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 Petition for a Writ of Certiorari to the Supreme Court of New Hampshire

Respondent's Brief in Opposition

BRIAN C. SHAUGHNESSY
Kazan, Shaughnessy, Kasten & McDonald, PLLC
746 Chestnut Street
Manchester, NH 03104
(502) 644-4357
brian@kskmlaw.com

ADINA H. ROSENBAUM
Counsel of Record
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
arosenbaum@citizen.org

Counsel for Respondent

November 2012

QUESTION PRESENTED

Whether 49 U.S.C. § 14501(c)(1), which preempts state laws "related to a price, route, or service of any motor carrier . . . with respect to the transportation of property," preempts negligence and consumer protection law claims based on the manner in which a towing company disposed of a vehicle to collect a debt secured by a lien.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **Pages**

STATUTES AND LEGISLATIVE HISTORY

INTRODUCTION

This case involves a towing company that failed to inform a towed vehicle's owner that it planned on auctioning the car, held an auction to sell the car even after the owner explained the car was not abandoned, lied to the owner about whether the car had been sold, and traded the car for its own benefit without compensating the owner for the car's value. The question presented is whether the towing company can be held liable for its actions under state law, or whether the owner's state-law claims are preempted by 49 U.S.C. § 14501(c)(1), which preempts state laws "related to a price, route, or service of any motor carrier . . . with respect to the transportation of property." In a thorough decision, the New Hampshire Supreme Court below reversed a grant of summary judgment for the defendant and held that § 14501(c)(1) does not preempt the plaintiff's state-law claims because they neither relate to motor carrier services nor are "with respect to the transportation of property." The decision below is correct, the Court lacks jurisdiction to review the decision because it is not a final judgment, and further review of this case is unwarranted.

STATEMENT OF THE CASE

A. Factual Background

On February 3, 2007, defendant Dan's City towed plaintiff Robert Pelkey's 2004 Honda Civic from the parking lot of his apartment complex without his knowledge. Pet. App. 2, 23. The car was towed pursuant to a policy at the complex that required tenants to move their cars during snowstorms. At the time of the towing, Mr. Pelkey was confined to bed due to a serious medical condition. *Id.* at 2. The car was parked in a designated handicap parking spot, displayed a valid and current

handicap license plate, was properly registered, and displayed a current parking sticker issued by the apartment complex. N.H. S. Ct. Pl.'s App. 18.

Soon after the towing, Mr. Pelkey was admitted to the hospital to have his foot amputated. While at the hospital, he suffered a heart attack, and he was not discharged for almost two months. Pet. App. 2.

While Mr. Pelkey was in the hospital, Dan's City sought permission from the New Hampshire Department of Safety to sell the car without notice as an abandoned or unclaimed motor vehicle. Although the car had fewer than 8,000 miles and a blue book value of approximately $12,000, Dan's City claimed that the car's market value was under $500. N.H. S. Ct. Pl.'s App. 20. The Department of Safety told Dan's City that it had to provide Mr. Pelkey with notice of the sale and provided Mr. Pelkey's address. N.H. S. Ct. Def.'s App. 67. Instead of sending Mr. Pelkey notice of the sale, however, Dan's City sent him a certified letter stating that it had towed his vehicle and that, if he did not contact it within 14 days, Dan's City would inform the police that he had abandoned his vehicle. Because of Mr. Pelkey's lengthy hospitalization, the letter was returned, and Dan's City made no further efforts to contact Mr. Pelkey and provide notice to him. Pet. App. 24.

Upon returning home from the hospital, Mr. Pelkey discovered that his car was not in his apartment complex's parking lot. His lawyer contacted the complex and was told that the car had been towed and was scheduled to be sold two days later. Mr. Pelkey's lawyer faxed a letter to Dan's City, explaining that Mr. Pelkey had been in the hospital, that his car was not abandoned, and that he wanted to arrange for the vehicle's return. N.H. S. Ct. Pl.'s App. 20.

