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

Brief For California Tow Truck Association as Amicus Curiae Supporting Petitioner

PATRICK J. WHALEN
Counsel of Record for Amicus Curiae
Law Offices of Brooks Ellison
1725 Capitol Avenue
Sacramento, CA 95811
(916) 448-2187
attorneys@ellisonlawoffices.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Local Ordinances

Other Authorities

INTEREST OF AMICUS CURIAE[1]

The California Tow Truck Association ("CTTA") is a nonprofit trade association representing more than 1,000 towing companies doing business throughout the state of California. Member companies range in size from small family-run businesses with only one or two tow trucks to large companies with fleets of dozens of tow trucks. Most of CTTA's members conduct towing operations in multiple counties and in and around dozens of cities throughout California. CTTA advocates on behalf of its members and also provides safety training to its members and their employees.

CTTA and its members have a strong interest in motor carrier regulations generally, and have a special familiarity with the interplay between the FAAAA and the towing industry. In California, not only is there extensive regulation of the towing industry at the state level, but many local jurisdictions impose regulations as well. These regulations are not always consistent with state law, and sometimes conflict with each other. This creates problems for towing companies operating in multiple jurisdictions, as towing companies can be subject to conflicting licensing rules, exorbitant fees,

[1] Pursuant to Rule 37.6, amicus affirms that no counsel for a party authored this brief in whole or in part and that no person other than amicus and its counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office in conjunction with the certificate of service.

duplicative inspections, and even criminal sanctions. CTTA has an interest in reasonable regulation of the towing industry that sets forth clear rules that apply uniformly, and allow industry operators to run their businesses in a commercially reasonable manner.

SUMMARY OF ARGUMENT

This case involves an interpretation of the preemptive scope of 49 U.S.C. § 14501(c)(1). Although it is in the specific context of possible tort liability for a towing company, the Court's resolution of the question will have far reaching ramifications on the towing industry and for motor carriers generally, in a wide variety of contexts. This Court's prior jurisprudence has acknowledged that there are "borderline questions" but so far has not provided much guidance as to where the scope of preemption ends and more importantly, the analysis to use in determining the scope of preemption in those cases. It has typically left such questions for another day. However, lower courts have struggled with defining the scope of preemption in a variety of contexts. Accordingly, the Court should give guidance as to how the FAAAA should be applied to all state and local laws regulating motor carriers, not just those particular legal claims asserted in this case. CTTA submits that in determining whether a particular law, regulation, or legal claim is "related to" the price, route or service of a motor carrier, courts should be guided by several factors so that the law can be applied consistent with Congress'

intent and motor carriers can operate in a commercially reasonable manner.

ARGUMENT

I. THE EXPRESS PREEMPTION PROVISION IS INTERPRETED BROADLY, BUT THE TEST FOR RESOLVING "BORDERLINE QUESTIONS" REMAINS UNCLEAR

Petitioner makes a compelling argument as to why the particular claims at issue in this case are indeed preempted. Because 49 U.S.C. § 14501(c)(1) has generally been interpreted by this Court and others to have a broad preemptive sweep, identifying claims that clearly are preempted is easier than identifying claims which are not; harder still is identifying where the line is between those two categories. CTTA urges this Court to articulate a rule that will provide clear guidance to both the motor carrier industry and the state and local governments that enact laws and regulations which may impact motor carriers.

This Court has recognized that the Federal Aviation Administration Authorization Act of 1994 ("FAAAA") "generally preempts state and local regulation 'related to a price, route, or service of any motor carrier ... with respect to the transportation of property.'" *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 429 (2002) ("*City of Columbus*"). Specifically, the FAAAA provides:

> "(1) General Rule. Except as provided in paragraphs (2) and (3), a State [or] political subdivision of 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). The FAAAA uses language identical to the Airline Deregulation Act of 1978 ("ADA"). In *Morales v. Trans World Airlines*, 504 U.S. 374 (1992), this Court opined on the scope of the preemptive effect of the language, in the context of Attorneys General from various states seeking to enforce their regulation of airline advertisements. This Court specifically rejected a narrow reading of the preemption clause:

> Petitioner contends that § 1305(a)(1) only pre-empts the States from actually prescribing rates, routes, or services. This simply reads the words "relating to" out of the statute. Had the statute been designed to pre-empt state law in such a limited fashion, it would have forbidden the States to "*regulate* rates, routes, and services."

