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 for Respondent

BRIAN C. SHAUGHNESSY
Kazan, Shaughnessy, Kasten & McDonald, PLLC
746 Chestnut Street
Manchester, NH 03104
(603) 644-4357
brian@kskmlaw.com

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

Counsel for Respondent

February 2013

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 . . . with respect to the transportation of property," preempts negligence and consumer-protection-law claims by a vehicle owner against a towing company that disposed of his vehicle.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **Pages**

FEDERAL STATUTES, LAWS, AND LEGISLATIVE HISTORY

STATE STATUTES AND RULES

OTHER AUTHORITIES

INTRODUCTION

This case presents the question whether federal law provides towing companies in possession of vehicles they have towed free rein to do whatever they choose with those vehicles—sell them, trade them, or keep them for their own private use, even when the vehicle owners have sought their cars' return—or whether state laws may protect vehicle owners' rights to their property and provide remedies to vehicle owners whose cars are sold against their will.

Respondent Robert Pelkey brought state-law claims against petitioner Dan's City Used Cars, a towing company that failed to provide him notice of its plan to auction his car, held an auction to sell the car even after Mr. Pelkey explained that he wanted to arrange for the car's return, represented that it had sold the car at auction when it had not, and eventually traded the car away without compensating him for his loss. Dan's City argues that Mr. Pelkey's claims are preempted by 49 U.S.C. § 14501(c)(1), which prohibits states from enacting or enforcing any "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." As the New Hampshire Supreme Court held below, however, § 14501(c)(1) does not preempt state laws protecting the property rights of owners of cars in the possession of towing companies. It does not create a regulatory vacuum in which towing companies may convert people's vehicles with impunity.

States and municipalities commonly regulate how towing companies or other entities in possession of towed vehicles can sell or otherwise dispose of those vehicles. These laws provide processes for companies in possession

of abandoned vehicles to gain or transfer ownership in the vehicles, and they protect vehicle owners against having their property sold against their wishes. In this case, Dan's City sought the benefit of state laws that allow custodians of towed vehicles to sell or otherwise dispose of those vehicles under certain circumstances. Yet it seeks to avoid any liability for violating state-law requirements for the sale or disposal of a towed vehicle. If § 14501(c)(1) preempts the enforcement of state laws and duties by vehicle owners whose cars have been sold against their wishes, however, then it also preempts state law processes for transferring title to a towed vehicle.

The process of transferring ownership or otherwise disposing of a car that has been towed is, at best, only tenuously connected to transportation prices, routes, or services. Requiring towing companies to abide by state laws forbidding them from acting deceptively or unreasonably in selling a car in their possession will not significantly affect their towing services. And whether a vehicle owner can be compensated when a towing company sells his car against his will is far removed from Congress's deregulatory goal in enacting § 14501(c)(1). State laws concerning the manner in which a towing company sells or otherwise disposes of a towed car in its possession are not "related to a [motor carrier] price, route, or service . . . with respect to the transportation of property," and the decision below should be affirmed.

STATEMENT OF THE CASE

A. Federal Statutory Background

In 1978, concluding that "maximum reliance on competitive market forces would favor lower airline fares and better airline service," Congress enacted the Airline Deregulation Act (ADA). *Rowe v. N.H. Motor Transport*

Ass'n, 552 U.S. 364, 367 (2008) (internal quotation marks and citation omitted). "To ensure that the States would not undo federal deregulation with regulation of their own, the ADA included a pre-emption provision, prohibiting the States from enforcing any law 'relating to rates, routes, or services' of any air carrier." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378-79 (1992) (citation omitted).

In 1980, Congress similarly deregulated the trucking industry. *See* Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793. Congress did not, at that time, however, expressly preempt state regulation. In 1994, seeking to create a level playing field between air carriers and motor carriers, Congress "sought to pre-empt state trucking regulation." *Rowe*, 552 U.S. at 368. Specifically, Congress included a provision related to motor carriers in a section of the Federal Aviation Administration Authorization Act of 1994 (FAAAA) entitled "preemption of intrastate transportation of property." Pub. L. No. 103-305, § 601(c), 108 Stat. 1606. As currently codified, that provision provides that 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 . . . or any motor private carrier, broker, or freight forwarder with respect to the transportation of property." 49 U.S.C. § 14501(c)(1).

The conference report accompanying the FAAAA noted that "41 jurisdictions regulate, in varying degrees, intrastate prices, routes and services of motor carriers." *See* H.R. Conf. Rep. 103-677, at 86, *reprinted in* 1994 U.S.C.C.A.N. 1715. "Typical forms of regulation," the report explained, "include entry controls, tariff filing and price regulation, and types of commodities carried." *Id.*; *see also* Statement of President William J. Clinton on

Signing the FAAAA, 30 Weekly Comp. of Pres. Doc. 1703 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1762-1 ("State regulation preempted under this provision takes the form of controls on who can enter the trucking industry within a State, what they can carry and where they can carry it, and whether competitors can sit down and arrange among themselves how much to charge shippers and consumers."). The report did not suggest that Congress was concerned with state regulations concerning the ownership and disposition of towed vehicles. Indeed, the report listed the jurisdictions that did not regulate intrastate prices, routes, and services as Alaska, Arizona, Delaware, the District of Columbia, Florida, Maine, Maryland, New Jersey, Vermont and Wisconsin. At the time of the FAAAA's enactment, all of those states regulated the sale or other disposal of towed or abandoned vehicles, as they continue to do today.[1]

In 1995, Congress added an exemption to the preemption provision stating that it "does not apply to the authority of a State or a political subdivision of a State to enact or enforce a law, regulation, or other provision

---

[1]Six of the states allowed liens for towing charges that could be enforced through sale under certain circumstances, or otherwise allowed the sale or transfer of ownership of towed or removed vehicles by the entities in possession of them if certain conditions were met. *See* Alaska Stat. § 28.10.502 (1994); Del. Code Ann. tit. 21 § 6901 (1994); Fla. Stat. Ann. § 713.78 (1994); Me. Rev. Stat. Ann. tit. 29 § 2610 (1994); N.J. Stat. Ann. § 39:4-56.6 (1994); Wis. Stat. Ann. § 779.415 (1994). The other four states allowed a governmental body to sell abandoned vehicles, *see* D.C. Code Ann. § 40-812.2 (1994); Md. Code Ann. Transp. § 25-207 (1994); Vt. Stat. Ann. tit. 24 § 2272 (1994), or to transfer ownership in them to the person in possession of them after that person submitted certain documentation. *See* Ariz. Rev. Stat. § 28-1405 (1994).