Despite being told that Mr. Pelkey wanted to arrange for the return of the car, Dan's City went forward with the auction. No third party bid on the car, so it remained in Dan's City's possession. Nonetheless, when Mr. Pelkey's lawyer made further inquiries about returning the car, Dan's City falsely told him that the car had been sold. Pet. App. 3. Dan's City later traded the car to a third party, without Mr. Pelkey receiving any compensation for the loss of his car. *Id.*

B. Proceedings Below

Mr. Pelkey filed suit against Dan's City, alleging, as relevant here, that Dan's City's engaged in deceptive acts that violated the New Hampshire Consumer Protection Act and that it breached duties to Mr. Pelkey, such as the duty to use reasonable care in disposing of the vehicle. N.H. S. Ct. Pl.'s App. 21. The superior court granted summary judgment to Dan's City, holding that Mr. Pelkey's claims were preempted by 49 U.S.C. § 14501(c)(1), which preempts state laws "related to a price, route, or service of any motor carrier . . . with respect to the transportation of property." Pet. App. 23-33.

The New Hampshire Supreme Court reversed, holding that "§ 14501(c)(1) does not preempt state laws pertaining to the manner in which a towing company disposes of vehicles in its custody to collect towing and storage charges secured by a lien." *Id.* at 10. The court rested its opinion on two separate grounds.

First, the court noted that "the text of § 14501(c)(1) makes clear that preemption does not apply simply because state laws relate to the price, route, or service of a motor carrier *in any capacity*; rather it applies only when state laws relate to the price, route, or service of a motor carrier *with respect to the transportation of*

property." *Id.* at 10-11 (emphasis in original). The court concluded that the state laws at issue were not "with respect to the transportation of property." *Id.* at 13-14. "When a towing company seeks to recover the costs incurred from towing and storing a vehicle," it explained, "the manner in which it does so is not incidental to the *movement* of property by a motor carrier." *Id.* at 13; *see* 49 U.S.C. § 13102(23) (defining transportation to include "services related to th[e] movement [of property]"). "Rather, it is incidental to the rights of property owners to recover their property, and the parallel obligations of the custodians of that property to accommodate the vehicle owners' rights." Pet App. 13. "Reading § 14501(c)(1) differently would unduly strain its plain terms and render the language 'with respect to the transportation of property' meaningless." *Id.*; *see also id.* at 14 ("Those claims have nothing to do with the *transportation* of property; they involve the balance of rights between a lien creditor, who is entitled to recover the value of the debt, and the owner of a towed vehicle, who is entitled to recover either the vehicle after paying the appropriate costs or the remainder of the vehicle's value once the creditor has sold it[.]" (emphasis in original)).

Second, the court held that even if Mr. Pelkey's claims rested on state laws "with respect to the transportation of property," they were not sufficiently related to a motor carrier's "service" to be preempted under § 14501(c)(1). Pet. App. 16. "The 'service' of a towing company," it explained, "is the moving of vehicles." *Id.* The court noted that Mr. Pelkey's negligence claims bore "only a remote connection to the defendant's 'service,'" and arose not from defendant's towing of the car, but from its disposal of it. *Id.* at 19. As for the Consumer Protection Act claims, the court noted that they were asserted against Dan's City

"based not upon its role as an entity that tows vehicles (or the price, route, or service relating to that role), but upon its role as a custodian of another person's property after the towing has been completed." *Id.* at 19-20. "The state's substantive requirement to refrain from unfair or deceptive practices in that role," the court continued, "has little to with a towing company's service of removing vehicles from where they are not permitted to be." *Id.* at 20.

In concluding, the court observed that the lack of a federal remedy militated "against reading § 14501(c)(1) so expansively as to encompass everything a towing company might do in the course of its business," and against reading it to cover Mr. Pelkey's claims, which "advance the right of a person whose vehicle has been towed to retrieve it upon payment of the towing and storage costs." Pet. App. 20.

Having found Mr. Pelkey's claims not preempted because the state laws at issue were not related to a towing company's "service" or "with respect to the transportation of property," the court did not consider the application of 49 U.S.C. § 14501(c)(2)(C), which states that § 14501(c)(1) does not apply to a state's authority to enforce a law "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."

REASONS FOR DENYING THE WRIT

I. The Court Lacks Jurisdiction To Review The Non-Final State-Court Decision Below.

The Court lacks jurisdiction over this case. Petitioner claims this Court has jurisdiction under 28 U.S.C. § 1254(1). Pet. 1. Section 1254, however, governs review of cases in the federal courts of appeals. Because this case seeks review of a state supreme court decision, not a federal court of appeals decision, § 1254(1) is inapplicable.

