outrageous conduct by air carriers, unrelated to their mission of delivery of air transportation service, have addressed those claims easily under the Court's existing precedents. For example, in *Rombom v. United Air Lines, Inc.*, 867 F. Supp. 214 (S.D.N.Y. 1994), the court dealt with claims arising out of an incident where a passenger was removed from an aircraft before departure for unruly conduct. *Id*. at 216. The court held all plaintiff's claims to be preempted to the extent they sought to impose liability on the airline for actions of its employees that implicated the way in which the employees performed their regular duties, so long as the alleged

conduct was not so outrageous that it could be said to go beyond the normal duties of the employee. *Id*. at 223. Only one claim was found to be beyond preemption at the summary judgment stage, in which the plaintiff had alleged that after her removal from the aircraft, the flight crew had her arrested out of spite. Since this alleged conduct was so outrageous as to be beyond the scope of an airline employee's regular duties, it was not preempted for lack of a meaningful connection between the alleged wrongful conduct and airline services. The effect of this claim on airline services was too tenuous to be preempted. *Id.* at 224.

In *Smith v. Comair*, 134 F. 3d 254 (4th Cir. 1998), the Fourth Circuit also recognized that "[s]uits stemming from outrageous conduct on the part of an airline toward a passenger will not be preempted under the ADA if the conduct too tenuously relates to or is *unnecessary* to an airline's services." *Id*. at 259 (citing *Rombom*)(emphasis added).

These decisions are arguably distinguishable from this case in that they are based in part on the tension between the ADA's broad preemption language, and its general savings clause. *See Rombom*, 867 F. Supp. at 219. This tension does not exist in FAAAA cases. The FAAAA is not limited by any Congressional enactment like the ADA savings clause, which provides that "[a] remedy under this part is in addition to any other remedies provided by law." 49 U.S.C. § 40120(c). In the absence of any indication of Congressional intent to preserve state-law tort claims from preemption under § 14501(c)(1), the only basis for limiting preemption is the statute itself. The courts in both *Rombom* and *Smith v.*

Comair ultimately based their decisions on the statutory preemption language, and recognized that the core question in these cases is whether the conduct alleged to give rise to liability is sufficiently "related to," or conversely, "unnecessary to" the defendant's services.

Was the conduct of Dan's City that Mr. Pelkey claims is actionable necessary to the provision of its services? New Hampshire law required Dan's City to file a report with the state DMV after it had held Mr. Pelkey's vehicle for more than 30 days, including necessary information about the vehicle. N.H. Rev. Stat. Ann. § 262:2(III). Despite any disagreement about whether the information in the report was all true, or reasonably believed to be so by Dan's City, filing of the form was required by law.

Was Dan's City's conduct in disposing of the vehicle reasonably necessary to the provision of its services? If tow trucking companies cannot provide notice of sale as dictated by state abandoned motor vehicle laws, and dispose of vehicles that remain unclaimed, how are they to be paid for towing and storing such vehicles? Would any rational provider of services such as tow trucking agree that obtaining payment for services rendered is not a necessary part of what they do?

All of the alleged wrongful conduct of Dan's City was part of the state sanctioned and regulated process for disposing of abandoned vehicles under Ch. 262. Mr. Pelkey may claim that Dan's City had a duty to suspend the process and negotiate the fees with him when it learned about the unfortunate reasons for his delay in claiming the vehicle, but these claims do not take them outside the realm of those activities that constitute the ordinary conduct

of towing companies in obtaining payment for towing and storage.