Id. at 385. The Court then addressed a related argument, i.e. whether preemption is limited only to state laws specifically addressed to the airline industry:

> Besides creating an utterly irrational loophole (there is little reason why state impairment of the federal scheme should be deemed acceptable so long as it is effected by the particularized application of a general statute), this notion similarly ignores the sweep of the "relating to" language. We have consistently rejected this precise argument in our ERISA cases: : "[A] state law may 'relate to' a benefit plan, and thereby be pre-empted, even if the law is not specifically designed to affect such plans, or the effect is only indirect." [Citation.]

Id., at 386. Thus, early on, the language at issue in this case has been found to have a broad sweep. This Court in *Morales* did suggest that some state laws might affect airlines in "too tenuous, remote, or peripheral a manner" to have preemptive effect, but determined that *Morales* "plainly does not present a borderline question," and otherwise declined to offer any guidance as to where to draw the line. *Id.*, at 390.

This Court did articulate at least some parameters to the otherwise broad sweep of preemption in *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995), which involved a class action suit against an airline by members of a frequent flyer program after the airlne retroactively modified the program. First, this Court held that it made no difference whether the claim involves conduct that

is "essential" to providing the service as opposed to "unessential." *Id.*, at 226. Rather, the salient inquiry was whether the frequent flyer program, which awarded free tickets as well as class-of-service upgrades, related to rates or services, and this Court held that such a program, and the claims alleged thereunder, unquestionably related to both. *Ibid.*

Next, this Court reviewed the Illinois' Consumer Fraud Act and found that because the law was prescriptive and "controls the primary conduct of those falling within its governance," it was preempted. *Id.*, at 227. However, the Court drew a line as to breach of contract claims. Such claims involve an "airline's alleged breach of its own, self-imposed undertakings" and do not involve a state "enacting or enforcing" a law. *Id.*, at 228-229.

The rationale underlying the holdings in *Morales* and *Wolens* was the fact that the preemption provision "was designed to promote 'maximum reliance on competitive market forces.' [Citation]." *Id.*, at 230. That rationale should guide the interpretation of the "related to" clause in the FAAAA.

Most recently, in *Rowe v. New Hampshire*, 552 U.S. 364 (2008), this Court held that a Maine statute aimed at regulating the delivery of tobacco was preempted because it mandated a particular recipient verification delivery service. *Id.*, at 368-371. Although acknowledging that the statute was "less direct than it might be," because it regulated shippers rather than carriers, this Court recognized that the focus had to be on how the law affected motor carriers' prices, routes, and services. *Id.*, at

372. This Court concluded that the case was "no more 'borderline' than was *Morales*." *Id.*, at 376.

II. LOWER COURTS HAVE STRUGGLED WITH THE SCOPE OF PREEMPTION IN "BORDERLINE" CASES

Lower courts have reached varying results as to the types of laws that are "related to" prices routes and services of carriers. For example, in *Californians For Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184 (9th Cir. 1998), the plaintiff contended that prevailing wage laws, which required motor carriers to pay a certain wage to their employees, resulted in price increases of 25% and forced them to re-direct and re-route equipment to compensate for lost revenue. *Id.*, at 1189. However, the Court concluded, without much analysis, that the effect on prices, routes and services was indirect, remote, and tenuous and thus was not "related." *Ibid.*

Seemingly in conflict with *Mendonca*, however, is the decision in *Dilts v. Penske Logistics LLC*, 819 F.Supp.2d 1109 (S.D. Cal. 2011). In *Dilts*, the court determined that California meal and rest break laws were preempted by the FAAAA as applied to motor carriers. *Id.*, at 1120. In reaching this conclusion, the court first noted that "[a]lthough the scope of the preemption clauses of both the ADA and the FAAA Act has been hotly debated, it has never been fully resolved." *Id.*, at 1117-1118. Citing *Rowe v. New Hampshire, supra*, 552 U.S. 364 at 371-372, the court observed that "[i]t is clear that the law at issue need not directly regulate motor

carriers in order to be preempted." Rather, it is sufficient if the law would require motor carriers to offer different services. *Id.*, at 1118. The court also noted that prior decisions had failed to specify "exactly where, or how, it would be appropriate to draw the line between a significant impact and a tenuous effect because neither of the state laws at issue in those cases presented a 'borderline question.'" *Ibid.*