28 U.S.C. § 1257, which provides jurisdiction to review certain state-court decisions, likewise does not confer jurisdiction here. Section 1257 limits this Court's review of state-court decisions to "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had." 28 U.S.C. § 1257(a). Here, the New Hampshire Supreme Court's decision reversed the grant of summary judgment in Dan's City's favor and remanded the case. Pet. App. 2. Thus, the decision below is not a "final judgment" within the meaning of § 1257. *See Market St. Ry. Co. v. R.R. Comm'n of Cal.*, 324 U.S. 548, 551 (1945) (explaining that, to be final, the state court judgment must be "an effective determination of the litigation").

This Court has identified four narrow categories of cases in which it has treated a state-court decision as a final judgment on the federal issue even though additional state-court proceedings are anticipated. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). This case fits within none of those categories. The first two categories cover cases in which (1) "the federal issue is conclusive or the outcome of further proceedings preordained," or (2) the federal issue "will survive and require decision regardless of the outcome of future

state-court proceedings." *Id.* at 479-80. These categories do not apply here because the outcome of this case is not preordained—either party may prevail on remand—and if Petitioner prevails on remand, the question presented will no longer require decision. Thus, "[t]he outcome of those further proceedings could moot the federal question" presented here. *Jefferson City v. Tarrrant*, 522 U.S. 75, 77 (1997). The third category, which covers cases in which "'later review of the federal issue cannot be had, whatever the ultimate outcome of the case,'" likewise does not apply because, if Petitioner does not prevail on remand, it "will be free to seek [Supreme Court] review once the state-court litigation comes to an end." *Id.* at 82-83 (quoting *Cox*, 420 U.S. at 481).

Nor does the fourth category confer jurisdiction over this case. That category applies where "the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds," "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action," and "refusal immediately to review the state court decision might seriously erode federal policy." *Cox*, 420 U.S. at 482-83. Here, refusal immediately to review the New Hampshire court's decision presents no risk of "seriously erod[ing] federal policy." *Id.* at 483. There is no federal statutory scheme regulating the disposal of towed vehicles to collect a debt. And this case is not one in which "the proper forum for trying the issue . . . depends on the resolution of the federal question." *Belknap, Inc. v. Hale*, 463 U.S. 491, 497 n.5 (1983) (citation omitted).

Moreover, as the New Hampshire Supreme Court explained, allowing Mr. Pelkey's claims "to proceed against the defendant does not 'significantly impact' Congress's

deregulatory objectives." Pet. App. 15. In enacting § 14501(c)(1), Congress was concerned with "[s]tate economic regulation of motor carrier operations," such as "entry controls, tariff filing and price regulation, and types of commodities carried," and sought to level the playing field between motor and air carriers. H.R. Conf. Rep. No. 103-677, pp. 86- 87 (1994), *reprinted in* 1994 U.S. Code Cong. & Admin. News 1715, 1758-59. As the court below noted, however, "the manner in which a company in possession of a towed vehicle may dispose of the vehicle to collect on a debt created by operation of state law" is "far removed from Congress's aim of promoting free markets and equalizing the competitive playing field between motor carriers and air carriers." Pet App. 15; c*f. Joe Nagy Towing, Inc. v Lawless*, __ So. 3d __, 2012 WL 4839853, *7 (Fla. App. Oct. 12, 2012) (not yet released for publication) ("[T]he Conference Report leaves little doubt that the purpose of the Amendment was to facilitate uniform economic regulations for organizations providing interstate and intrastate transportation services by air or ground. Nothing in the detailed Report suggests that Congress intended to preempt or in any way affect civil conversion claims.").

In short, because this case does not fall within any of the four categories identified in *Cox*, the Court lacks jurisdiction to review the decision below.

II. The Issues In This Case Do Not Merit Review.

Relying on a single other state supreme court case, *Weatherspoon v. Tillery Body Shop, Inc.*, 44 So. 3d 447 (Ala. 2010), and one unpublished court of appeals case, *Ware v. Tow Pro Custom Towing & Hauling, Inc.*, 289 Fed. Appx. 852 (6th Cir. 2008), Petitioner's primary argument for certiorari is that review is necessary to

resolve a split between the state supreme courts and a court of appeals. But Petitioners' claim of a split is overblown, the cases on which it relies do not grapple with differences between claims based on vehicle storage and claims based on vehicle disposal, and the paucity of authority on which it relies demonstrates that the issues here are not ones that arise often enough to require this Court's attention.