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." 49 U.S.C. § 14501(c)(2)(C).

B. Factual Background

On February 3, 2007, Dan's City towed Robert Pelkey's 2004 Honda Civic from the parking lot of his apartment complex without his knowledge. JA 9. The car was towed pursuant to the complex's policy that required tenants to move their cars during snowstorms. At the time of the towing, Mr. Pelkey was confined to bed because of a serious medical condition. *Id.* at 9. The car was parked in a designated handicapped-accessible parking spot, displayed a valid and current disability license plate, was properly registered, and displayed a current parking sticker issued by the apartment complex. *Id.* at 7.[2]

Soon after the towing, and before he realized his car was no longer in the parking lot, 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. *Id.* at 9-10.

New Hampshire, like other states, regulates the sale or other disposal of motor vehicles that have been removed from public or private property and are in the possession of a garage or storage company. At the time Mr. Pelkey's

---

[2]In its description of the proceedings below, Dan's City notes that various of the facts in the case are disputed. *See, e.g.*, Pet'r Br. 13. On a motion for summary judgment, the evidence and all inferences drawn from it are considered in the light most favorable to the non-moving party—here, Mr. Pelkey. *See, e.g.*, *Bond v. Martineau*, 53 A.3d 608, 611 (N.H. 2012).

car was towed, Chapter 262 of the New Hampshire code provided that if a vehicle that had been removed and stored was unclaimed for 30 days, the custodian of the vehicle could sell or otherwise dispose of the vehicle after giving proper notice of the sale. N.H. Rev. Stat. Ann. §§ 262:36-a, 262:37 (2007) (Pet. App. 34-35). If the last address of the vehicle's owner was known to the garage owner, or could be ascertained through "the exercise of reasonable diligence," the garage owner had to provide the owner notice of the time and place of the sale by registered or certified mail, or in person, at least 14 days before the sale. *Id.* § 262:38 (Pet. App. 35). A vehicle could be disposed of without notice if it was no longer in condition for legal use, upon written notice to and approval from the state department of safety. *Id.* § 262:36-a(III) (Pet. App. 35). The department would approve disposal if, among other reasons, the car's value was under $500, it had major mechanical problems such as a transmission beyond repair, or it was not in condition for legal use on a public way. N.H. Code Admin. R. Saf-C § 1913.02 (2007) (NH App. 36-37).

While Mr. Pelkey was in the hospital, Dan's City filed a "Notice to the Director of Removal" with the New Hampshire Department of Safety, informing the department that it had removed the car and seeking permission to sell the car without notice. Pet. App. 24; NH App. 64. Although Mr. Pelkey's car was fully operational, had fewer than 8,000 miles, and had a Blue Book value of approximately $12,000, Dan's City stated that the car's market value was under $500 and that it was not in condition for legal use on a public way. JA 11. The Department of Safety told Dan's City that it had to provide Mr. Pelkey with notice before sale of the vehicle and provided Mr. Pelkey's address. Pet. App. 24; NH App. 67.

Instead of sending Mr. Pelkey notice that it intended to sell his car or providing the time and place of the sale, however, Dan's City sent him a certified letter stating that it had towed his vehicle and considered it abandoned. Pet. App. 24. Because of Mr. Pelkey's lengthy hospitalization, the letter was returned, with a checked box indicating that Mr. Pelkey had moved and left no address. *Id.* The record contains no evidence that Dan's City made any further effort to find Mr. Pelkey's address or to contact Mr. Pelkey to inform him that it intended to sell his car.

After returning home from the hospital, Mr. Pelkey discovered that his car was not in the 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 to explain 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. JA 10.

Despite being told that Mr. Pelkey wanted to arrange for the return of the car, Dan's City went forward with the auction on April 19, 2007. No third party bid on the car, so it remained in Dan's City's possession. Nonetheless, when Mr. Pelkey's lawyer's office made further inquiries, Dan's City represented that the vehicle had been sold. Pet. App. 3; *see also* JA 10 (writ of summons reflecting belief that vehicle had been sold at auction). Dan's City later traded the car to a third party, without providing prior notice to Mr. Pelkey. Mr. Pelkey never received any compensation for the loss of his car. Pet. App. 3.

C. Proceedings Below

Mr. Pelkey filed suit against Dan's City, alleging, as relevant here, that Dan's City engaged in deceptive acts that violated the New Hampshire Consumer Protection

Act and that it breached statutory and common-law duties to Mr. Pelkey, such as the duty to use reasonable care in disposing of the vehicle. JA 12-14.[3] The superior court granted summary judgment to Dan's City on the Consumer Protection Act and negligence claims, holding them preempted by 49 U.S.C. § 14501(c)(1). 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 New Hampshire Supreme Court rested its decision on two 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.

---

[3]Mr. Pelkey also brought claims against Dan's City under the Fair Housing Act, 42 U.S.C. § 3613, and under New Hampshire Rev. Stat. Ann. § 540-A:3. The Superior Court granted summary judgment to Dan's City on the § 540-A:3 claim and dismissed the Fair Housing Act claim on statute of limitations grounds. *See* Sup. Ct. Docket No. 39, NH App. 20, 22. Mr. Pelkey did not appeal the judgment on those claims, and they are not at issue here. Mr. Pelkey also brought various claims against his apartment complex, Colonial Village, that are likewise not at issue here.

"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; *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 in accordance with the terms of RSA chapter 262." (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. "Although the ordinary meaning of the phrase 'relating to' is a broad one," the court noted, "it is not so broad as to encompass all possible private civil claims against any motor carrier." *Id.* "The 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." *Id.* at 17. 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 the car. *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 absence 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. 20-21.

Having found that Mr. Pelkey's claims were not preempted because the state laws at issue were not related to a towing company's "service . . . with respect to the transportation of property," the court did not consider 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."

SUMMARY OF ARGUMENT

As the New Hampshire Supreme Court correctly held, claims related to the sale or disposal of a towed car in a towing company's possession are not preempted by 49 U.S.C. § 14501(c)(1). Such claims do not involve the enforcement of a state law "related to a price, route, or service of any motor carrier . . . with respect to the transportation of property."

I.A. State-law claims related to the disposal of a towed car are not sufficiently related to motor carrier prices, routes, or services to fall within the scope of § 14501(c)(1).

To begin with, the state laws and duties at issue here do not regulate towing services; they do not reference towing services; and their enforcement will not have a significant impact on the provision of towing services. Further, they do not apply to Dan's City as an entity that tows vehicles, but as an entity in possession of a towed vehicle that it wants to sell. And that Dan's City sought to collect payment for its towing services through its sale or trade of Mr. Pelkey's car does not make Mr. Pelkey's claims sufficiently related to the towing services to be preempted. Not every action a towing company takes to collect on a debt for towing services, no matter how removed from the services themselves, is "related to" those services within the meaning of § 14501(c)(1).

