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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether state statutory, common law negligence, and consumer protection act enforcement actions against a tow-motor carrier based on state law regulating the sale and disposal of a towed vehicle are related to a transportation service provided by the carrier and are thus preempted by 49 U.S.C. §14501(c)(1).

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Dan's City Used Cars, Inc. d/b/a Dan's City Auto Body states no parent or publicly held company owns any of its stock.

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OPINION BELOW

The Supreme Court of New Hampshire has not yet published its Opinion in the New Hampshire Reports. The Slip Opinion is reprinted in the Appendix at 1-22.

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JURISDICTION

The Supreme Court of New Hampshire issued its decision on April 10, 2012. This Court has jurisdiction under 28 U.S.C.A. § 1254(1) to review The Supreme Court of New Hampshire's decision on a writ of certiorari.

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STATUTORY PROVISIONS INVOLVED

49 U.S.C. §14501(c)(1)

General Rule - Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier (other than a carrier affiliated with a direct air carrier covered by section 41713(b)(4)) or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.

49 U.S.C. §13102 (23)

Transportation The term transportation includes

(A) a motor vehicle, vessel, warehouse, wharf, pier,dock, yard, property, facility, instrumentality,

or equipment of any kind related to the movement of passengers or property, or both, regardless of ownership or agreement concerning use; and

(B) services related to that movement, including arranging for, receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, packing, unpacking, and interchange of passengers and property.

New Hampshire Revised Statutes (RSA)

Chapter 262 Antitheft Laws, Offenses, Penalties, Habitual Offenders, Arrest of Non-Residents and Abandoned Vehicle

Chapter 358-A Regulation of Business Practices for Consumer Protection

STATEMENT OF THE CASE

On February 3, 2007, Petitioner Dan's City Used Cars, Inc. d/b/a Dan's City Auto Body (Dan's City) towed a 2004 Honda from the Colonial Village parking lot because its owner had not moved the vehicle to allow for snow removal. Appendix (hereinafter App.) 24. When the Honda was not claimed within thirty days, Dan's City filed a Notice to the Director of Removal with the New Hampshire Department of Safety requesting permission to sell the Honda at auction without notice. App. 24. The March 12, 2007 Notice stated that the market value of the vehicle was under $500 and the vehicle was not in condition for legal public way use. App. 24. On March 29, 2007, the New Hampshire Division of Motor Vehicles (DMV) notified Dan's City of the name and address of the last registered owner of the Honda, and further advised Dan's City that notice of the auction was to be sent to the last known address of the vehicle's owner fourteen days before the auction was scheduled to occur. App. 24. Respondent Robert Pelkey was identified as the last owner of record of the Honda. App. 24.

Dan's City proceeded to advertise the auction of the Honda as required under RSA 262:38. Dan's City also sent Pelkey a certified letter notifying him that Dan's City had towed his vehicle and Dan's City was storing it. App. 24. The letter was returned by the Post Office, and the box moved, left no address was checked. App. 24. Prior to the auction, Pelkey's legal counsel learned that Pelkey's vehicle had been

towed by Dan's City and was scheduled to be sold at public auction on April 19, 2007. App. 24-25. Pelkey's legal counsel contacted Dan's City and advised that Pelkey had not abandoned his vehicle, and wanted to pay any charges owed and reclaim his vehicle. App. 25. Pelkey did not pay the towing and storage charges before or after the auction, at which no third-party bid on the Honda. Ultimately, Dan's City disposed of the car through trade. App. 25.

On March 27, 2009, Pelkey filed suit against Dan's City alleging, in part, that Dan's City's actions violated RSA 262,[1] which regulates the towing, sale and disposal of a vehicle from private property without the owner's consent ("non-consensual tow"). Pelkey also claimed Dan's City breached the common law duty of a bailee to use reasonable care to ascertain the identity of a vehicle's owner, to return it to him, and to use reasonable care in disposing of the vehicle. Pelkey additionally asserted that Dan's City violated New Hampshire's Consumer Protection Act, RSA 358:A-2, by making false statements about the vehicle on the Notice of Removal sent to the DMV, by failing to follow the procedures set forth in RSA 262, and by failing to cancel the auction.