To begin with, although Petitioner claims a split with the Sixth Circuit, the single court of appeals decision on which it relies for the split, *Ware*, is unpublished and therefore has no precedential value in that circuit. *See Crump v. Lafler*, 657 F.3d 393, 405 (6th Cir. 2011) ("Unpublished decisions in the Sixth Circuit are, of course, not binding precedent on subsequent panels[.]"). At best, therefore, petitioner has claimed a split between two state supreme court cases on an issue that the other 48 state supreme courts have yet to consider and that no court of appeals has addressed in a precedential manner.

Moreover, although Petitioner claims (Pet. 8) that this case presents a "fact pattern almost identical" to those in *Weatherspoon* and *Ware*, the facts and claims in those cases differ meaningfully from those here. For example, in neither of those cases did the towing company falsely tell the vehicle owner that it had sold the car at auction when it had not in fact done so. Indeed, unlike here, where Mr. Pelkey's attorney specifically informed Petitioner that the car was not abandoned, in *Weatherspoon*, the towing company and vehicle owner had no contact before the vehicle was sold. *See Weatherspoon*, 44 So. 3d. at 448-49; *Joe Nagy Towing*, 2012 WL 4839853, at *8 (distinguishing *Weatherspoon* from case in which vehicle owner repeatedly sought return of his car because "*Weatherspoon* involved no allegations that the appellant vehicle owner

communicated in any way with the towing company"). Because whether a state law is sufficiently related to motor carrier prices, routes, and services to be preempted depends on the nature of the claims being asserted, differences in facts and claims can alter the preemption inquiry.

Further, neither case on which Petitioner relies grapples with differences between claims related to *storage* of a vehicle and claims related to a company's *disposal* of a vehicle to collect a debt secured by a lien. In *Ware*, the only claim the court considered that was related at all to a vehicle's disposal was a claim that a tow company "converted the [plaintiffs'] truck by failing to provide the Wares sufficient notice of the storage fees and sale." 289 Fed. Appx. at 856. In discussing that claim, the court focused on storage fees, rather than on the sale. The court noted that the plaintiffs argued that various state statutes required written authorization for storage, prohibited collection of storage fees for over 60 days, and prohibited collection of storage fees unless certain circumstances were met. It then stated that the claim was preempted, without analyzing the sale element of the claim separately from the elements related to storage fees. *Id.* Moreover, the Sixth Circuit never addressed the applicability of § 14501(c)(2)(C), the exception to the preemption provision in § 14501(c)(1), because the plaintiffs had not raised it below. 289 Fed. Appx. at 857.

In *Weatherspoon*, the plaintiff alleged numerous causes of action against the company that towed and sold her car, including negligence and wantonness, deprivation of possession of the vehicle, recovery of chattel in specie, conversion, negligent and wanton supervision, and fraudulent suppression. In considering preemption, the court devoted significantly more space to discussing the

constitutionality of § 14501(c)(1) and whether it preempted private state-law claims related to motor carrier rates, routes, and services in general than to considering whether the specific claims before it were preempted. The court discussed preemption of the particular claims alleged in only one paragraph and did not note that the claims related to a debt secured by a lien.

Thus, the issues in this case have barely been considered by the lower courts. The vast majority of lower courts have not addressed whether § 14501(c)(1) preempts claims based on disposal of a vehicle to collect a debt secured by a lien, and the two cases on which Petitioner relies for a split have not fully analyzed differences between claims based on towing and/or storage of a vehicle and claims based on disposal of the vehicle. Any review of the issues in this case would benefit from giving the state supreme courts and federal courts of appeals further opportunity to consider them.

III. The New Hampshire Supreme Court Correctly Held That Mr. Pelkey's Claims Are Not Preempted.

The New Hampshire Supreme Court correctly held that § 14501(c)(1) does not preempt Mr. Pelkey's claims. As the court held, the claims in this case neither relate to motor carrier prices, routes, or services nor are "with respect to the transportation of property." Mr. Pelkey has not challenged Dan's City's ability to tow the vehicle, the fees charged for the towing, or even the fees charged for storage. Rather, his claims are based on Dan's City's deceptive acts and violation of state-law duties in the process of disposing of his car. Dan's City's acts in disposing of Mr. Pelkey's vehicle against his wishes were not services the company provided to Mr. Pelkey or

anyone else, let alone services with respect to the transportation of property. And Mr. Pelkey's claims have no more than a "tenuous, remote, or peripheral" effect on the services that Dan's City does provide. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 390 (1992) (citation omitted).