In any event, Mr. Pelkey alleges no outrageous conduct, unnecessary to Dan's City's services as a tow trucker, as alleged in *Rombom* or *Smith v. Comair*. He has not alleged any wanton, malicious or intentionally injurious conduct divorced from the regular, legitimate business activity of a tow truck company. The undisputed facts reflect nothing more than a garden variety dispute over payment of past due towing and storage charges, complicated by the fact that the vehicle owner was hospitalized for a long time after the tow, and did not receive notice of the tow from his landlord, or from Dan's City because its mail notice was undeliverable to Mr. Pelkey's address. Failure to suspend the sale and disposition process in the absence of any tender of payment, especially after Mr. Pelkey disputed any obligation to pay storage charges weeks after the failed auction, is hardly outrageous in any objective sense, although Mr. Pelkey certainly might subjectively feel otherwise due to his circumstances. Even if the *Rombom* outrageous conduct unrelated to service standard were applicable in this FAAAA case, Mr. Pelkey's claims would fall far short of the mark.

II. MR. PELKEY'S CLAIMS RELATE TO THE SERVICES OF DAN'S CITY "WITH RESPECT TO TRANSPORTATION."

The New Hampshire Supreme Court concluded that Mr. Pelkey's claims are not preempted because they are not made "with respect to transportation." Pet. App. 10-15. The court accepted the argument that Mr. Pelkey's claims are directed solely at Dan's City's conduct distinct from actually moving the vehicle from one place to another, and are therefore outside the scope of what Congress intended to preempt. The court's analysis should be rejected because it overlooks the broad statutory definition of the term "transportation."

"Transportation" is defined in 49 U.S.C. § 13102 (23)(2007 & Supp. 2012), and controls here. The definition includes many activities distinct from the actual movement of persons or property, including "services related to [the] movement [of property], including arranging for, receipt, delivery, . . . storage, handling, and interchange of . . . property." In *Ace Auto Body & Towing v. City Of New York*, 171 F.3d 765 (2nd Cir. 1999), the Second Circuit rejected a narrow dictionary definition of "transportation," like the one applied by the New Hampshire Supreme Court. It held that the broad statutory definition controls the preemption issue. *Id*. at 771.

There is no need to go beyond the language of § 13102 (23) in this case. Mr. Pelkey's claims seek to impose liability on Dan's City for failing to return the vehicle to him when he notified Dan's City of his claim to ownership, instead of taking steps to dispose

of the vehicle for payment of the unpaid towing and storage charges. These claims seek to establish liability under state-law for Dan's City's alleged breaches of duty with respect to the "arrangements for," "receipt," "delivery," "storage," "handling," and "interchange of" the vehicle it towed and stored.

In *PNH Corp v. Hullquist Corp.*, 843 F. 2d 586, 590 (1st Cir. 1988), a case under the Carmack Amendment to the Interstate Commerce Act, which contains a definition of transportation virtually identical to that in § 13102 (23),[22] the court recognized "this broad definition of transportation" to cover a defendant that had stored goods bound for delivery but never actually transported those goods. The court found the term broad enough to cover "all of a motor carrier's services incident to carriage and delivery." *Id*. Directed as they are at the alleged breach of duties by Dan's City in how his vehicle was handled and not returned to him after substantial towing and storage charges were incurred, Mr. Pelkey's claims relate to the transportation of his property as defined broadly by federal law.

The New Hampshire Supreme Court's analysis would limit the scope of FAAAA preemption to claims arising out of the *actual movement* of property, as distinct from all of the wide variety of activities that relate to the actual movement, as

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[22] The Carmack Amendment definition of "transportation," 49 U.S.C. § 10102(9), presently reads that "transportation includes, among other things, services related to [the] movement] [of passengers or property], including receipt, delivery, . . . storage, handling, and interchange of passengers or property."

described in § 13102(23). This narrow interpretation of the law is obviously flawed, as this Court has previously ruled in *Morales* that state-law claims directed at activities preceding the actual delivery of air transportation services (advertising) can be preempted. Moreover, lower courts have had no difficulty concluding that claims directed at activities occurring after the actual delivery of property, such as billing, are preempted. *Data Manufacturing*, 557 F.3d at 852. The Seventh Circuit has reached the same conclusion when dealing with tort claims directed at activities that take place far removed from the actual transportation of goods, such as fraudulent and criminal conduct leading to overpayment for transportation services. *S.C. Johnson & Son*, 697 F. 3d at 547 (describing bribery and kickback scheme of plaintiff's rogue employee resulting in wrongful charges for transportation services to plaintiff company).