On May 22, 2010, Dan's City moved for summary judgment on all counts, asserting that it was a motor carrier of property for purposes of this case, that Pelkey's claims arose out of the non-

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1 *See* 262:36-a, 262:37, 262:38, 262:39, and 262:40-a. App. 34-36.

consensual towing services provided by Dan's City, and that all of Pelkey's claims were preempted by 49 U.S.C. §14501(c)(1). On December 17, 2010, the Hillsborough County Superior Court granted Dan's City's motion for summary judgment, (Opinion, App. 33) finding that the plaintiff's claims "relate to Dan City's retention of a towed vehicle without notifying him; Dan's City's alleged sale of the towed vehicle as an abandoned vehicle under New Hampshire law; and Dan's City's alleged failure to comply with state requirements regarding Dan's City's towing and handling of abandoned vehicles. (cite omitted). These claims relate specifically to Dan's City's handling of the vehicle it tows, i.e., its service regarding the property it transports,' and expressly seek the enforcement of state laws related to duties owed stemming from the transportation of property." Opinion, App. 31-32. "The Court finds that the plaintiff's claims against Dan's City relate to Dan's City's service and therefore fall within the scope of claims preempted by 49 U.S.C. §14501(c)(1)." Opinion, App. 32.

On April 10, 2012, the Supreme Court of New Hampshire (hereinafter the "New Hampshire Supreme Court") reversed the trial court's decision, concluding that "plaintiff's action for wrongful disposition of his vehicle under state law is not preempted under 49 U.S.C. §14501(c)(1)." Slip Opinion, App. 22. In reaching this decision, the New Hampshire Supreme Court stated that "[w]e are convinced 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 storing charges secured by a lien." Slip

Opinion, App. 10. The New Hampshire Supreme Court reasoned that Congress did not intend to displace state law causes of action against custodians of towed vehicles (Slip Opinion, App. 10) in part because such claims are not related to the "transportation of property." Slip Opinion, App. 13. But, even if these claims could be considered related to the "transportation of property," the New Hampshire Supreme Court concluded that these claims are not sufficiently related to the towing company's "service" to be preempted because the claims arise out of the custodian's act of disposing of the vehicle – not towing it. Slip Opinion, App. 19. The New Hampshire Supreme Court also opined "that the absence of any federal remedy for private injuries of the kind allegedly suffered by the plaintiff also supports the inference that Congress did not intend to displace the operation of state laws in this context." Slip Opinion, App. 20.

REASON FOR GRANTING THE PETITION

THIS COURT SHOULD RESOLVE THE SPLIT AMONG STATE SUPREME COURTS - AND BETWEEN A STATE SUPREME COURT AND A CIRCUIT COURT - AS TO WHETHER 49 U.S.C. §14501(c)(1) PREEMPTS STATE LAWS REGULATING THE SALE AND DISPOSAL OF A TOWED VEHICLE, AND THE ENFORCEMENT OF THOSE LAWS AGAINST A TOW-MOTOR CARRIER THROUGH A STATE S CONSUMER PROTECTION ACT.

I. This Case Squarely Presents A Conflict.

In *Rowe v. New Hampshire Motor Transport Ass'n.,* this Court was asked to determine, in part, if 49 U.S.C. §14501(c)(1) preempted Maine law requiring motor carriers to provide a special delivery service designed to ensure that cigarettes were not being sold to minors. *Rowe v. New Hampshire Motor Transport Ass'n.,* 552 U.S. 364, 371 (2008). §14501(c)(1) provides, in pertinent part, that:

> "a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier....with respect to the transportation of property."

49 U.S.C. §14501(c)(1). Tow trucks are motor carriers of property within the meaning of 49 U.S.C. §14501(c)(1). *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 430 (2002).

In analyzing whether this Maine law was "related to" the price, route, or service of a motor carrier, this Court construed "related to" as it had in *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992) (holding that a state enforcement action is "related to" the price, route or service of an airline carrier, and therefore preempted, if the state enforcement action has "a connection with, or reference to" carrier rates, routes, or services). Applying the *Morales* principle to the facts in *Rowe*, this Court held that in regulating delivery service

procedures, Maine state law focused on trucking and similar services, thereby creating a direct "connection with motor carrier services," thus preempting same. *Rowe*, 552 U.S. at 369.

Since *Rowe* was decided, the 6th Circuit, the Supreme Court of Alabama (hereinafter the "Alabama Supreme Court"), and the New Hampshire Supreme Court have all relied upon *Rowe* in determining if Congress intended 49 U.S.C. §14501(c)(1) to preempt state enforcement actions against a tow-motor carrier arising out of its sale of a towed vehicle for unpaid towing and storage fees. *See Ware v. Tow Pro Custom Towing and Hauling, Inc.*, 289 Fed. Appx. 852 (6th Cir. 2008) (not published in F. Supp.); *Weatherspoon v. Tillery Body Shop, Inc.*, 44 So.3d. 447 (Ala. 2010); *Robert Pelkey v. Dan's City Used Cars, Inc. d/b/a Dan's City Auto Body,* Slip Opinion (4-10-2012) at App. 5. In doing so, the 6th Circuit and the Alabama Supreme Court held that state law regulating the sale and disposal of a towed vehicle is preempted by §14501(c)(1). *Ware*, 289 Fed. Appx. at 856; *Tillery*, 44 So. 3d at 448. On a fact pattern almost identical to those in the *Ware* and *Tillery* cases, the New Hampshire Supreme Court reached the opposite conclusion. *Pelkey*, *supra*, at App. 22.