In addition, the sale or trade of a towed vehicle is not itself a motor carrier "service." Whatever other limitations there are on the definition of "services," at the least, to be a service under the statute, the action must be performed for someone else, as part of a bargained-for exchange. Here, Dan's City did not attempt to sell and eventually trade away Mr. Pelkey's car for any customer; it traded away the car for its own benefit.

Moreover, Congress specified in § 14501(c)(1) that it was preempting only the enforcement of state laws related to motor carrier prices, routes, or services "with respect to the transportation of property." In enacting the FAAAA, Congress was concerned with regulation of the transportation of property—that is, with its movement from one place to another. The sale or trade of a car that has been towed is not related to the movement of the vehicle. It is a process distinct from transporting the vehicle, and claims related to that process are not preempted by the FAAAA.

Overall, state-law claims protecting vehicle owners from deceptive and abusive behavior in the disposal of their cars are simply too tenuous, remote, and peripheral to transportation services to be preempted. Likewise, such claims are remote from Congress's purpose, in enacting the FAAAA, of keeping states from substituting their own demands in place of competitive market forces in determining what services a motor carrier provides. The state laws underlying Mr. Pelkey's claims make no demands at all on motor carriers in their capacity as providers of transportation services.

I.B. To the extent it is based on common-law duties, Mr. Pelkey's negligence claim is not preempted for the additional reason that it does not involve enforcement of "a law, regulation, or other provision having the force and effect of law." This Court explained in *Sprietsma v. Mercury Marine*, 537 U.S. 51, 63 (2002), that a preemption provision that preempts enforcement of "a law or regulation" is most naturally read not to encompass common-law claims. For the same reasons, the words "a law [or] regulation" in § 14501(c)(1) do not include the common law, and the addition of the words "or other provision" underscores that the preemption provision applies only to positive state enactments.

II. Dan's City argues that the Court need not consider whether state regulatory schemes governing the disposal of towed vehicles are preempted. Yet Dan's City relies on the New Hampshire regulatory scheme governing disposal of towed cars to argue that vehicle owners are sufficiently protected against the actions of abusive towing companies. And in disposing of Mr. Pelkey's car, Dan's City sought to rely on state laws allowing towing companies to sell or otherwise dispose of towed cars under certain circumstances. But if state-law claims pertaining to the

disposal of towed vehicles are "related to a price, route, or service of any motor carrier. . . with respect to the transportation of property," so, too, is direct state regulation of that subject. If § 14501(c)(1) preempts vehicle owners' enforcement of state laws regarding the disposal of towed vehicles, it also preempts state laws permitting towing companies to dispose of towed vehicles and providing procedures for them do so. And although Dan's City claims state criminal laws will protect vehicle owners, if § 14501(c)(1) preempts enforcement of state civil laws relating to the disposal of a towed car, it preempts enforcement of state criminal laws in the area as well.

States have traditionally regulated in the area of disposal of towed or abandoned vehicles, balancing vehicle owners' interests in the return of their vehicles with towing companies' interests in being able to dispose of vehicles in their possession. Such laws are necessary both for towing companies in possession of abandoned vehicles and for vehicle owners whose cars have been towed: Without laws governing the sale of towed vehicles, towing companies in possession of abandoned vehicles would not know how to sell the vehicles to ensure that the new owners can obtain certificates of title. And if state laws pertaining to the disposal of towed vehicles are preempted, vehicle owners will be left without protection or a remedy if their unabandoned towed cars are sold against their will.

ARGUMENT

Mr. Pelkey's claims against Dan's City do not challenge the towing of his car, the way it was towed, or the price for that tow. Rather, they relate to the manner in which Dan's City attempted to sell and ultimately traded away Mr. Pelkey's car. That is, they concern the way in which Dan's City permanently deprived Mr. Pelkey of his property.

Claims related to the sale or other disposal of a towed vehicle do not involve the enactment or enforcement of "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." Moreover, consideration of the consequences of holding state laws governing the sale or other disposal of towed vehicles preempted confirms that Congress could not have intended the provision's preemptive force to extend that far.

I. Mr. Pelkey's Claims Are Not Preempted by Section 14501(c)(1).

A. Claims Related to the Sale or Other Disposal of a Vehicle Do Not Involve the Enactment or Enforcement of a Law "Related to a . . . [Motor Carrier] Service . . . With Respect to the Transportation of Property."

Section 14501(c)(1) does not preempt Mr. Pelkey's claims. Although the statutory language is broad, *see Morales*, 504 U.S. at 383, it does not preempt all state laws affecting motor carriers or all state-law claims against a motor carrier. *See, e.g.*, *id.* at 390. Rather, it preempts only enforcement of state laws that are "related to . . . a [motor carrier] price, route, or service" "with respect to the transportation of property." 49 U.S.C. § 14501(c)(1). Here, Mr. Pelkey's claims relate to the manner in which Dan's City attempted to sell and ultimately traded away his car.[4] These claims are not "related to" Dan's City's

[4]Dan's City notes (at 22) that some of the conduct related to the sale took place before the sale itself, such as Dan's City's failure to make reasonable efforts to identify Mr. Pelkey. But as (continued...)

towing services. And a towing company's sale or trade of a vehicle is not itself a "service" and does not concern "the transportation of property."

1. Although towing is a motor carrier service involving the transportation of property, Mr. Pelkey's claims are not sufficiently "related to" Dan's City's towing services to be preempted. State enforcement actions "relate to" prices, routes, or services if they have "a connection with or reference to" them. *Morales*, 504 U.S. at 384. In determining whether a state law relates to prices, routes, or services, this Court has looked to whether the law "directly regulate[s]," *Rowe*, 552 U.S. at 372, "express[ly] reference[s]," *Morales*, 504 U.S. at 388, or has a "forbidden significant effect" on them. *Id.*

Although the phrase "related to" is broad, this Court has made clear that it has limits. *See N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995) (explaining that "relate to" in ERISA cannot extend "to the furthest stretch of its