III. THE NEW HAMPSHIRE SUPREME COURT'S APPEAL TO EQUITABLE PRINCIPLES TO AVOID THE OPERATION OF CLEAR FEDERAL LAW MUST BE REVERSED.

Although it does not contain an explicit appeal to equity, the New Hampshire Supreme Court's decision is premised in part on the equitable notion that the preemption of Mr. Pelkey's claims under the FAAAA would leave him without a damages remedy against Dan's City. Pet. App. 20-22. The court, relying largely on distinguishable decisions involving personal injury claims under the ADA, concluded

that the FAAAA should be construed narrowly to avoid what it considered the inequity of leaving him without a private tort remedy for damages. Neither this Court's decisions, nor the lower court decisions relied upon by the New Hampshire Supreme Court hold that the FAAAA's preemption rule must yield or be compromised to avoid displacing state tort remedies.

Wolens found preemption of the plaintiffs' consumer protection act claims in that case, which were limited to monetary relief and did not limit the preemptive scope of the statute based on the loss of that private damages remedy. *Wolens*, 513 U.S. at 225, n.3. Similarly, the Court in *Morales* recognized that finding preemption in those cases would not give airlines "*carte blanche* to lie and deceive consumers," given the jurisdiction retained by the DOT to regulate the type of activities involved, and the fact that certain state laws "may affect [airline fares] in too tenuous, remote or peripheral a manner" to have preemptive effect. *Morales*, 504 U.S. at 390. The *Morales* court used as examples of such laws those regulating gambling and prostitution.

These decisions do not recognize an equitable exception to the FAAAA's preemptive scope based on the notion that Congress could not have intended to deprive consumers of a damages remedy under state tort or consumer protection laws. In *Wolens*, the court found preemption of such a state consumer protection act claim for damages was precisely what Congress intended under the ADA, *because* the preempted claims in that case were directed at the price and services of air carriers and their marketing programs. 513 U.S. at 226. *Morales* and *Wolens* teach that preemption of state-law tort or consumer

protection act claims depends in any given case on the nature of the conduct alleged to give rise to liability. *Travel All Over the World*, 73 F.3d at 1433 ("*Morales* does not permit us to develop broad rules concerning whether certain types of common law claims are preempted . . . Instead, we must examine the underlying facts in each case to determine whether the particular claims at issue 'relate to' airline rates, routes, or services.").

Under the FAAAA, if the necessary relationship is present between the state tort claims alleged by the plaintiff and the price, route, or services with respect to transportation, the claim is preempted. The only exceptions are those outlined in the statute, none of which apply in this case.

The New Hampshire Supreme Court's reliance on the Court's decision in *Silkwood v. Kerr-McGee*, 464 U.S. 238 (1984), which dealt with a question of implied preemption under the Atomic Energy Act, of punitive damages claims for personal injury arising from the plaintiff's contamination through employment at a nuclear power plant, is misplaced. That decision involved the complex interplay between state and federal law pertaining to regulation of nuclear power plants, not a statute expressly preempting state-law claims like the FAAAA. Moreover, the decision relied in large part on legislative history finding express Congressional intent to preserve state tort remedies. *Id*. at 251-252. In short, neither *Silkwood* nor any other decision of this Court permits an express preemption statute like the FAAAA to be limited in scope by the absence of a federal damages remedy.