The Court in *Dilts* then turned to some circuit decisions that did present "borderline questions." Specifically, the court cited *American Trucking Assoc., Inc. v. City of Los Angeles*, 660 F.3d 384 (9th Cir.2011) for the proposition that preemption by the FAAAA may occur even when the effect on rates, routes, and services is only indirect and that where the effect on prices, routes, and services may be close to merely tenuous or remote, "the proper inquiry is whether the provision, directly or indirectly, 'binds the ... carrier to a particular price, route or service and thereby interferes with competitive market forces within the ... industry.'" *Dilts, supra*, 819 F.Supp.2d. at 1118, citing *American Trucking Assoc., Inc. v. City of Los Angeles, supra*, 660 F.3d at 396. Employing that inquiry, the court determined that mandating meal and rest breaks for drivers would limit the length of feasible routes and reduce the number of deliveries, thereby limiting the services the carrier could provide. *Dilts, supra*, 819 F.Supp2d. at 1118-1119. The court found that those impacts on routes and services would have a significant impact on prices because additional employees would be needed to

deliver the same level of service, and that would increase costs. *Id.*, at 1119.

The Seventh Circuit recently weighed in on the scope of the preemption provision in *S.C. Johnson & Son, Inc. v. Transport Corp. of America, Inc.* 697 F.3d 544 (7th Cir. 2012). In that case, a manufacturer sued a number of motor carriers involved in a bribery and kickback scheme, alleging that their bribes to one of the manufacturer's employees resulted in them paying higher shipping rates. *Id.*, at 546. The court then undertook a remarkably cogent and comprehensive review of all of the Supreme Court's ADA and FAAAA cases, as well as a number of circuit decisions addressing the scope of preemption. *Id.*, at 549-556.

In an effort to distill a guiding principle from the case law, the court analogized to the production function that drives market transactions in the transportation industry. *Id.*, at 558. The court explained that the transportation industry

> typically includes inputs such as labor, capital, and technology. These inputs are often the subject of a particular body of law. For example, labor inputs are affected by a network of labor laws, including minimum wage laws, worker-safety laws, anti-discrimination laws, and pension regulations. Capital is regulated by banking laws, securities rules, and tax laws, among others. Technology is heavily influenced by intellectual property laws. Changes to these background laws will ultimately

> affect the costs of these inputs, and thus, in turn, the "price ... or service" of the outputs. Yet no one thinks that the ADA or the FAAAA preempts these and the many comparable state laws [citation] because their effect on price is too "remote." [Citation.] Instead, laws that regulate these inputs operate one or more steps away from the moment at which the firm offers its customer a service for a particular price. The laws prohibiting bribery, racketeering, embezzlement, industrial espionage, and gambling similarly set basic rules for a civil society, rather than particular terms of trade between parties to a transaction.

Ibid. While this analogy has some appeal as an analytical tool for deciding the scope of preemption in borderline cases, it overlooks the fact that some laws may have such a significant effect on inputs that, even though they occur one or more steps away from the commercial transaction, they so impact the transaction as to significantly raise the price, alter the route, or restrict the service that the carrier can provide. In other words, a "background law" only one step away from the commercial transaction may have a minor impact and thus not be preempted, but a major change to a background law several steps back from the transaction may be so significant, or affect the transportation industry in such a unique way, that it could be preempted.

Moreover, the approach suggested by the court in *S.C. Johnson* would not appear to easily resolve the conflict noted earlier between *Mendonca* and *Dilts.* In *Mendonca*, cited with approval in *S.C. Johnson*, the court found prevailing wage laws were not preempted. Using the production function analysis, it is true that prevailing wage laws could be considered "background laws" that impact the price of the labor input but are not so connected to the commercial transaction as to be preempted. But the same could be said of the meal and rest break laws that were found to be preempted in *Dilts*. Like prevailing wage laws, meal and rest break laws increase the input cost of labor and are removed from the transaction between the carrier and the customer. The "production function" analysis in *S.C. Johnson* would appear to reach a different result than the court did in *Dilts*. Thus, despite a thorough and scholarly effort, the approach that the court settled on in *S.C. Johnson* does not fully account for the myriad ways in which "background laws" of general application have a particularized impact on the motor carrier industry, and does not always lead to predictable results which square with other decisions. Accordingly, consideration of more than just the "production function" is necessary.