---

[4](...continued)
Dan's City itself recognized in seeking certiorari only on the question of whether claims based on laws "regulating the sale and disposal of a towed vehicle" are preempted, Pet. i, Mr. Pelkey's claims against Dan's City all relate to the disposal of the car. His Consumer Protection Act claim challenges deceptive statements made by Dan's City in seeking permission to sell the car, its failure to follow the proper procedures for disposing of a vehicle, and its failure to cancel an auction when Mr. Pelkey's identity and circumstances were revealed. JA 12. And his negligence claim challenges Dan's City's failure to make reasonable attempts to identify Mr. Pelkey before arranging to sell his car, to take reasonable efforts to return the vehicle instead of selling it, and to use reasonable care in disposing of the vehicle. *Id.* at 13.

indeterminacy" because "then for all practical purposes preemption would never run its course" and "Congress's words of limitation [would be a] mere sham"). "[F]ederal law does not pre-empt state laws that affect rates, routes, or services in 'too tenuous, remote, or peripheral a manner.'" *Rowe*, 552 U.S. at 375 (quoting *Morales*, 504 U.S. at 390). And "the state laws whose 'effect' is 'forbidden' under federal law are those with a '*significant* impact' on carrier rates, routes, or services." *Id.* (quoting *Morales*, 504 U.S. at 388, 390) (emphasis in *Rowe*).

Here, first, the Consumer Protection Act, common-law, and statutory duties on which Mr. Pelkey's claims are based do not regulate towing services. They do not, for example, "require carriers to offer a system of [towing] services that the market does not now provide." *Rowe*, 552 U.S. at 372. They do not "establish binding guidelines" that would effectively give consumers an "enforceable right" to a particular towing service. *Morales*, 504 U.S. at 388. And they do not "freeze into place services that carriers might prefer to discontinue in the future." *Rowe*, 552 U.S. at 372. They place no requirements at all on when, where, why, or how tow truck operators tow vehicles. They relate to the transfer of ownership of another person's vehicle, not to the towing of the vehicle.

Second, the state laws and duties underlying Mr. Pelkey's claims do not expressly reference towing services. The Consumer Protection Act claim and the negligence claim (insofar as it is based on the common-law duties of bailment) involve laws and duties that apply in the conduct of trade or commerce or when a person is the custodian of another person's property, whether a towed vehicle is involved or not. *See, e.g.*, N.H. Rev. Stat. Ann. 358-A:2 (Pet. App. 36) (making it unlawful to use deceptive acts "in the conduct of any trade or commerce"). To the extent the

negligence claim is based on statutory duties under Chapter 262, it involves laws that are less general, governing the disposal of "removed" vehicles, N.H. Rev. Stat. Ann. 262:36-a (Pet. App. 34); nonetheless, the word "removed" is not a reference to the *service* of towing.

Third, enforcing the laws and duties underlying Mr. Pelkey's claims would not have a significant effect on towing services. *See Rowe*, 552 U.S. at 375 ("[T]he state laws whose 'effect' is 'forbidden' under federal law are those with a '*significant* impact' on carrier rates, routes, or services." (quoting *Morales*, 504 U.S. at 388, 390)). Mr. Pelkey's claims are based on a law forbidding companies to use deceptive acts in the conduct of their business, and on statutory and common-law duties requiring reasonable efforts to identify the owner and return the towed vehicle, and to use reasonable care in disposing of the vehicle. Dan's City questions whether towing companies will continue towing vehicles if they can be held liable for violating these laws and duties. Pet'r Br. 37. But there is no evidence to suggest that towing companies do not already comply with such laws and duties in the vast majority of instances. It is difficult to believe that towing companies are so dependent on deceptive acts in regard to selling cars and on forgoing reasonable attempts to return vehicles to owners before selling them that they would discontinue or greatly modify their services rather than comply with these laws and duties. Similarly, it is hard to imagine that companies would stop towing or significantly change their services rather than take simple steps such as providing reasonable notice of their intent to auction a person's vehicle or refraining from trading away a vehicle when the owner has expressed willingness to discuss payment.

2. Dan's City argues that "it defies logic" to suggest that actions connected with selling or trading a vehicle that has been towed are not related to towing services. Pet'r Br. 21. According to Dan's City, the claims are "directed at the normal daily activities of a tow truck operator that comes into possession of a vehicle that appears to be abandoned," and it is "disingenuous" to claim that the activities are not "related to" a towing company's services. *Id.* at 31. However, that a law is applied to a towing company does not itself make the law preempted. Even when they are applied to motor carriers, state laws are not preempted under § 14501(c)(1) if they affect prices, routes, or services in only a "tenuous, remote, or peripheral" manner. *Morales*, 504 U.S. at 390 (citation omitted). The state laws and duties being enforced here relate to ownership of towed vehicles and are too remote from Dan's City's towing services to be preempted.

Indeed, that Dan's City is a motor carrier is irrelevant to the laws invoked here. They do not apply to Dan's City as an entity that tows vehicles. Rather, they apply to tow truck operators only to the extent that the operators are in possession of a removed car and seek to dispose of it, the same way that they would apply to anyone in possession of a towed vehicle who sought to sell it. The sale and disposal provisions of New Hampshire Revised Statutes Chapter 262, for example, discuss disposal by a "storage company," sale by "the custodian of the vehicle," and notice by a "garage owner or keeper." Pet. App. 34-35. Thus, they recognize that the entity disposing of a removed vehicle may not be the tow-truck operator at all.

That an action is undertaken by a company that tows cars—even when it is performed on a towed car—does not mean that claims concerning that action are sufficiently "related" to towing to be preempted. For example, tow

truck operators might operate auto repair shops where they tow cars to be fixed. Here, for instance, petitioner also does business as "Dan's City Auto Body." It would provide an unfair advantage to repair shops that provide towing services and disadvantage consumers in an arena far removed from the goals of the FAAAA if state regulation of mechanics or state-law claims based on negligence by mechanics was preempted as to those shops. Likewise, it would be irrational if mechanics could be held accountable for negligent work on a car if the owner dropped the car off at the mechanic's garage, but could not be held accountable if the car had broken down and been towed to the mechanic. Akin to the actions of a mechanic working on a car towed to his shop, Dan's City's actions in attempting to sell and eventually trading away Mr. Pelkey's car are too attenuated from the towing services to be deemed "related to" those services.

3. Dan's City also contends that Mr. Pelkey's claims are related to towing services because they "relate[] to payment" for those services, and "payment for services is an integral and indispensable element of any service transaction." Pet'r Br. 30, 22. Mr. Pelkey's claims, however, do not challenge Dan's City's right to seek payment for services, its charges, or its billing procedures. Rather, his claims relate to Dan's City's disposal of his car. That trading away the car was the means through which the company sought to collect on the debt for towing does not make claims regarding the trade sufficiently related to the towing services to be preempted. If Dan's City were correct, states would be barred by § 14501(c)(1) from regulating abusive debt collectors if they were collecting on a debt for towing, and a towing company could break into a vehicle owner's house, steal items, and then claim that any state-law action based on the theft was preempted

because it was merely seeking payment for services rendered.