Nor do the decisions involving personal injury tort claims under the ADA support the New

Hampshire Supreme Court's narrow view of preemption under the FAAAA. Personal injury tort cases against airlines have always presented a special set of concerns due to the safety implications of air travel. The Court in *Wolens* noted the significance of statutorily mandated liability insurance coverage as evidence that Congress did not intend to preempt state tort personal injury claims against airlines. 513 U.S. at 231, n. 7.[23] In addition to the Congressional mandate of liability insurance coverage, courts have pointed to the traditional authority of states to regulate public health and safety, which is preserved expressly by the "savings clause" of the ADA, as another reason to doubt that Congress intended the ADA to preempt safety-related tort personal injury claims. *See, e.g.*, *Margolis v. United Airlines*, 811 F. Supp. 318, 323 (E.D. Mich. 1993); *Rombom* 867 F. Supp. at 219 ("Courts faced with preemption challenges to state-laws affecting air carriers must balance the tension between [the ADA preemption statute] and [the savings clause in Section 1506]."). The fact that Congress said nothing about preemption of safety-related claims in the ADA has also led courts to conclude that no preemption of such claims was intended. *Dudley v. Bus. Express, Inc.*, 882 F. Supp. 199, 206 (D. N.H. 1994).

This case raises none of the special concerns that have led the courts to hold that safety-related

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[23] The *Wolens* Court also took note of the position of the United States as *amicus curiae* that it is unlikely that the ADA preempts safety-related personal injury tort claims. 513 U.S. at 231, n. 7.

personal injury tort claims against air carriers are not preempted under the ADA. First, there are no safety related issues in this case, which involves allegations of purely economic harm. More importantly, the FAAAA, unlike the ADA, contains no general savings clause for common law remedies existing at the time of its enactment. Instead it mandates a broad rule of preemption, while specifically reserving to the states "safety regulatory authority. . . with respect to motor vehicles," as well as other aspects of motor carrier regulation, such as financial responsibility. 49 U.S.C. § 14501(c)(2)(A). These important differences between the ADA and the FAAAA, as well as the fact that this case raises no safety-related personal injury claims, eliminate any valid reason to rely on ADA personal injury cases as persuasive authority for the FAAAA's preemptive scope, as it applies in this case.

Moreover, every preemption case involves a conflict between a claim of right under federal law and a claim of right under state-law. *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 584 (1981). A finding that federal law preempts state-law will almost always leave the state-law violation un-redressed. *Id*.; *See also Smith v. Dunham-Bush, Inc.,* 959 F.2d 6, 11 (2d Cir. 1992)(preclusion of remedy does not bar the operation of preemption under ERISA).

In *Wolens*, the ADA was held to preempt consumer protection act claims related to airfares, despite the general ADA savings clause, and the fact that the only federal remedy available to the plaintiffs was administrative relief through the DOT. 513 U.S. 228, n. 5. Given the holding in *Wolens*, the scope of preemption under the FAAAA,

unencumbered by any general savings clause, and limited only by specific exemptions enacted by Congress, cannot be limited because a plaintiff such as Mr. Pelkey is barred from recovering damages in tort from the motor carrier that towed the vehicle.

Finally, to the extent this question is relevant to the scope of preemption of state tort claims, preemption in a case like this does not leave consumers without a remedy. In Mr. Pelkey's case, he retains a claim for damages against the party that the legislative history of the FAAAA suggests he should turn: the party that ordered the towing of the vehicle, here, Colonial.[24] The New Hampshire Supreme Court also failed to take into account other state laws that provided Mr. Pelkey the right to report his vehicle to the police as stolen or converted, which could have triggered the DMV to suspend its registration until any dispute with Dan's City was resolved. N.H. Rev. Stat. Ann. § 262:2.[25] Even in the absence of a complaint of conversion or theft, Chapter 262 violations are punishable as motor

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[24] 49 U.S.C. § 14501(c)(5) was added to the FAAAA in 2005 to permit states to regulate non-consensual towing of vehicles from private property by requiring written authorization from the property owner or requiring that the property owner be present before a vehicle may be towed. Although New Hampshire has not done so, states are free enact laws permitted by § 14501(c)(5) to impose greater responsibility on property owners with regard to the non-consensual towing of vehicles from their property.

