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

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

Respondent's arguments opposing certiorari misconstrue both Petitioner's arguments as well as the applicable law. Respondent also glosses over the clear split of authority between the Alabama Supreme Court and the New Hampshire Supreme Court on the question of whether 49 U.S.C. § 14501(c)(1) preempts state law claims against towing companies that dispose of towed vehicles because of unpaid towing and storage fees. *See 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*, 163 N.H. 483 (2012). Given that these two courts analyzed the same federal statute, and interpreted the same decisions of this Court in reaching their opposite conclusions, the issue of the preemptive effect of 49 U.S.C. § 14501(c)(1) in cases such as this one is ripe for review. This Court has jurisdiction to hear this matter, and it should determine now whether federal law preempts state common law and statutory damage claims arising out of the towing, storage, and disposal of vehicles towed without their owners' consent, so that state and federal courts around the country have clear guidance on this important issue.

REASON FOR GRANTING THE WRIT

THE COURT HAS JURISIDICTION TO HEAR THIS CASE AND THE EFFECT OF THE NOW UNSETTLED LAW ON THE TOW TRUCKING INDUSTRY MERITS THIS COURT'S ATTENTION.

I. The New Hampshire Supreme Court's Decision in *Pelkey* Is An Appealable Final Judgment.

The *Pelkey* decision is a final decision within the meaning of 28 U.S.C. §1257. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 485 (1975). As in *Cox*, the New Hampshire Supreme Court's decision is final on the issue of preemption, and that federal issue is not subject to further review in the state courts. *See id.* In addition, as in *Cox*, Petitioner here will be liable for damages if the elements of the state cause of action are proved, and will be put to the unfair cost and expense of defending an action that is barred by federal law if the New Hampshire Supreme Court's ruling on preemption is erroneous. *See id.* In both *Cox* and other cases, this Court has permitted review in these circumstances to avoid the mischief of economic waste and of delayed justice. *See id. See also Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945).

Moreover, even if Petitioner prevailed at trial and made further consideration of the federal preemption question unnecessary, the clear conflict

between the Alabama Supreme Court and the New Hampshire Supreme Court would remain unreviewed, leaving an important question of federal law unresolved. *See Cox,* 420 U.S. at 485. This would undermine the important federal policy embodied in 49 U.S.C. § 14501(c)(1), and also leave unanswered a question which is of practical and daily importance to the tens of thousands of tow truck operators in this country.

This Court has already recognized that the general issue of state and local regulation of motor carriers is worthy of its attention. *See Rowe v. New Hampshire Motor Transport Ass'n*, 552 U.S. 364, 369 (2008); *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424 (2002). In order to give prompt justice in the instant case, and ensure clarity on an important federal preemption issue so that the tow trucking industry is not left in limbo, this Court should follow the pragmatic approach it has followed in the past in determining finality, *see Cox,* 420 U.S. at 486, and conclude it has jurisdiction to hear this matter.

II. The Issues In This Case Merit Review Because They Have Generated Conflicting Decisions In Multiple Cases Where A Vehicle Owner Sues A Towing Company Which Disposes Of A Vehicle To Recoup Unpaid Towing And Storage Charges.

Respondent's arguments against certiorari are based upon immaterial factual distinctions between this case and the *Weatherspoon* and *Ware* cases,

where the latter courts reached a contrary conclusion to that of the New Hampshire Supreme Court on the preemption issue. *Weatherspoon*, 44 So. 3d at 447; *Ware v. Tow Pro Custom Towing & Hauling, Inc.*, 289 F. App'x, 852 (6th Cir. 2008) (not selected for publication); *Pelkey*, 163 N.H. at 483. All of these cases involve claims by vehicle owners seeking damages against a towing company after a towed vehicle has been stored, towing and storage fees are not paid, and the towing company disposes of the vehicle to cover the bill for unpaid fees.[1]