In any event, if the fact that the disposal of a vehicle was the means through which a towing company sought payment for a debt for towing services were sufficient for the claims to "relate to" those services, they would relate far more directly to the *price* of those services, because the payment is the payment *of the price*. Claims related to the price of non-consensual towing, however, are exempt from preemption under 49 U.S.C. § 14501(c)(2)(C), which exempts from preemption the enactment or enforcement of "a law, regulation, or other provision 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, if the fact that Dan's City sold Mr. Pelkey's car to collect on a debt for towing services were sufficient to bring Mr. Pelkey's claims within the scope of § 14501(c)(1), the claims would be exempt from preemption under § 14501(c)(2)(C).

In its petition-stage reply (at 7), Dan's City relied on legislative history to argue that the non-consensual tow exception in § 14501(c)(2)(C) was "clearly intended to exempt only the actual prices charged for nonconsensual towing services from preemption." "Congress's authoritative statement," however, "is the statutory text, not the legislative history," *Chamber of Commerce v. Whiting*, ___ U.S. ___, 131 S.Ct. 1968, 1979 (2011) (citation omitted), and the text of § 14501(c)(2)(C) does not limit the exemption to the enforcement of laws directly regulating the prices of non-consensual tows; the statute exempts from preemption the enforcement of any laws "relating to" the price of non-consensual tows. Under ordinary principles of statutory construction, the words "relating to"

in § 14501(c)(2)(C) should be given the same meaning as the words "related to" in § 14501(c)(1). *See, e.g.*, *IBP, Inc. v. Alvarez*, 546 U.S. 21, 34 (2005) ("[It is a] normal rule of statutory interpretation that identical words used in different parts of the same statute are generally presumed to have the same meaning.").[5] Dan's City cannot have it both ways: "Relating to" cannot have a narrow meaning in 49 U.S.C. § 14501(c)(2)(C) while "related to" has a broad meaning in § 14501(c)(1). If Mr. Pelkey's claims are insufficiently related to the price of a non-consensual tow to fall within § 14501(c)(2)(C), they must also be insufficiently related to services to fall within the bounds of preemption under § 14501(c)(1), as their relationship to services is even more attenuated than their relationship to price.

4. Dan's City claims that the challenged activities related to vehicle disposal can themselves be considered "services" within the meaning of § 14501(c)(1) because some courts of appeals have interpreted "services" to include "matters incidental to and distinct from" the point-to-point transportation itself. Pet'r Br. 35. The lower courts dispute whether the word "services" in the FAAAA and ADA is limited to the "the provision of . . .

---

[5] "Related to" and "relating to" are used interchangeably in the FAAAA and ADA. The ADA's preemption provision originally applied to laws "relating to" prices, routes, and services, and that was the language interpreted in *Morales*, 504 U.S. at 383. When it reenacted Title 49 in 1994, Congress changed "relating to" to "related to" but "intended the revision to make no substantive change." *Am. Airlines, Inc. v. Wolens*, 513 U.S. 319, 223 n.1 (1995) (citing Pub. L. No. 103-272, § 1(a), 108 Stat. 745). The conference report for the FAAAA explained, in turn, that it was following the recodification language but that it intended "related to" to have the same meaning as "relating to." H.R. Conf. Rep. 103-677, at 83.

transportation to and from various markets at various times," *Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259, 1266 (9th Cir. 1998) (en banc), or whether it includes other matters that are "appurtenant and necessarily included with the contract of carriage between the passenger or shipper and the airline," such as "ticketing, boarding procedures, provision of food and drink, and baggage handling, in addition to the transportation itself." *Hodges v. Delta Airlines, Inc.*, 44 F.3d 334, 336 (5th Cir. 1995) (en banc) (citation omitted). But regardless of which view of the scope of "services" is correct, at the least, to be a "service," an action must be part of what the airline or motor carrier is providing to its customer. *See, e.g.*, Black's Law Dictionary (9th ed. 2009) (defining service, in the relevant definitions, as "[t]he act of doing something useful for a person or company, usu. for a fee" and "an intangible commodity in the form of human effort, such as labor, skill, or advice").

Even the courts of appeals that use broader definitions of "service" limit the term to "a bargained-for or anticipated provision of labor from one party to another." *Hodges*, 44 F.3d at 336; *Branche v. Airtran Airways, Inc.*, 342 F.3d 1248, 1258 (11th Cir. 2003) ("[E]ven if 'services,' as used in [the ADA], is construed to encompass aspects of air carrier operations beyond the transportation of passengers . . . its definition is nonetheless still limited to the *bargained-for* aspects of airline operations over which carriers compete."); *Travel All Over the World, Inc. v. Kingdom of Saudi Arabia*, 73 F.3d 1423, 1433 (7th Cir. 1996) (noting, in holding that a travel agency's slander and defamation claims against an airline were not preempted, that "[c]ertainly, [the airline's] false statements regarding [the travel agency's] services were not part of any contractual arrangement that [the airline] had with [the

travel agency] or its clients."). Here, the disposal of Mr. Pelkey's car, despite his desire to have it returned, was not a service Dan's City provided to a customer, let alone one that was "necessarily included with the contract of carriage." *Hodges*, 44 F.3d at 336. Dan's City did not trade away Mr. Pelkey's car for the benefit of a customer; it traded away the car to benefit itself.

The "services" at issue in *Rowe*, 552 U.S. 364, this Court's most recent § 14501(c)(1) case, provide a helpful contrast. There, the Court held that § 14501(c)(1) preempted Maine statutes that regulated procedures for delivering tobacco within the state. Delivery is part of the service that shippers provide. *See id.* at 372 (discussing how the laws at issue would affect what delivery services the shippers "offer" and "provide"). When people hire a company to ship them tobacco, part of what they contract for is the delivery of the tobacco to its destination. *See id.* at 373 (noting that "picking-up, sorting, and carrying goods" are "essential details of the carriage itself"). In contrast, when people hire a company to tow away someone else's vehicle, they contract for the towing, not for the sale or trade of the vehicle, a matter in which they have no interest. Indeed, it is likely that property owners who arrange for tows of other people's vehicles expect that the towed vehicles will eventually be returned to their owners, not that ownership in the vehicle will be transferred to a third party.