[25] This is that same statutory provision that requires a towing and storage company to report an abandoned vehicle to DMV if it is unclaimed for more than 30 days. N.H. Rev. Stat. Ann. § 262:2(III).

vehicle law violations for first offenses, and crimes for repeated offenses. N.H. Rev. Stat. Ann. § 262:41. Any person who "with fraudulent intent" conceals any material fact in connection with an application for a certificate of title is guilty of a felony. N.H. Rev. Stat. Ann. § 262:1(I)(d). New Hampshire's comprehensive regulatory scheme thus provides significant protection for the public, including individuals like Mr. Pelkey.

Given these extensive protections that exist in New Hampshire law to protect the public against the unscrupulous conduct of parties that handle vehicles towed without their owners' consent, there is no justification for construing the FAAAA preemption statute narrowly to make sure an aggrieved person has resort to a private damages remedy. *Wolens*, 513 U.S. at 228, n. 4 (existing DOT authority to investigate unfair and deceptive practices and unfair methods of competition counsels against allowing state consumer protection act claim to avoid ADA preemption). Congress has specifically permitted states to regulate this kind of wrongful conduct through motor vehicle laws and criminal laws, to the extent those laws are based on the states' safety regulatory authority. 49 U.S.C. § 14501(c)(2)(A). As private tort or consumer protection act claims have no relation to public safety, but instead involve the application of the state's *economic* authority over motor vehicles, they cannot stand under the safety regulatory exemption, or otherwise under the general rule of preemption. *See City of Columbus*, 536 U.S. at 439 (Congress' clear purpose in § 14501(c)(2)(A) is to ensure its preemption of States' economic authority over motor carriers).

Thus, to the extent the New Hampshire Supreme Court's decision was predicated on the false premise that preemption of the state-law claims in this case would create a remedial vacuum that does not exist, it cannot be sustained.

CONCLUSION

The judgment of the New Hampshire Supreme Court should be reversed.

Respectfully submitted,

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STATUTORY APPENDIX

FEDERAL STATUTES

United States Code

49 U.S.C. § 13102 Definitions

In this part, the following definitions apply:

(23) Transportation.—The term "transportation" includes—
(A) a motor vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, regardless of ownership or an agreement concerning use; and
(B) services related to that movement, including arranging for, receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, packing, unpacking, and interchange of passengers and property.

49 U.S.C. § 14501. Federal authority over intrastate transportation

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(c) Motor Carriers of Property

(1) General rule – Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States

may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier (other than a carrier affiliated with a direct air carrier covered by section 41713(b) (4)) or any motor private carrier, broker, or freight forwarder wit respect to the transportation of property.

(2) Matters not covered – Paragraph (1) –

(A) shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization;

(B) does not apply to the intrastate transportation of household goods; and

(C) does not apply to the authority of a State or a political subdivision of a State to enact or enforce a law, regulation, or other provision relating to the price of for-hire motor vehicle transportation by a tow truck, if such transportation is performed without the prior consent or authorization of the owner or operator of the motor vehicle.

(3) State standard transportation practices

(A) Continuation – Paragraph (1) shall not affect any authority of a State, political subdivision of a State, or political authority of 2 or more States to enact or enforce a law, regulation, or other provision, with respect to the intrastate transportation of property by motor carriers, related to –

(i) uniform cargo liability rules,

(ii) uniform bills of lading or receipts for property being transported,

(iii) uniform cargo credit rules,

(iv) antitrust immunity for joint line rates or routes, classifications, mileage guides, and pooling, or

(v) antitrust immunity for agent–van line operations (as set forth in section 13907),

if such law, regulation, or provision meets the requirements of subparagraph (B).

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(5) Limitation on statutory construction – Nothing in this section shall be construed to prevent a State from requiring that, in the case of a motor vehicle to be towed from private property without the consent of the owner or operator of the vehicle, the person towing the vehicle have prior written authorization from the property owner or lessee (or an employee or agent thereof) or that such owner or lessee (or an

employee or agent thereof) be present at the time the vehicle is towed from the property, or both.

NEW HAMPSHIRE REVISED
STATUTES ANNOTATED

TITLE XXI
MOTOR VEHICLES

CHAPTER 259

WORDS AND PHRASES DEFINED

259:4-a Authorized Official.