III. THE TOWING INDUSTRY CURRENTLY OPERATES WITH PARTICULARIZED INPUTS AND IN THE CONTEXT OF A LARGE BODY OF FEDERAL, STATE, AND LOCAL REGULATION

The "production function" approach of the court in *S.C. Johnson* is commendable in that it

recognizes that every preemption question must be viewed in the context of the particular industry being impacted by the law in question. Focusing on the particular production inputs is important, because different industries have different inputs, and laws that affect one industry in only a minor respect could have huge ramifications in a different industry. To that end, it is important to understand how the towing industry works, including the inputs it uses and the legal framework in which it operates. Only then can an intelligent inquiry about preemption be had.

A. The Towing Industry Provides a Unique Array of Services for the Motoring Public

Towing companies provide services to a variety of customers. They are perhaps best known for providing roadside assistance to motorists who run out of fuel, have a flat tire, or are experiencing mechanical problems with their vehicle. This service can be provided directly to the motorist, but is often provided by the towing companies as subcontractors for a motor club. In such circumstances, the motorist has an existing contractual arrangement with a motor club which guarantees a defined level of roadside assistance service for a particular membership fee. The motor clubs then contract with individual towing companies to provide that service.

Towing companies also contract directly with various state and local governments to provide towing services to law enforcement. When law

enforcement responds to a vehicle accident, they will often need to clear the roadway promptly to get traffic flowing, and thus they will dispatch one of their contracted towing companies to the scene of the accident. The towing company then removes the damaged vehicle from the roadway and coordinates with the vehicle's driver (or their insurance company) to deliver the vehicle to the repair facility designated by the owner. They provide another service to law enforcement in the form of impounds. Various state and local laws allow or require a vehicle to be impounded when the driver has been arrested for certain offenses, including, for example, driving under the influence of an intoxicating substance. In such situations, law enforcement directs the towing company to tow a vehicle to a preapproved storage lot, and to hold it until law enforcement authorizes the release of the vehicle.

Towing companies also provide services to private property owners who wish to remove vehicles from their parking lots. In these arrangements, towing companies commonly contract with stores, apartment complexes, and small business where parking is at a premium, and guarantee to respond quickly when called and to remove unauthorized vehicles so that spaces can be made available for the business' paying customers.

It is common for most towing companies to engage in all three of the types of business described above, although some companies specialize. The common thread in all of the services provided is that towing companies are mobile. They are constantly moving through different jurisdictions, especially in dense urban areas, and often operate in multiple

jurisdictions. Because their services may be needed any time of day or night, most towing companies are staffed as a 24-hour, seven-days-per week operation, such that they are always able to dispatch trucks and drivers to wherever they are needed.

The typical inputs for the towing industry are labor, in the form of drivers; capital, in the form of land for storage lots and money to purchase tow trucks; and technology, in the form of dispatch and communications equipment.

B. Federal Law Regulates the Towing Industry in a Way that Impacts the Labor Input

Under the authority of 49 U.S.C. § 31502, the Federal Motor Carrier Safety Administration within the Department of Transportation has prescribed "hours of service" regulations for motor carriers. See 49 CFR § 395. The purpose of these regulations is to "reduce excessively long work hours that increase both the risk of fatigue-related crashes and long-term health problems for drivers." Federal Register, Vol. 76, No. 248, December 27, 2011, p. 81134.

These regulations are highly technical, but basically limit the number of hours drivers can be on duty consecutively, and mandate a certain number of consecutive off-duty hours before a driver can drive again. Driers must maintain detailed logbooks of their on-duty and off-duty start and stop times, and must have it with them at all times and present it to law enforcement upon demand. While it is beyond the scope of this case, suffice it to say that rules are so complex, and the exceptions so numerous, that an entire industry of software

programs has developed to assist towing companies in managing their staffs to comply with hours of service, yet still have drivers available on a round-the-clock basis.