5. Section 14501(c)(1)'s limitation of its preemptive scope to the enactment or enforcement of laws related to services "with respect to the transportation of property" underscores that actions related to the disposal of towed cars are not preempted. As Justice Scalia has pointed out, the "with respect to the transportation of property" language "limits the scope of preemption to include only

laws, regulations, and other provisions that single out for special treatment 'motor carriers of property,'" leaving states free to enact or enforce laws "that do not target motor carriers 'with respect to the transportation of property.'" *City of Columbus v. Ours Garage & Wrecker Serv.*, 536 U.S. 424, 449 (2002) (Scalia, J., dissenting); *see also* Pet. App. 10-11 ("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*.").

Transportation is defined for the purpose of § 14501(c)(1) as a motor vehicle or other equipment "related to the movement of passengers or property" or "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." 49 U.S.C. § 13102(23). Here, Mr. Pelkey's claims are not based on the movement of his property or services related to that movement; they are based on actions surrounding Dan's City's subsequent attempted sale and trade of his car. The sale or trade of a towed vehicle is not a step in transporting that vehicle, but a process that takes place after the transportation process has been completed. Indeed, as noted above, the New Hampshire statute that allows for sale of a towed vehicle discusses sale by "the custodian of the vehicle," N.H. Rev. Stat. Ann. § 262:37 (Pet. App. 35), demonstrating that the state is regulating companies as custodians of vehicles whose movement has ceased, not as motor carriers transporting property. Further, in some states, the state, not the towing company, disposes of a towed vehicle, which again reflects that

transporting vehicles and disposing of towed vehicles are discrete processes. *See, e.g.*, D.C. Code Ann. § 50-2421.10 ("The Department may, consistent with reasonable business practices, sell or otherwise dispose of an unclaimed vehicle.").

Dan's City notes that the services listed in the definition of "transportation" include "arrangement for," "receipt," "delivery," "storage," "handling," and "interchange of" the property, and, focusing particularly on "storage," argues that Mr. Pelkey's claims "seek to establish liability under state-law for Dan's City's alleged breaches of duty with respect to [those services]." Pet'r Br. 44. To begin with, however, those services are not always part of transportation; they are only part of transportation when they are "related to [the] movement" of passengers or property. 49 U.S.C. § 13102(23)(B). Thus, for example, although the temporary storage of a package while it is in transit would be included within the definition of transportation because it is part of the movement of the package from one place to another, the storage of property that has not been moved, or in which the movement has ended, would not be. Here, Dan's City's storage of Mr. Pelkey's vehicle, which took place after the towing was over, was not related to the movement of property.

In any event, Mr. Pelkey claims do not concern Dan's City's storage of his car. His claims are not based on laws that regulate or reference how towed vehicles should be stored, and requiring towing companies to abide by the laws and duties at issue would not significantly impact towing companies' storage practices. Likewise, Mr. Pelkey is not challenging how Dan's City arranged for the tow of his vehicle, or how it delivered, handled, or interchanged his vehicle. He is challenging actions related to how it

disposed of his vehicle, that is, how it purported to extinguish his property rights and transferred his property to someone else. Notably, the list of services in the definition of transportation does not include selling the property or in any way determining its ownership.

In enacting the FAAAA, Congress was concerned with the transportation of property, with its movement from one place to another. Because Mr. Pelkey's claims do not challenge services related to the movement of property, but rather actions related to the nonconsensual sale or trade of his property, they are not preempted.

6. Just as they are remote from Dan's City's towing services, Mr. Pelkey's claims against Dan's City based on the attempted sale and ultimate trade of his car are far removed from the purposes of the FAAAA. *See Travelers*, 514 U.S. at 656 (explaining that because the terms "relate to" and "connection with" are "unhelpful," the Court must "look instead to the objectives of the . . . statute as a guide to the scope of the state law that Congress understood would survive."). In enacting § 14501(c)(1), Congress sought to avoid "a State's direct substitution of its own governmental commands for 'competitive market forces' in determining (to a significant degree) the services that motor carriers will provide." *Rowe*, 552 U.S. at 372. It was concerned not with ownership rights in towed vehicles, but with issues such as "entry controls, tariff filing and price regulation, and types of commodities carried," and with problems such as circumstances "in which rates for shipments within a state exceed rates for comparable distances across state lines" causing "companies frequently [to] ship goods across state lines and back into the state of origin to avoid the higher rates for purely intrastate shipments." H.R. Conf. Rep. 103-677, at 87. Allowing a vehicle owner to seek compensation when a towing

company engages in deceptive or negligent behavior in selling or trading away his car against his will would not reinstate the "antiquated controls" on motor carrier prices, routes, and services that Congress sought to end. *Id.* at 88. It would not keep tow truck operators from "freely compet[ing]" over the provision of their transportation services or replace the free market for such services with governmental demands. In fact, state-law claims related to motor vehicle disposal place no demands on towing at all.

That the claims here are far removed from Congress's goals in enacting the FAAAA is demonstrated by the FAAAA's conference report, which described the types of regulation Congress intended to preempt. The conference report gives no indication that Congress intended to preempt state laws concerning the disposal of towed vehicles. To the contrary, the report lists nine states that did not regulate "intrastate prices, routes and services of motor carriers." *Id.* at 86. At the time the FAAAA was enacted, all of the listed states regulated the sale or other disposal of towed or abandoned vehicles, *see supra* n. 1. Congress's specific consideration of these states thus suggests that Congress did not consider such regulation to be regulation of a motor carrier price, route, or service, and that Congress did not intend to oust such regulation. *But see Rowe*, 552 U.S. at 374.

Moreover, the way towing companies go about disposing of vehicles towed without their owners' consent, and the respect they provide to the owners' private property, is not an area in which "reliance on competitive market forces" would stimulate "efficiency, innovation, and low prices," *id.* at 371, because the owners have no ability to choose among towing companies based on their disposal practices.

In short, as the court below noted, "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. Mr. Pelkey's claims are not related to motor carrier services with respect to the transportation of property, and the decision below should be affirmed.

B. Mr. Pelkey's Negligence Claim Based on Common-Law Duties Does Not Involve "a Law, Regulation, or Other Provision."

To the extent that it is based on Dan's City's violation of common-law duties, Mr. Pelkey's negligence claim is not preempted for an additional reason: It does not involve the enactment or enforcement of "a law, regulation, or other provision having the force and effect of law." 49 U.S.C. § 14501(c)(1). *See* Pet'r Br. 26 (acknowledging that, for the preemption provision to apply, a state must be enacting or enforcing "a law, regulation, or other provision").