"Authorized official," for purposes of RSA 262:31 through 40-b, shall mean any police employee of the division of state police, highway enforcement officer or other authorized employee of the department of safety, or peace officer.

CHAPTER 262

ANTITHEFT LAWS, OFFENSES, PENALTIES, HABITUAL OFFENDERS, ARREST OF NONRESIDENTS AND ABANDONED VEHICLES

262:1 Penalties.

I. A person who, with fraudulent intent:

a. Alters, forges or counterfeits a certificate of title or certificate of origin;

b. Alters or forges an assignment of a certificate of title or a certificate of origin, or an assignment or release of a security interest, on a certificate of title or a certificate of origin or a form the director prescribes;

c. Has possession of or uses a certificate of title or certificate of origin knowing it to have been altered, forged or counterfeited; or

d. Uses a false or fictitious name or address, or makes a material false statement, or fails to disclose a security interest, or conceals any other material fact, in an application for a certificate of title or certificate of origin, or in any proof or statement in writing in connection therewith, shall be guilty of a class B felony if a natural person, or guilty of a felony if any other person.

II. A person who:

a. With fraudulent intent, permits another, not entitled thereto, to use or have possession of a certificate of title;

b. Wilfully fails to mail or deliver a certificate of title or application therefor to the department within 20 days after the time required by this title;

c. Wilfully fails to deliver to his transferee a certificate of title within 20 days after the time required by this title; or

d. Wilfully violates any provision of this chapter, except as provided in paragraph I, shall be guilty of a misdemeanor if a natural person, or guilty of a felony if any other person.

262:2 Report of Theft; Recovery of Unclaimed Vehicle.

I. A peace officer who learns of the theft of a vehicle not since recovered, or of the recovery of a vehicle whose theft or conversion he knows or has reason to believe has been reported to the department, shall forthwith report the theft or recovery to the department.

II. An owner or a lienholder may report the theft of a vehicle, or its conversion, if a crime, to the department, but the director may disregard the report of a conversion unless a warrant has been

issued for the arrest of a person charged with the conversion. A person who has so reported the theft or conversion of a vehicle shall, forthwith after learning of its recovery, report the recovery to the department.

III. An operator of a place of business for garaging, repairing, parking or storing vehicles for the public, in which a vehicle remains unclaimed for a period for 30 days, shall within 5 days after the expiration of that period, report the vehicle as unclaimed to the director. A vehicle left by its owner whose name and address are known to the operator or his employee is not considered unclaimed. A person who fails to report a vehicle as unclaimed in accordance with this paragraph forfeits all claims and liens for its garaging, parking or storing and shall be fined not more than $25 for each day his failure to report continues.

IV. The department shall maintain and appropriately index weekly any cumulative public records of stolen, converted, recovered and unclaimed vehicles reported to it pursuant to this section. The director may make and distribute copies of the records so maintained to police officers upon request without fee and to others for the fee, if any, the commissioner prescribes.

V. The director may suspend the registration of a vehicle whose theft or conversion is reported to him pursuant to this section; until the department learns of its recovery or that the report of its theft or conversion was erroneous, it shall not issue a certificate of title for the vehicle.

262:31 Authority to Take.

An authorized official may take a vehicle into his custody and may cause the same to be taken away and stored at some suitable place only as provided in this subdivision.

262:37-a Access to Records.

The custodian of the vehicle may obtain the name and last known mailing address of the last registered owner of a vehicle stored pursuant to this subdivision, and a law enforcement officer with jurisdiction, upon request of the operator of a tow truck, shall give to the tow truck operator, upon receipt of such information, the name and mailing address of the registered owner of the vehicle if the owner or custodian of the vehicle was not present or able to give that information at the scene. If the law enforcement officer is aware that the owner or custodian of the vehicle was removed to a medical or correctional facility, the law enforcement officer shall notify the tow truck operator of that fact.