Juggling the need to have drivers available at any time of day with the need to comply with hours of service means that the labor input to a towing company is significantly more expensive. A towing company cannot rely merely on general overtime laws, and simply pay drivers more to work extra hours. Quite the contrary, towing companies have to hire a sufficient number of additional drivers to cover all the shifts and allow all the drivers to have enough off-duty time to be in compliance with hours of service regulations. If a driver calls in sick, the towing company cannot simply call another driver back to work to cover that shift, because that driver may not yet have spent enough time off duty to be able to start work again. As a result, the labor costs for a towing company are higher and require a substantial amount of management.

C. State Regulation of the Towing Industry is Extensive

In addition to the federal government, many states also impose their own laws on the towing industry. For example, in California, the Legislature has already enacted numerous statutes regulating the towing industry. Tow trucks are defined by California Vehicle Code section 615. Virtually every aspect of tow trucks and their

equipment is regulated by state law, including the position of their license plates,[2] the requirement of tail and stop lamps,[3] the use of flood lamps,[4] the requirement of warning lamps,[5] the maintenance of brakes,[6] the requirement to carry a broom,[7] the requirement to carry a shovel,[8] the requirement to carry a fire extinguisher,[9] the requirement of signage on the tow truck,[10] and the requirement of safety chains.[11]

In addition to the truck and its equipment, all towing businesses are required to obtain a motor carrier permit.[12] All trucks must display the motor carrier identification numbers on the vehicle.[13] The manner in which the towing businesses conduct their operations is also strictly regulated. For example, statutes specify the conditions under which towing can occur in a variety of situations.[14] Moreover, the way towing firms run their business and finances is heavily regulated. There is a strict prohibition on gifts or commissions.[15] They must observe certain speed limitations.[16] They cannot

---

[2] Cal. Veh. Code § 5201, subd. (a).
[3] Cal. Veh. Code §§ 24600, 24603, 24605.
[4] Cal. Veh. Code § 25110.
[5] Cal. Veh. Code § 25253.
[6] Cal. Veh. Code §§ 26454, subd. (b), 26458
[7] Cal. Veh. Code § 27700, subd. (a).
[8] Cal. Veh. Code § 27700, subd. (b).
[9] Cal. Veh. Code § 27700, subd. (c).
[10] Cal. Veh. Code § 27907.
[11] Cal. Veh. Code § 29004.
[12] Cal. Rev. & Tax. Code § 7232.
[13] Cal. Veh. Code § 34507.5.
[14] Cal. Veh. Code §§ 22652-22659.
[15] . Cal. Veh. Code § 12110.
[16] Cal. Veh. Code § 22406.1.

solicit business except in certain circumstances.[17] They must accept certain forms of payment.[18] And they must maintain records of stored vehicles.[19]

All of the foregoing requirements impose additional costs and require additional capital outlay to ensure that all tow trucks comply with the statutory mandates and that all required equipment is present on each truck.

In addition to the foregoing list of statutory requirements, which is far from exhaustive, the vast majority of CTTA members participate in the California Highway Patrol ("CHP")[20] rotation system. Under this system, whenever there is a vehicle accident or criminal incident that requires towing services, CHP contacts the next towing company on the approved list. Being on the list ensures a reliable stream of calls and is a good adjunct to other towing business that a company may be able to generate. To get on the rotation list, CHP requires operators to:

- have a minimum of 3 years of experience;
- participate in a drug and alcohol testing program;
- maintain minimum staffing levels and hours of operation;
- meet maximum response times;

---

[17] Cal. Veh. Code § 22513.
[18] Cal. Veh. Code § 22651.1.
[19] Cal. Veh. Code § 10650.
[20] The CHP is California's primary statewide law enforcement agency, analogous to the State Police in other states, and is charged with, inter alia, enforcing all laws and regulating the operation of vehicles and the use of highways. *See* Cal. Veh. Code §§ 2250, 2400, subd. (b).

- have an adequate storage facility;
- meet minimum equipment specifications;
- allow CHP to inspect all trucks at least one per year;
- charge reasonable rates;
- maintain minimum levels of insurance;
- adhere to a code of conduct.