1. In *Sprietsma v. Mercury Marine*, 537 U.S. 51, 63 (2002), this Court unanimously held that a preemption provision forbidding enforcement of "a law or regulation" did not preempt common-law claims. *Id.* (interpreting 46 U.S.C. § 4306). The Court explained that "the article 'a' before 'law or regulation' implies a discreteness—which is embodied in statutes and regulations—that is not present in the common law." Moreover,"because 'a word is known by the company it keeps,' . . . the terms 'law' and 'regulation' used together in the preemption clause indicate that Congress preempted only positive enactments." *Id.* (quoting *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995)). And, it observed, "[i]f 'law' were read

broadly so as to include the common law, it might also be interpreted to include regulations, which would render the express reference to 'regulation' in the preemption clause superfluous." *Id.*

For these same reasons, the words "a law [or] regulation" in § 14501(c)(1) do not include the common law. As in *Sprietsma*, here, the phrase "law, regulation, or other provision," is preceded by the article "a," demonstrating a discreteness not present in common law. As in *Sprietsma*, the doctrine that words are known by the company they keep indicates that "law," like "regulation," includes only discrete, positive enactments (that is, statutes). And as in *Sprietsma*, if "law" were read to include common law, it might also be read to include "regulation[s]" and "other provision[s] having the force and effect of law," rendering those terms superfluous.

Moreover, because the words "a law [or] regulation" in § 14501(c)(1) are followed by "other provision having the force and effect of law," it is even clearer here than it was in *Sprietsma* that "law" and "regulation" do not include common law. In both its everyday and its legal meaning, "provision" refers to a stipulation or specific clause in a law or other legal instrument. *See*, *e.g.*, *Black's Law Dictionary* (9th ed. 2009) (defining provision as "[a] clause in a statute, contract, or other legal instrument . . . [a] stipulation made beforehand"); *Webster's Third New Int'l Dictionary* 1827 (1981) (defining provision as "a stipulation (as a clause in a statute or contract) made in advance; proviso"). The common-law principles on which Mr. Pelkey relies are not "provision[s]" under the ordinary meaning of that term. Thus, the phrase "other provision having the force and effect of law" does not itself include the common law. And, by referring to "other provision" after "law" and "regulation," the statute reinforces that the

only laws and regulations that are preempted are those that are also contained in "provision[s]"—that is, those that are positively enacted or promulgated, not common-law principles.

2. This Court has never addressed whether common law is "a law, regulation, or other provision" under § 14501(c)(1), nor has it ever held a common-law claim preempted by the FAAAA or ADA. In the only case in which it has considered whether the ADA's or FAAAA's preemption provision applied to a common-law claims, *Wolens*, 513 U.S. 219, the Court held that the ADA does not preempt state-law breach-of-contract claims. *Wolens* focused on whether self-imposed contract terms are "law" under the ADA, rather than on whether the common law is "law." But *Sprietsma*'s subsequent explanation that a preemption provision that preempts enforcement of "a law or regulation" is most naturally read not to encompass common-law claims applies equally here.

3. As this Court explained in *Sprietsma*, it is "perfectly rational for Congress not to pre-empt common-law claims, which—unlike most administrative and legislative regulations—necessarily perform an important remedial role in compensating accident victims." 537 U.S. at 64; *see also, e.g.*, *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 518 (1992) ("[T]here is no general, inherent conflict between federal pre-emption of state warning requirements and the continued vitality of state common-law damages actions."). In enacting the FAAAA, Congress was concerned with "state economic regulation" of motor carriers, H.R. Conf. Rep. 103-677, at 87, and with states substituting their own demands for competitive market forces in determining motor carrier prices, routes, or services. *Rowe*, 552 U.S. at 372; *cf. Morales*, 504 U.S. at 378 (noting that the purpose of the ADA's preemption

provision was to "ensure that the States would not undo federal deregulation with regulation of their own"). Congress's focus was on positive state regulation, not on cutting off traditional common-law remedies for wrongful actions.

II. Congress Could Not Have Intended To Preempt State Laws or State-Law Claims Concerning the Sale or Other Disposal of Towed Vehicles.

Consideration of the consequences of preempting state laws concerning the disposal of towed cars confirms that Congress could not have intended § 14501(c)(1) to preempt those laws. Such laws are necessary both to protect vehicle owners and to create processes for towing companies to sell abandoned cars.

A. The federal government does not regulate disposal of towed vehicles. Rather, states protect the rights of vehicles owners in this area, balancing those rights against the interest of towing companies in disposing of unclaimed cars in their possession. States and municipalities regularly regulate the transfer of title or other disposal of towed or abandoned vehicles. *See, e.g., supra* note 1. Moreover, state law governs the issuance of titles to motor vehicle owners more generally, and the transfer of titles between owners of motor vehicles. *See, e.g.*, N.H. Rev. Stat. Ann. Ch. 261 (regulating certificates of title and registrations of vehicles). States need ways to ensure a smooth transfer of title or disposal of vehicles if they are abandoned, and to make sure that vehicle owners are not deprived of property that they have not in fact abandoned. Particularly given the role of states in regulating motor vehicle titles, it is hard to believe that Congress would have intended to leave states with no way to regulate the transfer of title or other disposal of towed vehicles.

Dan's City itself recognizes the importance of state laws governing the disposal of towed vehicles. *See, e.g.*, Pet'r Br. 41 (asking rhetorically what would happen "[i]f tow trucking companies cannot provide notice of sale as dictated by state abandoned motor vehicle laws"). Indeed, it attempts to take shelter in the state's laws governing the matter. *See id.* (asserting that "[a]ll of the alleged wrongful conduct of Dan's City was part of the state sanctioned and regulated process for disposing of abandoned vehicles under Ch. 262"). And it attempts to use the continued existence of the regulatory scheme as a reason why it would not be problematic to preempt state-law claims. *See id.* at 51 ("New Hampshire's comprehensive regulatory scheme thus provides significant protection for the public, including individuals like Mr. Pelkey.").

If the FAAAA preempts state-law claims relating to the disposal of towed vehicles, however, it must also preempt positive state regulation of such disposal. State-law claims challenging the disposal of a towed car could be preempted only if such disposal were deemed "related to a price, route, or service of any motor carrier . . . with respect to the transportation of property." And if that were the case, then positive state regulation of the disposal of the car likewise would be preempted. Indeed, if anything, the laws and duties underlying state-law claims, particularly claims based on general duties such as those contained in the New Hampshire Consumer Protection Act and imposed on bailees by the common law, are further removed from the deregulatory goals underlying § 14501(c)(1) than is positive state regulation.

