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 OF *AMICI CURIAE* LOUISIANA, NEW HAMPSHIRE, AND 20 OTHER STATES IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether 49 U.S.C. §14501(c)(1), which prohibits states from enacting or enforcing "a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier," preempts negligence and consumer-protection-law claims by a vehicle owner against a towing company that disposed of his vehicle.

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INTEREST OF AMICI CURIAE

The amici States have a compelling interest in protecting their citizens from negligent or fraudulent conduct and in providing a remedy in the event such conduct occurs. The preservation of our authority to enforce laws in furtherance of those state goals is therefore of paramount importance. The states' interest is heightened even more in areas of law that have been historically or traditionally left to the states. The regulation of private property rights and the enforcement of general civil tort laws are two such areas.

This case is particularly important because if the state laws at issue are invalidated, the balance of authority between federal and state interests in this area will be skewed in a way that Congress never intended, and citizens will be left without a remedy for negligent or fraudulent conduct by towing companies. The amici states therefore urge the Court to affirm the decision of the New Hampshire Supreme Court that the state laws at issue are not preempted by the Federal Aviation Administration Authorization Act of 1994 (FAAAA), Pub. L. No. 103-305, 108 Stat. 1605-1606.

STATEMENT

Respondent Robert Pelkey was bedridden with a serious medical condition in February 2007 when his apartment complex had petitioner Dan's City Used Cars tow his car from the parking lot. Although legally parked, the car was towed without Mr. Pelkey's

knowledge in accordance with a policy that required tenants to move their cars during snowstorms.

Mr. Pelkey was hospitalized for almost two months after his car was towed. During that time, Dan's City began the process of attempting to dispose of the car pursuant to a New Hampshire law that allowed the custodian of a vehicle that had been removed and stored to sell or dispose of it if it went unclaimed for 30 days and the custodian followed certain notice and approval requirements. See N.H. Rev. Stat. Ann. 262.36-a, 262.37 (2007).

When Mr. Pelkey returned home after his discharge from the hospital, he discovered that his car had been towed and scheduled to be sold at public auction in two days. Mr. Pelkey's attorney contacted Dan's City to advise of the circumstances and make Dan's City aware that Mr. Pelkey had not "abandoned" his car and in fact wanted it back. Dan's City nonetheless attempted unsuccessfully to sell the car at auction. Some weeks later, after having told Mr. Pelkey's attorney that the vehicle had been sold at auction, Dan's City traded the vehicle to a third party.

Mr. Pelkey filed suit in state court alleging that Dan's City's actions were deceptive in violation of the New Hampshire Consumer Protection Act, N.H. Rev. Stat. Ann. 358-A:2, and breached other statutory and common law duties, such as the duty to use reasonable care in disposing of his vehicle.

The superior court granted summary judgment to Dan's City on those claims, finding them preempted

by the FAAAA. Pet. App. 23-33. The New Hampshire Supreme Court reversed based (among other reasons) on its conclusion that "[t]he 'service' of a towing company is the moving of vehicles"; "[t]he manner in which a towing company may auction another person's property to collect on a debt relates to post-service debt collection—an area of the company's affairs falling well outside its service of towing vehicles." Pet. App. 17.

INTRODUCTION AND SUMMARY OF ARGUMENT

This should be a simple case. The FAAAA preempts state laws "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 state-law claims at issue pertain to a towing company's disposal of cars it has already towed—which occurs after the conclusion of the "service" the towing company provides its customer. State laws relating to the disposal of another person's property, or even "removed" vehicles specifically, see N.H. Rev. Stat. Ann. 262:36-a, do not directly regulate or reference a towing company's "service" to its customer; and they do not have a significant impact on that service, regardless of any effect they may have on the company's bottom line. See Resp. Br. 14-23.

