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 THE PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT, ROBERT PELKEY

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INTEREST OF THE AMICUS CURIAE

The Property Casualty Insurers Association of America ("PCI") is a non-profit, national trade association that speaks for a large portion of the insurance industry in America.[1] PCI has more than 1,000 members. They do business in all fifty states, the District of Columbia, and Puerto Rico. PCI's insurers account for approximately 40% of the nation's property casualty insurance. Particular to the issue before the Court, PCI's member companies write about 46% of the automobile insurance issued across the nation.

PCI is uniquely qualified to represent the views of the property casualty insurance community respecting the issue before the Court. PCI members insure millions of motor vehicles and their owners, and PCI's member companies have paid hundreds of millions of dollars in towing company charges and costs under policies issued to their insureds. PCI and its members thus are acutely affected by issues relating to the relationship between towing companies, such as the petitioner, and insured vehicle owners, such as the respondent.

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[1] Pursuant to Rule 37.6 of this Court, no counsel for any party authored this brief either in whole or in part, and neither counsel for a party nor any party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than PCI and its members made a monetary contribution supporting preparation of this brief.

PCI is concerned that, were the decision of the Supreme Court of New Hampshire reversed, insureds would be unable to seek redress in court for towing company misconduct like that at issue in this case. PCI submits, consistent with the New Hampshire court's ruling, that its members' insureds should have a remedy when towing companies violate the law. That law should be given effect, and it should not be subject to preemption—especially where, as here, federal law does not provide for an alternative remedy. States should be permitted to regulate towing companies by enacting commonsense laws to prevent abuses, and, when needed, to provide for their redress.

SUMMARY OF THE ARGUMENT

This court should affirm the decision of the Supreme Court of New Hampshire. Mr. Pelkey advances both state statutory and common law negligence claims. These claims are not preempted by 49 U.S.C. §14501(c)(1).

Preemption under §14501(c)(1) applies in this case only where three elements are present:

(1) a state has enacted a "law, regulation, or other provision";

(2) that provision "relate[s] to" a motor carrier's "price, route, or service"; and

(3) the "price, route, or service" is "with respect to the transportation of property."

49 U.S.C. §14501(c)(1). These elements are entirely absent here, most notably because the disposal of a towed vehicle does not "relate to" a towing company's "price, route, or service," nor is the disposal of vehicles an activity "with respect to the transportation of property."

This reading is supported by the fact that state regulation of towing company vehicle disposal does not interfere with Congress' intent in enacting Section 14501(c)(1). That intent was to prevent a nationwide patchwork of *transit regulations*—regulations affecting prices, routes, and services. Congress did not intend to interfere with state law relating to the disposition of property in the possession of a carrier.

Dan's City's argument, if accepted by the Court, would be contrary to Congressional intent. It would shift the financial burden of towing misconduct onto the shoulders of people like Mr. Pelkey, and potentially onto insurance companies like PCI's members. This is especially inappropriate given the harm towing companies like Dan's City cause. PCI submits that Mr. Pelkey should be permitted to avail himself of state law remedies, as the New Hampshire court held.

ARGUMENT

I. The text of 49 U.S.C. §14501(c)(1) does not preempt Mr. Pelkey's claims.

The Supreme Court of New Hampshire correctly held that Mr. Pelkey's claims are not preempted by this provision:

> [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). Thus, in order to trigger the preemptive effect of this provision under the circumstances here, three elements must be present:

(1) a state has enacted a "law, regulation, or other provision";

(2) that provision "relate[s] to" a motor carrier's "price, route, or service"; and

(3) the "price, route, or service" is "with respect to the transportation of property."

While it is true that the Court has not precisely defined the "borderline" between matters preempted under Section 14501(c)(1) versus those that are not, *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 390 (1992) (citation omitted), the Court

has constructed a number of signposts to guide the preemption analysis.