The conclusion that Congress did not intend to create a regulatory gap in the area of disposal of towed vehicles by ousting state law in this area of traditional state

authority is particularly forceful in light of "the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Ours Garage*, 536 U.S. at 432 (citation omitted). This presumption is a "cornerstone" of the Court's preemption jurisprudence, based on "respect for the States as independent sovereigns in our federal system." *Wyeth v. Levine*, 555 U.S. 555, 565 & n.3 (2009) (quotation marks and citation omitted). Dan's City faults the New Hampshire Supreme Court for citing the presumption, claiming it is questionable whether the presumption applies in cases interpreting the scope of express preemption clauses or where the traditional state powers are not about health or safety. Pet'r Br. 31-32. But this Court has regularly cited the presumption against preemption in cases involving the scope of express preemption, *see, e.g.*, *Altria Group, Inc. v. Good*, 555 U.S. 70, 77 (2008), including in cases considering the meaning of "relate to," *see, e.g.*, *Cal. Div. of Labor Standards Enforcement v. Dillingham Const., N.A.*, 519 U.S. 316, 325 (1997), and considering the scope of preemption under the FAAAA. *Ours Garage*, 536 U.S. at 432. Moreover, this Court has applied the presumption in all fields of traditional state regulation, not just those involving health and safety. *See, e.g., Dillingham*, 519 U.S. at 325 (applying presumption in case concerning whether ERISA preempts prevailing wage laws).

B. State regulatory schemes governing the transfer of ownership in towed cars protect vehicle owners from abusive towing companies who would seek to sell the owners' property. Such regulation is not necessary only to protect vehicle owners, but also to protect towing companies in possession of abandoned cars. Because of the role states play in titling motor vehicles, towing companies

and others in possession of abandoned vehicles need state laws so that they can sell those vehicles in a manner that ensures the new owners will be able to obtain certificates of title from the state. *See, e.g.*, N.H. Code Admin. R. Saf-C § 1913.01 (requiring an applicant for title of a car purchased at public auction to submit a "properly executed report of sale or transfer of a non-titled motor vehicle").

Here, even as Dan's City wants a right under state law to sell cars, it also wants to be free from liability when it violates the requirements imposed by state laws relating to the manner in which towing companies dispose of motor vehicles. 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. Again, however, Dan's City cannot have it both ways: If state laws related to the disposal of towed vehicles are not preempted to the extent they provide a process for the sale of towed vehicles (and they are not), they are also not preempted to the extent they allow vehicle owners to recover damages when the requirements for sale are violated and the owners suffer pecuniary injury.

C. 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 for immediate sale without compensating the owners. As this Court has explained, however, "[i]t is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984);

see Bates v. Dow Agrosciences LLC, 544 U.S. 431, 449 (2005) ("If Congress had intended to deprive injured parties of a long available form of compensation, it surely would have expressed that intent more clearly."). Indeed, it is impossible to believe that Congress would have intended to deprive vehicle owners of a remedy under such circumstances.

Dan's City contends that preemption of state-law claims relating to the disposal of towed vehicles would not "open New Hampshire citizens to unfettered abuse by unscrupulous towing companies," because "the criminal law exists to deter conversion and theft of consumer property." Pet'r Br. 22. It notes, for example, that "Chapter 262 violations are punishable as motor vehicle law violations for first offenses, and crimes for repeated offenses." *Id.* at 50-51. Dan's City does not explain, however, why Mr. Pelkey's enforcement of the duties in Chapter 262 related to the disposal of a towed car is, in its view, preempted, but the state's criminal enforcement of those same duties is not. If the enforcement of state civil laws regarding the disposal of towed vehicles is preempted as relating to motor carrier prices, routes, or services with respect to the transportation of property, the enforcement of state criminal laws is as well.

Dan's City argues that Mr. Pelkey was not without a remedy for the improper sale of his property because he had "the right to report his vehicle to the police as stolen or converted, which could have triggered the DMV to suspend its registration until any dispute with Dan's City was resolved." Pet'r Br. 50. But if the laws making it illegal or tortious to sell a towed car are preempted, there would be no basis for the DMV to suspend the registration. In any event, even if the DMV could suspend registration,

that suspension would not ensure that Mr. Pelkey would be compensated for the loss of his property.

Dan's City also contends that even if claims concerning the disposal of towed vehicles were preempted, states could enforce laws regarding disposal if towing companies engaged in outrageous conduct that was unnecessary to their services because such conduct would be too far removed from motor carrier services. Pet'r Br. 23. Whether an action is outrageous and whether it relates to services, however, are not the same inquiry. Moreover, any case claiming wrongful sale of a towed vehicle will involve allegations of unlawful or tortious behavior that some may find outrageous but others may not. Many people, for example, might think it "outrageous" for a towing company in possession of a towed vehicle not to take reasonable steps to inform a car's owner that it plans on auctioning his car; or for the company to proceed with the auction after the owner contacts the company and explains that the reason he has not yet reclaimed the car is that he has been in the hospital and that he wants to arrange for the car's return; or for the company to misrepresent to the owner that the car has been sold at auction when it has not been; or for the company to trade the car away, without notice, and without ever compensating the owner for his loss. And engaging in deceptive or unreasonable behavior in the course of attempting to sell or otherwise disposing of a car is not a "necessary" part of any transportation service.

Finally, Dan's City points out that if claims against towing companies were preempted, vehicle owners would retain a claim against the entity that ordered the vehicle to be towed—here, Colonial Village, Mr. Pelkey's apartment complex. *See* Pet'r Br. 50. But the fact that a towing company has violated its state-law duties does not

necessarily mean that whoever called for the tow violated any of *its* duties. In many cases in which the sale of the vehicle is improper, the towing of the vehicle will have been be perfectly proper, and the vehicle owner will have no claim against the party who arranged for the tow.

That a vehicle owner may have no claim against the property owner that ordered his vehicle towed underscores the difference between claims based on towing services and claims, like those here, based on the sale or trade of a towed car. Mr. Pelkey's claims against Dan's City are not based on whether it was proper for his car to be towed, nor are they based on anything Dan's City did as part of the towing. They are based on Dan's City's violation of duties in the course of attempting to sell and eventually trading away his car. The laws and duties governing the disposal of a towed vehicle are not "related to a price, route, or service of any motor carrier . . . with respect to the transportation of property," and, accordingly, are not preempted by the FAAAA.

CONCLUSION

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

Respectfully submitted,

BRIAN C. SHAUGHNESSY
Kazan, Shaughnessy, Kasten & McDonald, PLLC
746 Chestnut Street
Manchester, NH 03104
(603) 644-4357
brian@kskmlaw.com

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

Counsel for Respondent

February 2013