To overcome this, Dan's City relies on the phrase "related to," and attempts to use it as a springboard through which to override all state laws relating to the disposal of another person's property as applied to towing companies. This Court has seen such efforts before. In the ERISA context, employers, in-

surance companies, and benefit plans argued that ERISA's preemption provision overrode myriad state laws that were far afield from the types of laws Congress thought it was displacing when it enacted the statute. Through a series of cases, this Court imposed necessary limits on the scope of ERISA preemption, ensuring that traditional state laws did not fall merely because they had an impact on ERISA plan decisions or costs. The Court's application of ERISA's "related to" preemption provision sheds light on how the FAAAA's similarly phrased preemption provision should be applied—and supports Mr. Pelkey's arguments for why his claims are not preempted.

In its pathbreaking decision in *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.,* 514 U.S. 645 (1995), the Court explained that ERISA could not possibly preempt every state law that literally had a "relation to" ERISA benefit plans. The Court therefore held that preemption should be assessed by using "the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive" and the nature and effect of the state law on ERISA plans. *Id.* at 656, 659. Applying that approach, the Court held that ERISA did not preempt a New York statute that imposed surcharges on patients covered by commercial insurers, but not on patients covered by Blue Cross/Blue Shield—even though the statute influenced ERISA plans' decisions on a fundamental matter and raised their costs. In two subsequent cases, *California Division of Labor Standards Enforcement v. Dillingham Construction, N.A., Inc.,* 519 U.S. 316 (1997), and *De Buono v.*

NYSA-ILA Medical and Clinical Services Fund, 520 U.S. 806 (1997), the Court applied that approach to uphold a state law dealing with prevailing wages and apprenticeship training standards and a state tax on medical facilities as applied to a facility owned by an ERISA plan.

As explained in further detail below, these ERISA cases confirm that Mr. Pelkey's state-law claims based on Dan's City's disposal of his car are not preempted by the FAAAA. Specifically, they confirm that the claims do not reference or directly regulate towing companies' "services," and do not have a "significant impact" on towing services. They confirm that preempting Mr. Pelkey's claims would not advance the objectives of the FAAAA. And they confirm that the presumption against preemption applies and reinforces the conclusion that his claims are not preempted.

ARGUMENT

THE FAAAA DOES NOT PREEMPT MR. PELKEY'S STATE-LAW CLAIMS AGAINST DAN'S CITY USED CARS

I. This Court's ERISA Decisions Provide Guidance In Assessing When A State Law Is Displaced By a "Related To" Preemption Provision.

A. The ERISA decisions represent the Court's most sustained effort at applying "related to" preemption.

Construing a preemption provision that uses the phrase "related to" presents an immediate challenge "since, as many a curbstone philosopher has observed, everything is related to everything else." *California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.,* 519 U.S. 316, 335 (1997) (Scalia, J., concurring). The phrase "related to" indicates that the preemption provision "has a broad scope," *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992) (internal quotation marks omitted), but the precise extent of its scope is not self-defining. Nor is the difficulty solved by declaring that a state law is preempted if it has "a connection with" the specified subject matter. "For the same reasons that infinite relations cannot be the measure of pre-emption, neither can infinite connections." *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.,* 514 U.S. 645, 656 (1995).

In *Rowe v. New Hampshire Motor Transport Association,* 552 U.S. 364 (2008), the Court dealt with this concern by relying on certain principles set out in *Morales*, which interpreted the similar preemption provision in the Airline Deregulation Act of 1978 (ADA). Specifically, the Court found that *Morales* established the following:

- "'[s]tate enforcement actions having a connection with, or reference to,' carrier 'rates, routes, or services' are preempted";

- "such pre-emption may occur even if a state law's effect on rates, routes, or services 'is only indirect'";

- "it makes no difference whether a state law is 'consistent' or 'inconsistent' with federal regulation";

- "pre-emption occurs at least where state laws have a 'significant impact' related to Congress' deregulatory and pre-emption related objectives," which are "helping ensure transportation rates, routes, and services that reflect 'maximum reliance on competitive market forces'"; and

- "federal law might not pre-empt state laws that affect fares in only a 'tenuous, remote, or peripheral manner.'" *Rowe*, 552 U.S. at 370-71 (quoting *Morales*, 504 U.S. at 378, 384, 386-87, 390).