262:40-a Vehicles Removed From Private and State Property; Conspicuous Notice in Parking Lots and Garages.

I. The owner or person in lawful possession of any private property or the manager of a state-owned park and ride facility on which a vehicle is parked without permission or is apparently abandoned may:

A. Cause the removal of the vehicle in a reasonable manner provided he or she gives notice of such removal to a peace officer as soon as reasonably possible; or

B. Notify a peace officer that he or she wishes to have such a vehicle removed from the property, whereupon the peace officer or another authorized official shall cause the removal of such vehicle pursuant to the removal, impoundment, and notice procedures required by this subdivision.

262:41 General Penalty.

Unless otherwise herein provided, any person convicted of a violation of any provision of this title, or of any rule made under authority thereof, shall be guilty of a violation for the first offense. For any subsequent offense committed during any calendar year he shall be guilty of a violation if a natural person, or guilty of a misdemeanor if any other person.

CHAPTER 358

REGULATION OF BUSINESS PRACTICES FOR CONSUMER PROTECTION

358-A:10 Private Actions.

I. Any person injured by another's use of any method, act or practice declared unlawful under this chapter may bring an action for damages and for such equitable relief, including an injunction, as the court deems necessary and proper. If the court finds for the plaintiff, recovery shall be in the amount of actual damages or $1,000, whichever is greater. If the court finds that the use of the method of competition or the act or practice was a willful or knowing violation of this chapter, it shall award as much as 3 times, but not less than 2 times, such amount. In addition, a prevailing plaintiff shall be awarded the costs of the suit and reasonable attorney's fees, as determined by the court. Any attempted waiver of the right to the damages set forth in this paragraph shall be void and unenforceable. Injunctive relief shall be available to private individuals under this chapter without bond, subject to the discretion of the court.

II. Upon commencement of any action brought under this section, the clerk of the court shall mail a copy of the complaint or other initial pleadings to the attorney general and, upon entry of any judgment or decree in the action, shall mail a copy of such judgment or decree to the attorney general.

CITY OF MANCHESTER,
NEW HAMPSHIRE
CODE OF ORDINANCES

CHAPTER 70

MOTOR VEHICLES AND TRAFFIC

TITLE VII – TRAFFIC CODE

§ 70.40 Towing.

(A) (1) Any company or person which tows a motor vehicle without the consent or authorization of the owner or operator of the motor vehicle shall not charge a towing fee in excess of $70 during regular business hours. The fee for a tow conducted at a time other than regular business hours shall be $85. For purposes of this section, ***REGULAR BUSINESS HOURS*** shall mean, at a minimum, the hours from 8:00 a.m. to 5:00 p.m., Monday through Friday, holidays excepted, as well as any other posted business hours. The company or person shall post the business hours of its storage lot and shall disclose such information upon request of the owner or operator of a motor vehicle.

(2) Any company or person which tows a motor vehicle without the consent or authorization of the owner or operator of the motor vehicle shall not charge a fee in excess of $25 per day for storing the towed motor vehicle. There shall be no storage fee for the first 24 hours after a motor vehicle is towed.

(B) No company or person shall charge any fee other than a towing fee or storage fee, as provided for in § 70.40(A), for a motor vehicle which has been towed without the consent or authorization of the owner or operator; except a company or person may charge a service fee of up to $25 to release a motor vehicle from a storage lot to its owner or operator at a time other than regular business hours. In the event a service fee is charged, the company or person shall have the owner or operator sign an acknowledgment upon the release of the motor vehicle. The acknowledgment shall specify the date and time the vehicle was released, the location of the storage lot, and the amount of the service fee charged. No "hoisting", "let-down", "standby" or "gate" fee shall be charged.

(C) Any company or person which has towed a motor vehicle without the consent of the owner or operator shall release to the owner or operator any and all property contained within or on such vehicle, but not attached to the vehicle, upon request by the owner or operator of the vehicle without requiring the payment of any fee therefore including the towing fee and the storage fee provided for in §70.40(A).