Respondent's contention that claims arising out of wrongful disposal of a vehicle are somehow not related to a towing company's services ignores the reality that disposal only occurs because fees for the services, including both towing and storage services, are unpaid. There is a clear relationship between the disposal of a towed vehicle and the towing company's transportation services, as disposal is nothing but a

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[1] Petitioner notes for the record, however, that Respondent's portrayal of the facts of this case is somewhat misleading. It is undisputed that Respondent and his counsel knew that Mr. Pelkey's vehicle had not been sold to a third-party at auction in sufficient time for Mr. Pelkey to reclaim his vehicle. Mr. Pelkey, however, apparently did not want to pay any storage fees at all, and instead, on May 25, 2007, through his counsel proposed that Petitioner waive all storage charges that had accumulated since February 3, 2007. N.H.S.Ct. Def.'s App. 86-87. Further, the letter which Petitioner sent to Respondent about his vehicle was not simply returned to Petitioner. The letter was returned by the Post Office, which indicated Mr. Pelkey had moved and left no address. *Id.* at 5-6.

means for obtaining payment for services rendered. Thus, while the specific facts of claims against towing companies for wrongful disposal of a towed vehicle will always vary somewhat, the preemption analysis related to nonconsensual tows remains the same, i.e., whether the actions of the tow truck operator are "related" to a towing truck's service, and whether these actions are encompassed within the statutory definition of "transportation."

This pattern of cases is likely to continue to repeat itself, as disposal of towed vehicles is the only means for a tow truck operator to recover unpaid fees for towing and storage charges where the vehicle owner, for whatever reason, fails to claim the vehicle. Whether these state law actions brought by vehicle owners against towing companies over alleged wrongful dispositions of vehicles are preempted by federal law should therefore be resolved by this Court now. The fact that Respondent is critical of the depth of analysis in the *Weatherspoon* and *Ware* decisions does not mean that the Court needs to wait until more courts have weighed in before deciding this issue. The resolution of the preemption issue rests primarily on how criteria already identified by this Court are applied to this general fact pattern.

III. The Disagreement Between the New Hampshire Supreme Court and Other Courts About Whether The Absence Of A Federal Remedy For Aggrieved Vehicle Owners Should Affect A Preemption Decision Is An Additional Reason For The Court To Decide This Appeal.

The New Hampshire Supreme Court explicitly rejected the Alabama Supreme Court's conclusion that "the failure of Congress to provide an alternative remedy upon preemption is [no] basis for finding that [the plaintiff's] claims are not preempted." *Pelkey*, 163 N.H. at 496. The state courts are clearly in a state of confusion as to when the absence of a remedy permits a court to bar preemption. The Court should address this confusion by clarifying whether the absence of a federal remedy against a tow truck operator is a bar to preemption of claims that are within the scope of § 14501(c)(1).

IV. The Price Exception Will Not Save Respondent's Claims.

Respondent suggests that the "price" exception to preemption, as set forth in § 14501(c)(2)(C), would save his claims even if this Court determined that Respondent's claims were otherwise preempted.[2]

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[2] Respondent acknowledges that this issue was not ruled upon by the New Hampshire Supreme Court, nor has Respondent filed a cross-petition for a writ of certiorari related to same.

Respondent's claim that this "price" exception would save his case, however, ignores the legislative history of § 14501(c). § 14501(c)(2)(C) is clearly intended to exempt only the actual prices charged for nonconsensual towing services from preemption, and is not intended to allow states and municipalities to regulate other aspects of the towing industry. *See R. Mayer of Atlanta, Inc. v. City of Atlanta*, 158 F. 3d 538, 544 (11th Cir. Ga. 1998), disapproved in part on other grounds in *Ours Garage & Wrecker Service, Inc.*, 536 U.S. at 424 (citing extensively to the legislative history related to this amendment). *See also Harris County Wrecker Owners for Equal Opportunity v. City of Houston*, 943 F. Supp. 711, 723 (S.D. Tex. 1996) (discussing the rejection of the Senate's proposed amendment).