This Court had little difficulty applying those standards in its previous cases. *Morales* found it "clear" that the NAAG Guidelines had "the forbidden significant effect upon fares." 504 U.S. at 388. And *Rowe* found that the Maine law was effectively com-

manding what services motor carriers must provide in the course of delivering their customers' packages. 552 U.S. at 371-72. Mr. Pelkey's brief demonstrates that it is equally "clear" that Mr. Pelkey's claims do *not* have "the forbidden significant effect upon [services]." See Resp. Br. 14-23. Recognizing, however, that clarity is often in the eye of the beholder, we believe support for Mr. Pelkey's position also comes from an additional source.

This Court has decided a series of cases that provide important insights in addressing "related to" preemption provisions. Specifically, between 1981 and 1997 the Court decided 16 cases involving "[t]he boundaries of ERISA's pre-emptive reach." *De Buono v. NYSA-ILA Medical and Clinical Services Fund*, 520 U.S. 806, 808-09 n.1 (1997). Moreover, in *Travelers* the Court expressly recognized the challenges of construing a "related to" preemption provision and set about developing a workable approach—one that it applied there and in several later cases. Our goal is not, of course, to import the complexity of ERISA jurisprudence into FAAAA jurisprudence. Rather, it is merely to take advantage of markers already planted by this Court.

Looking to the ERISA preemption cases also makes eminent sense because *Morales* relied on ERISA preemption decisions in developing its approach to ADA preemption. See *Morales*, 504 U.S. at 383-87; *id*. at 384 (rejecting argument that Court should "not use [its] interpretation of identical language in ERISA as a guide"). That *Travelers* refined ERISA preemption doctrine after *Morales* and after Congress enacted the FAAAA is of no moment. None

of the preemption guidelines established in *Morales* and followed in *Rowe* are inconsistent with *Travelers*. To the contrary, in emphasizing that the inquiry should focus on Congress's "pre-emption related objectives," *Rowe* embraced one of *Travelers*' principal teachings: that the Court "must go beyond the unhelpful text and the frustrating difficulty in defining its key term, and look instead to the objectives of the . . . statute as a guide to the scope of state law that Congress understood would survive." *Rowe*, 552 U.S. at 371; *Travelers*, 514 U.S. at 656.

B. To further Congress's objectives, this Court has imposed careful limits when applying ERISA's "relates to" preemption provision.

ERISA's preemption provision declares that ERISA "shall supersede any and all State laws insofar as they . . . relate to any employee benefit plan" covered by the statute. 29 U.S.C. §1144(a). This Court's struggle with the provision began in 1981 when it decided *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981), the first of the 16 cases catalogued in *De Buono*. The Court observed that lower courts were "reach[ing] various conclusions as to the meaning of ERISA's pre-emptive language" because the text "g[ave] rise to some confusion," particularly where the state law being challenged was directed at "a matter quite different from" ERISA plans. *Id.* at 523-24. The Court eventually adopted a workable framework that has resulted in there being only a handful of ERISA preemption cases over the past decade. And, as explained in §II, *infra*, the Court's application of that framework strongly supports the

conclusion that the FAAAA does not preempt state laws related to the disposal of property.

In *Travelers*, the Court described its decisions between 1981 and 1995 as establishing that "ERISA pre-empted state laws that mandated employee benefit structures or their administration" and "state laws providing alternative enforcement mechanisms." 514 U.S. at 658. Thus, for example, in *Alessi* the Court found preempted a New Jersey statute that prohibited ERISA pension plans from offsetting retirement benefits by the amount of any worker's compensation payments to which the employee was entitled. 451 U.S. at 525. See also *Shaw v. Delta Air Lines*, 463 U.S. 85 (1983) (holding that ERISA preempted a New York law that required employees, including those with ERISA plans, to pay benefits to employees disabled as a result of pregnancy).