Thus in *Ware*, plaintiffs' truck was towed from a truck stop by Tow Pro Custom Hauling, Inc. ("Tow Pro") without the Wares' knowledge or consent. *Ware*, 289 Fed. Appx. at 853. When Danny Ware found out where their truck was being stored, he contacted Tow Pro and was told he would need to pay outstanding towing and storage fees before Tow Pro

would release the truck. *Id.* Tow Pro also informed the Wares' legal counsel, and subsequently the Wares, that the truck was subject to sale at auction if the outstanding fees were not paid in ten days. *Id.* at 853-854. When no payment was forthcoming, Tow Pro published notices of the sale in a local newspaper, and ultimately sold the vehicle to Tow Pro's owner. *Id.* at 854.

The Wares brought suit against Tow Pro based, in part, on Tow Pro's alleged failure to comply with a Tennessee law which sets out the circumstances under which a garage keeper in possession of a towed vehicle obtains a lien on it for towing and storage charges. *Id.* at 856. The Wares also claimed, in part, that Tow Pro converted their truck by failing to provide the Wares sufficient notice of the sale of their vehicle, as required under Tennessee law. The Sixth Circuit, however, held that the Wares' claims relate on their face to the transportation of property, which as defined by §131020 (23) includes storage, and thus the Wares' claims fall within §14501(c)'s preemptive reach. *Id.* (citing in part to *Ace Auto Body & Towing v. City of New York*, 171 F.2d 765 (2nd. Cir. 1999) (rejecting the argument that "transportation" as it is used in §14501(c)(1) does not include "storage," and criticizing *Rhode Island Pub. Towing Ass'n v. Rhode Island*, Civ. No. 96-454ML, 1997 WL 135571 (D.R.I. Feb. 28, 1997) (not published in F. Supp.) for ignoring the broader statutory definition of the term transportation that Congress gave it). The 6th Circuit therefore affirmed the district court's ruling preempting the Wares' claims, concluding the lower court was "clearly correct in light of the plain

language of the statute and the Supreme Court's ruling in *Rowe v. New Hampshire Motor Transport. Ass'n.*, absent a statutory exemption from preemption.[2] *Id.* at 856 (citing to *Rowe v. New Hampshire Motor Transport Ass'n.*, 552 U.S. at 371).

Similarly, in *Weatherspoon v. Tillery Body Shop, Inc.*, plaintiff Debra Weatherspoon's Chevrolet Blazer was towed by Tillery Body Shop, Inc. ("Tillery") without her knowledge after police determined it was abandoned. *Weatherspoon*, 44 So. 3d at 448. Four months later, Tillery published a notice in the local paper for three consecutive weeks stating that the Blazer would be sold at public auction. *Id.* The auction was held, and a third-party purchased the Blazer from Tillery, who reported that the Blazer had been sold in compliance with the Alabama law which governs the sale of abandoned vehicles. *Id.* at 449.

Weatherspoon subsequently sued Tillery, alleging a violation of state statutes regulating towing services, including the sale and disposal of a vehicle for unpaid towing and storage fees, as well as numerous other claims, including fraudulent suppression of Tillery's duty to disclose to

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[2] The 6th Circuit did not reach the issue of whether an exemption to preemption applied in this case because plaintiffs failed to raise the issue in the lower court. *Ware*, 289 Fed. Appx. at 858 (noting that the California Court of Appeals in *CPF Agency Corp. v. Sevel's 24 Hour Towing Serv.*, 34 Cal.Rptr.3d 120 (Cal.Ct.App.2005) held that plaintiff's claim that a towing service had overcharged it for storage fees was expressly excepted from preemption.