With respect to Section 14501(c)(1)'s "related to" language, preemption of course applies where states attempt to "directly regulate[]" carrier prices, routes, or services respecting the transportation of property. *Rowe v. New Hampshire Motor Transp. Ass'n*, 552 U.S. 364, 373 (2008). Preemption also applies to matters "having a connection with or reference to" such matters, *id.* at 384, and a "'significant' and adverse 'impact'" with respect to the statutory scheme's ability to achieve its objectives. *Rowe*, 552 U.S. at 371 (2008) (quoting *Morales*, 504 U.S. at 390).

Section 14501(c)(1) therefore will prevent a state's "direct substitution of its own governmental commands for 'competitive market forces'" in determining the services that motor carriers will provide. *Rowe*, 552 U.S. at 384 (quoting *Morales*, 504 U.S. at 378). The provision does so by preventing "a patchwork of state service-determining laws, rules, and regulations" that are "inconsistent with Congress' major legislative effort to leave such decisions, where federally unregulated, to the competitive marketplace." *Rowe*, 552 U.S. at 373.

But there is no preemption where the state matter affects pricing "in too tenuous, remote, or peripheral a manner." *Morales*, 504 U.S. at 390. That is the case here.

In addition to the "related to" language, Section 14501(c)(1) further self-limits its preemptive

effect because the "price, route, or service" in question must be "with respect to the transportation of property." As Justice Scalia has previously expressed, this "with respect to" language "massively limits the scope of preemption to include only laws, regulations, and other provisions that single out for special treatment 'motor carriers of property.'" *Columbus v. Ours Garage & Wrecker Service, Inc.*, 536 U.S. 424, 449 (2002) (Scalia, J., dissenting). Because of this limitation, states "remain free to enact and enforce general traffic safety laws, general restrictions on the weight of cars and trucks that may enter highways or pass over bridges, and other regulations that do not target motor carriers 'with respect to the transportation of property.'" *Id.*

This case is not a close one. It clearly falls on the non-preemption side of the "borderline." *Morales*, 504 U.S. at 390. Mr. Pelkey's claims do not "relate to" carrier prices, routes or services respecting the transportation of property. They do not amount to a state law attempt to "directly regulate[]" prices, routes, or services, nor do they have a "'significant' and adverse 'impact'" with respect to the statutory scheme's ability to achieve its objectives. *Rowe*, 552 U.S. at 371, 373. Indeed, permitting Mr. Pelkey and others like him to bring state law claims relating to the wrongful disposition of their cars by towing companies will not result in interference with "competitive market forces" by imposing a "patchwork" of state laws impeding carrier prices, routes, or services. *Id.* at 384, 373. Mr. Pelkey's claims simply are "too tenuous, remote, or peripheral" to be preempted under Section 14501(c)(1). *Morales*, 504 U.S. at 390.

Perhaps more significantly, Mr. Pelkey's claims do not relate to a carrier "price, route, or service" "*with respect to the transportation of property*." That "massively limit[ing]" language, *Ours Garage*, 536 U.S. at 449 (Scalia, J., dissenting), expresses a *movement* requirement. Thus, in order to trigger Section 14501(c)(1) preemption, a carrier's activities in question *must* involve the movement of property. Here, however, Mr. Pelkey's claims have nothing to do with Dan's City's *movement* of his car. They have to do with its *disposition* of that property. Moreover, the state laws under which Mr. Pelkey brings his claims are not targeted to towing companies.

Thus, the "with respect to" limiting language of Section 14501(c)(1) compels the conclusion that Mr. Pelkey's claims are not preempted. Indeed, if under that language states "remain free to enact and enforce general traffic safety laws," such as restrictions on the weight of cars and trucks that may enter highways, *id.*, then states similarly must be free to permit people like Mr. Pelkey to proceed with their state law statutory and common law claims when a towing company like Dan's City wrongfully disposes of their cars.

Because the Supreme Court of New Hampshire correctly reached this conclusion, this Court should affirm the decision below.