In *Travelers*, the Court addressed for the first time the claim that ERISA preempted a state law because of its indirect effect on ERISA plans. The case involved a New York statute that required hospitals to collect surcharges (ranging from 9% to 13%) from patients covered by commercial insurers but not from patients insured by Blue Cross/Blue Shield. 514 U.S. at 650-51. "[S]everal commercial insurers, acting as fiduciaries of ERISA plans they administer, joined with their trade associations," alleged that ERISA preempted the surcharge statute because the surcharges "make the Blues more attractive . . . as insurance alternatives and thus have an indirect economic effect on choices made by insurance buyers, including ERISA plans." *Id.* at 651, 659. And that was not a choice about a minor matter: it went to

"an ERISA welfare plan's most basic administrative decision: how best to provide plan members with health care coverage." Brief for Respondents The Travelers Insurance Co. at 18, *Travelers*, 514 U.S. 645 (Nos. 93-1408, 93-414, 93-1405) ("Travelers Br.").

The Court unanimously held that ERISA did not preempt the surcharges. The Court established a two-step analytical framework that required consideration of "the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive" and the nature of the effect of the state law on ERISA plans. 514 U.S. at 656, 659. As to the former inquiry, the Court explained that "[t]he basic thrust of the pre-emption clause . . . was to avoid a multiplicity of regulation in order to permit the nationally uniform administration of employee benefit plans." *Id.* at 657. The New York surcharge statute did not undermine that objective, for "[a]n indirect economic influence . . . does not bind plan administrators to any particular choice and thus function as a regulation of an ERISA plan itself. . . . Nor does the indirect influence of the surcharges preclude uniform administrative practice . . . ." *Id.* at 659-60.

At bottom, found the Court, "nothing in the language of the Act or the context of its passage indicates that Congress chose to displace general health care regulation, which historically has been a matter of local concern." *Id.* at 661. The Court therefore rejected the notion that the ERISA preemption provision would "displac[e] all state laws affecting costs and charges on the theory that they indirectly relate to ERISA plans that purchase health care coverage."

Ibid. Although ERISA might preempt a state law that "produce[s] such acute, albeit indirect, economic effects . . . as to force an ERISA plan to adopt a certain scheme of substantive coverage or effectively restrict its choice of insurers," the New York statute was not such a law. *Id.* at 668.

The Court applied this analysis in two cases decided two years later. In *Dillingham*, the Court upheld a California prevailing-wage statute that allowed a contractor to pay a lower wage to workers in a state-approved apprenticeship program. 519 U.S. at 319. A company with an apprentice training committee that constituted an "employee welfare benefit plan" within the meaning of ERISA alleged that ERISA preempted the California statute. This Court disagreed, finding the subjects of public works wages and apprentice training standards "quite remote" from the subject matter with which ERISA was concerned, and noting that nothing in ERISA or its legislative history indicated that Congress intended to preempt state apprenticeship training standards. *Id.* at 330-331. The Court further found that the statute had no forbidden effect on ERISA plans: it did not "bind them to anything"; at most it provided only an "economic incentive" for compliance with the prevailing wage law. *Id.* at 332.

Finally, in *De Buono* the Court upheld a New York statute that imposed a tax on gross receipts of income of medical facilities, including facilities owned and operated by ERISA plans. 520 U.S. at 809. The Court "not[ed] that the historic police powers of the State include the regulation of matters of health and safety," and found that "[t]here is nothing

in the operation of the [New York law] that convince us it was the type of state law that Congress intended ERISA to supersede." *Id.* at 814. In particular, the Court explained that if the ERISA plan had chosen to purchase medical benefits from a hospital, the New York tax would have imposed "indirect" costs on it—costs that "would be in all relevant respects identical to the 'direct' impact felt here." *Id.* at 816. "Thus," held the Court, "the supposed difference between direct and indirect impact . . . cannot withstand scrutiny." *Ibid.*

II. Consistent With Those Decisions, State Laws Pertaining To A Towing Company's Disposal Of Towed Cars Do Not "Reference," "Directly Regulate," Or Have a "Significant Impact" On The "Services" Towing Companies Provide Their Customers.