D. Local Governments within California Impose Additional Regulations on the Towing Industry

In addition to the foregoing requirements at the state level, numerous local governments have imposed regulations on towing within their jurisdictions. The City and County of San Francisco requires any tow truck driver operating within the city to have a license, and requires the towing company to also obtain a license, at a cost of more than $1,000 per truck and driver per year.[21] Other cities have different permitting and licensing schemes.[22] Many of these schemes require truck inspections that are duplicative of those required by the CHP, and impose requirements that may conflict with those of the CHP or those of neighboring jurisdictions. It is the nature of the towing business that a company must be staffed to tow cars on a 24-hour basis as needed. Moreover, because the dispatcher never knows where services

[21] S.F. Police Code §§ 3000, 3050.

[22] *See, e.g.*, San Jose Mun. Code § 6.66.010 et seq., Los Angeles Mun. Code § 103.204 et seq., Turlock Mun. Code § 4-15-101 et seq.

will be needed, all trucks and all drivers need to be able to respond to any type of call. Thus, as a practical matter, every tow truck and every driver must be in compliance with every law. But by their very nature, participants in the transportation business are mobile, and drive through many different jurisdictions. Because towing companies commonly do business in multiple cities, especially in dense metropolitan areas where one city runs into the next, it is often financially infeasible and/or practically impossible to be in compliance with the laws of all the jurisdictions that a tow truck driver may pass through on a given day.

E. California's Laws Create Liability for Enforcement Actions and Civil Damages

Towing businesses in California not only face the prospect of regulatory enforcement of the myriad rules and regulations that apply to their business, but they also face the possibility of civil liability of the kind involved in this case to the extent they are sued by a private citizen for violating one or more of the laws or regulations. As just one example, Vehicle Code section 22658 imposes numerous and detailed requirements for towing a vehicle from private property. The violation of any one of the multiple requirements can expose a towing company to criminal fines, imprisonment, and civil liability with quadruple damages. *See, e.g.*, California Vehicle Code section 22658, subdivision (j).

F. All of the Laws Imposing Liability Must Be Examined Collectively In Light of the Way Towing Companies Operate

In order to determine whether a particular law (or a claim based on a particular law) is preempted, the law cannot be viewed in isolation. Rather, it is imperative that it be viewed in light of the existing regulatory framework and the manner in which towing businesses currently operate to comply with all of the laws that govern them. Only when viewing a challenged law or claim through the lens of a towing company can the relevant factors for determining the scope of preemption be identified.

Thus, in order to identify the factors that are relevant, it is necessary to understand particular aspects of the motor carrier industry and how they function in the modern economy. As different sectors of our society continue to grow ever interconnected, not only do states and local jurisdictions enact more laws and regulations, the number of industries impacted by regulations continues to expand, at times to sectors that were likely not contemplated when the laws were enacted.

As just one example, consider the fact that with technological advances, many towing companies have transitioned from traditional radio-based dispatch equipment in trucks to cellular smartphone devices, which provide greater range, clearer signals, and GPS technology to instantly and accurately track the location of tow trucks. Many states have passed or are contemplating laws that ban the use of cell phones while operating a motor

vehicle. Those laws, if applied to tow truck drivers, could very well impact the ability of towing companies to provide timely and efficient service to its customers. Although such laws may be aimed at the public in general, they may have a particularly large impact on the towing industry, which has made significant capital investment in the new technology on the assumption that using the technology will pay off over time.[23]

IV. IN EVALUATING THE SCOPE OF PREEMPTION, COURTS SHOULD CONSIDER THE MAGNITUDE OF THE IMPACT, THE CUMULATIVE EFFECT OF THE LAW WITH OTHER LAWS, AND THE EXTENT TO WHICH TOWING COMPANIES CAN MANAGE THE RISK IF LIABILITY IS IMPOSED

A. The Magnitude of the Impact of a Law on Prices, Routes, and Services is a Key Consideration

Because of the plethora of laws and regulations, it is sometimes difficult to know how or even whether a law impacts the transportation

[23] It is possible that such a law would be saved from preemption under the safety exception in 49 U.S.C. § 14501(c)(2). The applicability of the safety exception is beyond the scope of this case, and in any event, before determining whether the safety exception applies, it is always necessary to first determine whether the law in question is even "related to" prices routes or services in the first place. *See, e.g.*, *Automobile Club of New York, Inc. v. Dykstra*, 520 F.3d 210, 214, fn. 2 (2nd Cir. 2008),

industry merely be resorting to the text of the law. A law that is not directly aimed at the transportation industry can have a huge, perhaps unintended impact on motor carriers. Accordingly, focusing on the whether the law "directly" or "indirectly" impacts motor carriers is unhelpful. As the Ninth Circuit court noted in *American Trucking Assoc., Inc. v. City of Los Angeles*, *supra,* 660 F.3d at 396, courts "must examine the actual or likely effect of a State's action." Whether the effect occurs "directly" or "indirectly" is irrelevant. *Id.*, at 396-397. What matters is the nature of the effect. *See Rowe, supra*, 552 U.S. at 372.