Moreover, if Mr. Pelkey's claims concerning the disposal of his vehicle were sufficiently related to Dan's City's towing services to be preempted, they would also be sufficiently related to the price of those services, because holding an auction and trading the car were the means through which Dan's City sought payment for the "price" it charged. Claims related to the price of non-consensual towing, however, are exempt from preemption under 49 U.S.C. § 14501(c)(2)(C), which provides an exception to preemption under § 14501(c)(1) for state laws "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." Thus, even if the state laws at issue here were sufficiently related to prices, routes, and services to be preempted under § 14501(c)(1), they would be saved from preemption by § 14501(c)(2)(C). *See Independent Towers of Wash. v. Washington*, 350 F.3d 925, 932 (9th Cir. 2003) (holding it unnecessary to determine whether regulation of acceptable methods of payment for non-consensual towing was related to price because, if it were, it would be saved from preemption by § 14501(c)(2)).

The lower court's conclusion that § 14501(c)(1) does not preempt state laws governing the manner in which a towing company disposes of a vehicle to collect a debt is particularly appropriate here because the only reason Dan's City would have had authority to sell Mr. Pelkey's vehicle—a piece of property belonging to someone else

that it had taken without that person's knowledge or consent—is that state regulation authorizes such sales in certain circumstances. As the New Hampshire Supreme Court noted, "the defendant has sought the benefit of state law allowing it to claim a lien on a vehicle in its possession, . . . but now seeks to avoid the inconvenience of providing adequate notice and conducting an auction as required by state law." Pet. App. 17. If § 14501(c)(1) preempts all state laws related to towing companies' sale of vehicles to collect towing and storage fees, then it preempts not only the requirements for conducting an auction and disposing of a vehicle, but also the state-law authority for towing companies to conduct auctions and dispose of vehicles in the first place.[1]

Further, if claims related to selling or otherwise disposing of a towed car were preempted, then, no matter what state law provided about how long a vehicle must be kept before it could be sold, towing companies could tow cars directly from parking lots to auction lots and sell the cars immediately, without providing any compensation to the owners of the vehicles, and the owners would have no remedy against the towing companies for their losses. Such a result cannot be what Congress intended in § 14501(c)(1). *See Joe Nagy Towing*, 2012 WL 4839853, at *7 (in case in which vehicle owner repeatedly sought return of car before it was sold, noting that if claims like the

[1]Petitioner notes that states can take "precautionary measures" to address "situations where a vehicle owner who truly has not abandoned it fails to claim the vehicle in a timely manner," Pet. 14, thereby recognizing that § 14501(c)(1) does not preempt all state or local laws related to towed vehicles and owners' attempts to retrieve them. Petitioner does not explain how the state laws that it asserts are preempted differ from the measures that it agrees states can take.

vehicle owner's were preempted by § 14501(c)(1) "then towing companies (and other 'motor carriers,' for that matter) around the country could convert others' property with impunity").

Indeed, that Congress did not intend § 14501(c)(1) to preempt state laws such as those at issue here is demonstrated by the Conference Report on the Federal Aviation Administration Authorization Act of 1994 (FAAAA), which included § 14501(c)(1). The Conference Report listed nine states that, it stated, did not regulate "intrastate prices, routes and services of motor carriers." H.R. Conf. Rep. No. 103-677, p. 86. At the time of the FAAAA, however, most of the listed states regulated disposal of towed vehicles. Thus, the Report shows that Congress did not consider such regulation to be regulation of a motor carrier "price, route, or service." The court below correctly held that Mr. Pelkey's claims are not preempted, and those claims should be allowed to proceed.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

BRIAN C. SHAUGHNESSY
Kazan, Shaughnessy, Kasten & McDonald, PLLC
746 Chestnut Street
Manchester, NH 03104
(502) 644-4357
brian@kskmlaw.com

ADINA H. ROSENBAUM
Counsel of Record
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
arosenbaum@citizen.org

Counsel for Respondent

November 2012