Mr. Pelkey alleges that, in disposing his car, Dan's City engaged in deceptive acts that violated the New Hampshire Consumer Protection Act and breached statutory and common-law duties the company owed him. In assessing whether the FAAAA preempts those claims, the necessary starting point is defining the "service" a towing company provides. A towing company's "service" is what it provides its customer, here, Colonial Village, the owner of Mr. Pelkey's apartment complex. It is, at most, the "bargained-for provision of labor." Resp. Br. 22 (quoting *Hodges v. Delta Airlines, Inc.*, 44 F.3d 334, 336 (5th Cir. 1995) (en banc)). The sale or other disposal of a (purportedly) unclaimed towed car is not part of that service.

Colonial Village had no interest in, and presumably no knowledge of, what Dan's City did with Mr. Pelkey's car once it was towed. The "services" Dan's City provided Colonial Village—the actual towing of the vehicle off the latter's premises at its request—had been concluded long before Dan's City began trying to auction off Mr. Pelkey's car. A towing company does not sell or trade a towed car as a service to its customer, much less as a service to the car's owner. The actions forming the basis of Mr. Pelkey's claims resulted not from any towing services to anyone, but rather from Dan's City's efforts under New Hampshire law to convert Mr. Pelkey's car into cash to benefit Dan's City and Dan's City alone.

Mr. Pelkey's brief, with only a few fleeting references to ERISA cases, persuasively explains why his state-law claims therefore do not directly regulate or expressly reference the "service" a towing company actually provides; and do not have a significant impact on that service. As we explain below, this Court's ERISA decisions reinforce that conclusion.

The New Hampshire laws at issue do not "reference" towing companies' "services." It is not clear whether Dan's City contends that the state-law claims at issue are preempted because they "reference" towing services. This Court's cases show that they do not. The Consumer Protection Act and negligence claims both arise under laws of general applicability. The Consumer Protection Act broadly makes it unlawful to use deceptive acts "in the conduct of any trade or commerce," N.H. Rev. Stat. Ann. 358-A:2; and the duty of care imposed by the state's common law of negligence likewise broadly applies to

all persons who are the custodian of another person's property. Neither conceivably "references" towing "services." See *Dillingham,* 519 U.S. at 328.

Nor does his claim under Chapter 262 of the New Hampshire Code, which governs the disposal of "removed" vehicles, N.H. Rev. Stat. Ann. 262:36-a, "reference" towing "services." There is no reason to believe that all "removed vehicles" had previously been towed. And even if they had, the statute pertains to the vehicles' disposition, not the towing service itself. Cf. *Travelers*, 514 U.S. at 656 (surcharges do not "reference" an ERISA plan because they "are imposed upon patients and HMOs regardless of whether the commercial coverage or membership, respectively, is ultimately secured by an ERISA plan").

State disposal laws do not directly regulate towing services. Dan's City's principal contention is that the disposal of vehicles are part and parcel of the "services" towing companies provide, and that a state regulation of disposal is therefore a forbidden direct regulation of motor carrier "services." Pet. Br. 29, 30, 34-36. As discussed above, a towing company does not sell or trade an unclaimed towed vehicle as a service to its customer. The most that Dan's City can say, therefore, is that "services" within the meaning of §14501(c)(1) includes "activities that are incidental and distinct from the actual transportation services." Pet. Br. 34. That concedes the point.