Depending on the precise nature of the law, it may require a minor modification to the manner in which towing companies do business, or it may require wholesale changes to the business model, retrofitting of trucks, and retraining of personnel, all of which will directly impact the prices, routes and services that towing companies can provide. The greater the impact, the more likely a law is to be preempted. Thus, the magnitude of the impact on the transportation industry is a factor that courts must consider in assessing whether a particular law is preempted.

B. The Cumulative Effect of Related Laws May Militate in Favor of Preemption

A single law may not appear to have much impact until reference is made to the greater scheme of regulations of which it is merely a part. In that vein, it is important to keep in mind that the towing industry is already heavily regulated by state and

local government, and, if history is any indication, the industry will likely be subject to an ever-increasing number of laws and regulations on a growing list of topics.

While compliance with any one law or regulation may not be burdensome, the cumulative effect of trying to comply with multiple, overlapping, and sometimes conflicting laws can be extremely costly. Rather than bear the costs, some towing companies simply alter their routes so as to avoid jurisdictions that impose onerous requirements. Other companies try to maintain their routes, but limit the level of service they provide as a cost-saving measure. The net effect is that the various laws, collectively if not singly, undeniably impact prices, routes and services.

Each additional law or regulation may only incrementally impact prices, routes, or services, such that, one could argue that any one of them, standing alone, has only a tenuous effect. But as the number of laws and regulations multiply, there is a tipping point at which it becomes commercially unreasonable to comply with all of them. The impact of a single law necessarily depends on the interplay it has with other applicable laws governing the same conduct. A minor tweak in one law can have far reaching ramifications if it conflicts with other laws or changes the manner in which they can reasonably be applied.

Accordingly, in some situations, it may be necessary to look at the overall body of laws that regulate a motor carrier, or an entire regulatory framework, to determine whether one particular law is preempted.

For example, the requirement of California Vehicle Code section 27700, subdivision (b) that tow trucks must be equipped with a shovel may not appear to be overly burdensome. But when combined with separate rules requiring that trucks have a broom, and a fire extinguisher, and specified chains, and other equipment, there may be a problem. There is a finite amount of space on a tow truck, and at a certain point, if tow truck drivers have to make room for certain items required by law, they may not have room left to carry hydraulic jacks, pneumatic tire-changing equipment, or extra gasoline for stranded drivers. The inability to carry those items would naturally impact the type and quality of services they could provide to motorists. For these reasons, the cumulative effect of the challenged law must be considered in light of the other laws already governing the industry and the way in which a motor carrier has adapted his or her business to comply with those laws.

C. The Ability of the Industry to Manage the Risk in a Commercially Reasonable Manner Should Be Considered

When plaintiffs seek to impose civil liability based on an alleged violation of one or more of the numerous laws governing motor carriers, courts should also consider traditional risk management strategies. Businesses routinely engage in risk management by trying to reduce their liability in a reasonable way. They commonly use traditional cost-benefit analyses to decide whether to invest in more training and newer equipment to reduce the

likelihood of liability, or whether instead to simply purchase insurance to cover the potential exposure. Thus, when analyzing whether a civil claim based on a statutory or regulatory violation is preempted, courts should consider whether the cost of managing the risk is commercially reasonable. In a heavily regulated industry like transportation, it may not be possible for motor carriers to manage all of the risk or insure against every possible civil claim. Even if it is possible, it will likely only be achieved at significant cost, which will naturally have a direct impact on the prices the business charges for its services.