Weatherspoon that it had her vehicle. *Weatherspoon*, 44 So.3d. at 448. In considering Tillery's claims, the Alabama Supreme Court reasoned that her claims related specifically to the towing company's handling of the vehicles it towed, and expressly sought the enforcement of state laws related to duties owed stemming from the transportation of the truck. *Id.* The Alabama Supreme Court therefore held that Tillery's state law claims against the towing company were preempted by 49 U.S.C. §14501(c)(1). *Id.*

In doing so, the Alabama Supreme Court rejected several arguments made by the *Weatherspoon* dissent, (Murdock, J. dissenting), and arguments made in the 6th Circuit dissenting opinion in *Ware* (Griffin, J., concurring in part and dissenting in part). *See Weatherspoon*, 44 So. 2d at 459; *Ware,* 289 Fed. Appx. at 858. Focusing on the definition of storage, the *Ware* dissent construed storage to apply to the freight and cargo being transported by a motor carrier, not to the storage by the motor vehicle carrier of a vehicle it had towed. Similarly, the dissent in *Weatherspoon* argued that storage is not sufficiently related to a price, route or service of a tow truck for preemption to apply. *Id.* (citing to *Rhode Island Public Towing Ass'n, Inc. v. State,* (No. CV-96-154 ML, Feb. 28, 1997 D.K.I. 1997) (not published in F. Supp.). The dissent in *Weatherspoon* also argued that the States' historic powers are not to be superseded by a Federal Act unless that is the clear and manifest purpose of Congress, which it did not find to be true in this case. *Weatherspoon*, 44 So. 2d at 463. It viewed Congress's failure to include a lack of remedy where

a tow truck operator wrongfully disposes of a vehicle as a strong indicator that Congress simply did not intend for federal law to preempt state law in this specific regard. *Id.*

II. The Issue Presented By The Conflict Is Of Great Practical And Recurring Importance, And Only This Court Can Resolve It.

The New Hampshire Supreme Court, and the 6th Circuit and the Alabama Supreme Court, reached opposite conclusions as to whether §14501(c)(1) preempts state law related to the sale and disposal of towed vehicles for unpaid towing and storage charges. This split occurred despite the fact that all three courts were faced with a nearly identical fact pattern where a vehicle was towed without the knowledge or consent of the owner; the owner failed to pay the towing and storage charges due; the tow-motor carrier sold the vehicle to obtain payment for its services; and the owner sued the tow-motor carrier alleging violation of state laws governing the sale of a towed vehicle for unpaid towing and storage charges, various common law claims alleging a duty on the part of the tow-motor carrier to return the towed vehicle to its owner, and consumer protection act or fraud claims. In addition, all three courts relied upon *Rowe* in assessing whether Congress intended to preempt the state law in question, and whether the plaintiff's claims were "related to" the "service" of a tow-motor carrier. All three courts likewise construed the same definition of "transportation," again reaching differing results. The split among these courts therefore could not be

clearer, and this Court is the only Court that can resolve this issue.

This Court should grant this Petition for a writ of certiorari because the situation presented – i.e. the towing of a vehicle without the knowledge or consent of the owner – is a routine service provided by tow-motor carriers in every city and town in this country. Tow-motor carriers need to know whether with every non-consensual tow they face a potential lawsuit brought by an unhappy vehicle owner who fails to timely claim his vehicle, fails to pay for the towing and storage charges, and then loses that vehicle at auction. A definitive ruling on the scope of preemption under §14501(c)(1) with respect to the sale and disposal of a towed vehicle will also provide state and local governments with guidance as to the general types of laws and ordinances related to tow truck operations which are preempted under §14501(c)(1). This would, in turn, avoid needless litigation in the lower courts over a very real situation which tow-motor carriers, and owners of vehicles towed without the owner's knowledge and consent, will continue to face on a daily basis.

III. The Decision Below Is Incorrect.

In rejecting the well-reasoned opinions of the Alabama Supreme Court and the 6th Circuit on the scope of §14501(c)(1) preemption with respect to tow-motor carriers, the New Hampshire Supreme Court created an artificial distinction between the act of towing, and the necessary storage and possible disposal of the towed vehicle. This artificial distinction is at odds with the plain meaning of §14501(c)(1). The New Hampshire Supreme Court's

decision that the storing of vehicles is not sufficiently related to a towing service is similarly at odds with the plain meaning of transportation as defined in §13102(23), which includes storage. Moreover, the New Hampshire Supreme Court has totally ignored the obvious economic impact which making tow-motor carriers subject to multiple state and local laws and ordinances will have on tow-motor carriers. *See generally R. Mayer of Atlanta, Inc.*, 158 F.3d 538, 546 (11th Cir. Ga. 1998), at fn6. In addition, the New Hampshire Supreme Court's focus on the lack of a federal remedy is misplaced. Congress undoubtedly recognized that there are other precautionary measures which a state or municipality can take to limit, if not totally prevent, situations where a vehicle owner who truly has not abandoned it fails to claim the vehicle in a timely manner.

CONCLUSION

The Court should grant the Petition for a writ of certiorari and reverse the decision of the Supreme Court of New Hampshire.

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