The regulation of an activity that is not a "service" might have an "acute" or "significant" enough impact to be preempted by the FAAAA. (We address

that basis for preemption next.) But by definition it is not the *direct* regulation of the service itself. Dan's City relies on *Rowe*, but the Maine statutes at issue required a motor carrier to "follow[ ] particular delivery procedures" if it wished to ship products for tobacco retailers. 552 U.S. at 372. Suffice to say, delivering goods is the basic "service" provided by motor carriers. What a motor carrier does *after* it provides its service (there, delivery, here, towing) is a different matter altogether.

The ERISA cases support this conclusion. Indeed, the state laws involved here are even more attenuated from FAAAA "services" than the patient surcharge and gross receipts tax at issue in *Travelers* and *De Buono* were to ERISA plans. The state laws at issue there provided "incentives" to ERISA plan administrators, but were not preempted because they did not *dictate* "employee benefit structures or their administration." 514 U.S. at 658. The case against preemption is stronger here, where the New Hampshire laws do not even pertain to the actual service towing companies provide their customers. To be sure, the laws regulate towing companies (among others). But *De Buono*—which held that a state tax on medical facilities, including those run by ERISA plans, is not preempted—confirms that "related to" preemption requires more.

State disposal laws do not have a "significant impact" on towing services. Dan's City contends that state disposal laws have a forbidden "significant impact" on towing services because they "would directly impact the prices and services of tow truckers" and "would subject tow truck drivers to the

vagaries of each state's law." Pet. Br. 36, 37. The ERISA cases conclusively refute that contention.

The state laws upheld against preemption challenges in *Travelers* and *De Buono* directly raised the costs incurred by ERISA plans. The New York statute in *Travelers* imposed significant surcharges on insurance plans purchased by many ERISA plans; and the New York gross receipts tax in *De Buono* directly raised the costs of operating hospitals run by ERISA plans. The Court in *De Buono* could not have been clearer: "Any state tax, or other law, that increases the cost of providing benefits to covered employees will have some effect on the administration of ERISA plans, but that simply cannot mean that every state law with such an effect is preempted by federal statute." 520 U.S. at 816. Even if New Hampshire laws related to the disposal of cars increase Dan's City's costs, and thereby affect its services, FAAAA preemption does not follow.

Dan's City's "vagaries of each state's law" argument fares no better. Indeed, The Travelers Insurance Company made precisely that argument in *Travelers*, asserting that "[a]llowing states to alter the relative costs of different types of benefit payors would thus require plans to tailor[ ] their plans to the peculiarities of the law of each jurisdiction, thereby thwarting Congress's goal of nationwide uniformity." Travelers Br. 23. Rejecting Travelers' argument, the Court ruled that "cost uniformity was almost certainly not an object of pre-emption, just as laws with only an indirect economic effect on the relative costs of various health insurance packages in a given State are a far cry from those 'conflicting

directives' from which Congress meant to insulate ERISA plans." 514 U.S. at 662.

At bottom, Dan's City's "vagaries of each state's law" argument begs the question. Congress intended to shield towing companies from varying state laws only as they relate to towing "services." Congress did not intend to shield towing companies from varying state laws outside that preempted area. And as explained above, the disposal of removed cars is outside the area covered by §14501(c)(1).

A final word on the impact of New Hampshire's laws on Dan's City: Mr. Pelkey's claims arise in part out of the same state law that Dan's City invoked in disposing of Mr. Pelkey's vehicle in the first place. Absent that state law, Dan's City had no right to sell or trade Mr. Pelkey's car at all. If the state laws giving Dan's City that right are not preempted, neither are state-law claims based on Dan's City's failure to comply with those laws. What's sauce for the goose is sauce for the gander.

Preempting Mr. Pelkey's claims would not advance the objectives of the FAAAA. As noted, *Rowe* stated that the FAAAA preemption inquiry should focus on Congress's "pre-emption related objectives"—which reflects *Travelers*' ruling that the Court should look "to the objectives of the . . . statute as a guide to the scope of state law that Congress understood would survive." *Rowe*, 552 U.S. at 371; *Travelers*, 514 U.S. at 656. The Court's application of that approach in its ERISA cases illuminates how it supports Mr. Pelkey here.