V. THESE FACTORS CAN HELP RESOLVE "BORDERLINE QUESTIONS"

From the foregoing, the following factors emerge as critical considerations when evaluating the scope of preemption in "borderline" cases. First, the magnitude of the impact must be evaluated. Often, this can be measured in dollars, but for many laws the question will turn on the degree to which services are impaired or reduced, or the extent to which routes must be altered. *See, e.g.*, *Dilts v. Penske Logistics LLC*, *supra*, 819 F.Supp.2d at. 1119 [finding that mandatory meal and rest breaks would require different routes and delay deliveries to consumers].

Second, courts should consider the cumulative effect of the multiple and perhaps even conflicting laws under which a motor carrier must operate. Is the motor carrier in question already heavily regulated by other laws that are not being

challenged as preempted? If so, how do those laws, in combination with the law under review, act together to impact prices, routes, and services? Thus, even if the law being challenged had only an incremental additional impact on prices, routes, or services in light of other laws, it could be the case that that impact, though relatively minor, is sufficient to tip the balance so that the competitive forces of the market can no longer operate with stability. Finally, when deciding whether to impose civil liability for an alleged breach of a particular law, courts should consider the cost and availability of commercially reasonable risk management strategies. In other words, would a reasonable tow truck operator be able to foresee the liability and take reasonable steps to manage that risk without significantly raising his prices, or altering his services?

While the facts of the instant case do not present a "borderline question" they serve as a useful backdrop to illustrate the application of the foregoing factors. For example, Count II of the complaint[24] alleges breaches of common law and statutory duties to use reasonable care to ascertain the identity of a vehicle's owner, to return it to him

---

[24] Count II provides a better illustration than Count I, which alleges a violation of New Hampshire's Consumer Protection Act. This claim is easy to deal with, as courts have been fairly unanimous that consumer fraud laws are preempted because they "necessarily have an industry-wide effect on prices and services, since they dictate the rules for price advertising and other marketing practices." *S.C. Johnson & Son, Inc. v. Transport Corp. of America, Inc., supra,* 697 F.3d at 559, citing *Morales, supra*, 504 U.S. at 389–90.

and to use reasonable care in disposing of the vehicle. Assuming such duties exist at common law in New Hampshire, it would be appropriate to first consider the magnitude of the impact on prices, routes or services that would occur if towing services were required to spend time, money, and personnel resources identifying the owners of abandoned vehicles. Since towing companies generally are not equipped to perform the services of a private investigator business, it presumably would have to devote significant resources to tracking down such individuals, at great cost, and with the result being fewer staff to perform the core functions of the towing business, i.e. driving tow trucks, hauling vehicles, and assisting motorists. Similarly, the context of the law is important, because at the time of this case, New Hampshire law did not provide a mechanism for towing companies to obtain the identity of the vehicle owner. Petitioner's Brief on the Merits, p. 14, fn. 11. Thus, while the duty to identify a vehicle owner may be relatively innocuous in the abstract, the fact that other laws do not allow the dissemination of the necessary information changes the calculus. There do not appear to be multiple and conflicting laws addressing this issue in New Hampshire, such that the cumulative nature of the laws may not be a big factor for this claim. However, the cost of risk management is very relevant to this claim. As alluded to by the petitioner, it is difficult to know how much effort would have to be devoted to identifying unknown owners in order to be deemed "reasonable." *See* Petitioner's Brief on the Merits, p. 37. A reasonable towing company operator could never be certain

whether he was effectively reducing his liability by expending resources on such endeavors. The costs, however, would be significant and would necessarily detract from the level of services that company could provide. Accordingly, the factors advanced by CTTA counsel in favor of preemption.

CONCLUSION

This Court has previously opined on the scope of preemption in *Morales*, *Wolens*, and *Rowe*, but none of those presented the more difficult "borderline questions." To assist courts, motor carriers, and state and local governments, CTTA urges this Court to articulate the relevant factors that should be considered in determining whether a particular law should be preempted. Those factors include the magnitude of the impact, the extent to which other cumulative or conflicting laws govern the same motor carrier conduct, and the extent to which it is commercially reasonable to manage the risk that would flow from imposing liability. Applying those factors to the facts of this case, the judgment of the New Hampshire Supreme Court should be reversed.

Respectfully submitted,

PATRICK J. WHALEN
Counsel of Record for Amicus Curiae
Law Offices of Brooks Ellison
1725 Capitol Avenue
Sacramento, CA 95811
(916) 448-2187
attorneys@ellisonlawoffices.com

January 28, 2013