II. Third parties, such as insurance companies, rely on the body of state laws covering towing and disposal of towed vehicles.

State law applicable to the disposal of towed vehicles is important, as Mr. Pelkey acknowledges, because those laws are needed to transfer title when vehicles are disposed of, among other reasons. Resp't Br. 31. The need to rely on those laws, however, is not limited solely to the internal needs of the states. Numerous third parties rely on state statutory schemes applicable to towed vehicles and their disposal. PCI's insurance company members, for example, also rely on those laws, as they play an integral role in the towing process.

Insurance policies issued by automobile insurers typically include coverage provisions for payment of towing-related expenses in the event of an auto breakdown or accident. *See, e.g., Miller v. City of Chicago*, 774 F.2d 188, 193 (7th Cir. 1985) ("towing and storage charges are ordinarily covered by standard auto insurance policies"); *see also Amicus Curiae* Br. of Cal. Tow Truck Ass'n 13 (acknowledging insurance companies' role in the towing process). Insurance companies insure millions of motor vehicles and their owners, and every year pay millions of dollars in towing company charges and costs under their policies. Insurers rely on state statutory schemes applicable to towing as one of the foundational building blocks upon which their towing coverage provisions rest.

Were this Court to accept the overbroad preemption argument advanced by Dan's City, one of

the fundamental underpinnings of law relied upon by insurers in furnishing towing coverage would be significantly weakened. Such a ruling could increase the cost of insurance. Insureds might make additional policy claims if unable to seek a remedy from the wrongdoer towing company under state law, for example. Those costs inevitably will have to be passed on, in some form, to insurance consumers. This result runs counter to Congress' intent to create market efficiency when it passed the statutory scheme before the Court. *Cf. Rowe*, 552 U.S. at 371 (describing goal of Congress to stimulate "efficiency, innovation, and low prices" (quoting *Morales*, 504 U.S. at 378)).

In addition, given that towing coverage under an insurance policy is, of course, not without its limits, preemption of Mr. Pelkey's claims could also expand insureds' *own* obligations where a towing company has done wrong. Indeed, there are many instances where towing-related insurance coverage is inapplicable; so, if preempted, Mr. Pelkey's claims, and those of many others, will neither be covered by insurance nor actionable under state law.

If this Court sides with the preemption argument advanced by Dan's City, the financial burdens to be borne by insureds like Mr. Pelkey and insurance companies like PCI's members will increase. That burden is misplaced. It should be borne by the alleged wrongdoer – the towing company – and should not be inequitably shifted either to the vehicle's owner or to the insurance company.

III. Vehicle owners should be allowed to avail themselves of state law remedies against towing companies where no such remedies are provided under federal law.

Given Dan's City's preemption arguments, one would logically expect an available federal remedy to apply to Mr. Pelkey's claim against Dan's City. But no federal remedy exists, a matter about which there is no dispute. This is because Congress, in enacting the statutory scheme, was seeking to prevent a "patchwork" of state laws concerning the prices, routes, and services of motor carriers. *See Rowe*, 552 U.S. at 373; Resp't Br. 26-28. Congress simply was not attempting to address claims by vehicle owners against towing companies that dispose of vehicles.

That Congress did not create a federal remedy for claims against towing companies dovetails with the notion that regulation of towing companies has traditionally been the province of state law. *See, e.g.*, Resp't Br. note 1 (referencing various state laws applicable to disposal of towed vehicles). That traditional role in this arena should be sustained by this Court. Mr. Pelkey should have a remedy under state law given federal law does not supply one. The Supreme Court of New Hampshire so held, consistent with this Court's decisions. *See Silkwood v. Kerr–McGee Corp.*, 464 U.S. 238, 251 (1984) ("[i]t is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct"). That decision should be affirmed.

CONCLUSION

For the foregoing reasons, *amicus curiae*, the Property Casualty Insurers Association of America, respectfully requests that this Court affirm the decision of the Supreme Court of New Hampshire.

Respectfully submitted,

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