Travelers found that "[t]he basic thrust of [ERISA's] pre-emption clause . . . was to avoid a multiplicity of regulation in order to permit the nationally uniform administration of employee benefit systems." 514 U.S. at 657. Uniformity in plan administration does not require, however, uniformity in all state laws that "influence" a plan's administration or that "bear[ ] on the costs of benefits." *Id.* at 660. Moreover, viewing plan administration too expansively would have effects that Congress is unlikely to have intended, such as "displac[ing] general health care regulation, which historically has been a matter of local concern." *Id.* at 661. See also *ibid.* (finding it also doubtful that Congress would have intended to preempt other categories of state law that indirectly affect ERISA plan costs, such as "[q]uality control and workplace regulation"). *Dillingham* reached the same conclusion with respect to "wages to be paid on public works projects and the substantive standards to be applied to apprenticeship training programs," finding them to be "quite remote from the areas with which ERISA is expressly concerned." 519 U.S. at 330.

Nothing in the objectives or purpose of the FAAAA indicates that Congress intended or expected to preempt state law remedies for tortious conduct related to the disposal of cars. Congress sought to deregulate the "price, route, or service" or motor carriers in response to barriers states had imposed on the interstate market, such as entry controls that stifled competition by protecting certain carriers and burdening potential new carriers. See H.R. Conf. Rep. No. 103-677, at 86, *reprinted in* 1994 U.S.C.C.A.N. 1715, 1758. State laws addressing the

disposal of property—including laws barring deceptive or negligent behavior during the course of disposal—are "remote" from those concerns. In short, "nothing in the language of the Act or the context of its passage indicates that Congress chose to displace [state laws relating the disposal of property], which historically has been a matter of local concern." *Travelers,* 514 U.S. at 661.

The presumption against preemption supports finding that Mr. Pelkey's claims are not preempted. Construing §14501(c)(1) as not preempting the New Hampshire laws comports with the longstanding "assumption 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." *Altria Group, Inc. v. Good*, 555 U.S. 70, 77 (2008). The disposition of abandoned property is undoubtedly a field that "has been traditionally occupied by the States." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). Dan's City "therefore bear[s] the considerable burden of overcoming 'the starting presumption that Congress does not intend to supplant state law.'" *De Buono*, 520 U.S. at 814 (quoting *Travelers*, 514 U.S. at 654). It has not met that burden.

Dan's City asserts that the presumption does not apply because state disposal-of-property laws do not pertain to "health and safety" and because this case involves an express preemption provision. The ERISA cases once again refute his contentions. *Dillingham* applied the presumption to a state law addressing "apprenticeship standards and the wages paid on state public works." 519 U.S. at 330. Because

laws of that sort—which are not health and safety laws—"have long been regulated by the States," the Court applied its "ordinary assumption that the historic police powers of the States were not to be superseded by the Federal Act." *Id.* at 331 (internal quotation marks omitted).

The Court has repeatedly applied the presumption in interpreting ERISA's express preemption provision, confirming the error of Dan's City's contention that the preemption does not apply in express preemption cases. See *De Buono*, 520 U.S. at 814; *Dillingham*, 519 U.S. at 331; *Travelers*, 514 U.S. at 654. And the Court recently confirmed that the presumption applies in express preemption cases. *Altria Group*, 555 U.S. at 77 ("when the text of a preemption clause is susceptible of more than one plausible reading, courts ordinarily accept the reading that disfavors pre-emption") (internal quotation marks omitted).

As explained above, §14501(c)(1) is best read as not preempting state laws related to the disposition of automobiles. At the very least, §14501(c)(1) does not express a clear intent to preempt such laws and therefore does not overcome the presumption against preemption.

CONCLUSION

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

Respectfully submitted,

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