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IN THE SUPREME COURT OF THE UNITED STATES

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DAN'S CITY USED CARS, INC., :

DBA DAN'S CITY AUTO BODY, :

Petitioner : No. 12-52

v. :

ROBERT PELKEY :

- - - - - x

Washington, D.C.

Wednesday, March 20, 2013

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:11 a.m.

APPEARANCES:

ANDRE D. BOUFFARD, ESQ., Burlington, Vermont; on behalf of Petitioner.

BRIAN C. SHAUGHNESSY, ESQ., Manchester, New Hampshire; on behalf of Respondent.

LEWIS S. YELIN, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; for United States, as amicus curiae, supporting Respondent.

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P R O C E E D I N G S

(11:11 a.m.)

CHIEF JUSTICE ROBERTS: We will have argument next in Case 12-52, Dan's City Used Cars v. Pelkey.

Mr. Bouffard?

ORAL ARGUMENT OF ANDRE D. BOUFFARD

ON BEHALF OF THE PETITIONER

MR. BOUFFARD: Mr. Chief Justice, and may it please the Court:

The issue in this case is whether Section 14501 of the United States Transportation Code expressly preempts the Respondent's State law consumer protection in tort claims for damages against a tow trucker who towed his vehicle lawfully and then, several months later, disposed of the vehicle after the fees for towing and storage had not been paid.

Both of these claims are preempted because they are directed at the conduct -- the type of conduct that tow truck companies all over this country every day engage in, in dealing with a particular type of tow that's referred to in the business as nonconsensual tows.

JUSTICE GINSBURG: Mr. Bouffard, this law, this New Hampshire law, it regulates storage. Is this a

1 law that applies only to the towing companies who tow
2 the automobile and then store it, or does the law apply,
3 say, to a garage, say, someone brings a car to a garage
4 for repairs, and does this storage law regulate garage
5 operations as well as towing operations?

6 MR. BOUFFARD: Justice Ginsburg, this law
7 regulates abandoned motor vehicles. It's an abandoned
8 motor vehicle law.

9 JUSTICE GINSBURG: So -- so it would apply
10 to a garage operator.

11 MR. BOUFFARD: Well, if a garage operator
12 came into possession of an abandoned motor vehicle, then
13 I suppose it would. If -- if you look at the -- at the
14 title to this subchapter of this New Hampshire statute,
15 the title is abandoned vehicles, Your Honor.

16 JUSTICE GINSBURG: Yes, but what made it
17 abandoned was that they tried to locate the owner,
18 couldn't and so -- this same thing could happen with a
19 garage owner as happened to the towing truck. So
20 there's nothing peculiar about being in the towing
21 business that makes this storage application -- storage
22 statute apply.

23 MR. BOUFFARD: Well, let me be clear about
24 this statute, Your Honor. It's an abandoned vehicle
25 statute, and what's really important to understand with

1 this case is that none of the Plaintiff's claims rely on
2 this abandoned vehicle statute.

3 The Plaintiff has pled in his complaint a
4 couple of allegations of violations of this abandoned
5 vehicle law, but the substantive rights that were sued
6 upon by the Plaintiff in this case do not live in the
7 abandoned motor vehicle law.

8 The substantive rights that were sued upon
9 by the Plaintiff live in the State's consumer protection
10 law, which is a separate New Hampshire statute,
11 unrelated to the abandoned vehicle law. And secondly,
12 the claim that the -- the common law negligence claim in
13 this case arises out of the common law of New Hampshire.
14 It doesn't arise out of the abandoned motor vehicle law.

15 One of the sources of confusion, I would
16 submit, in the New Hampshire Supreme Court's decision is
17 that it did not adequately deal with the -- the role of
18 the abandoned vehicle law in this case. The abandoned
19 vehicle law actually plays a relatively minor role as it
20 relates to the causes of action that were pled in this
21 case and the causes of action that the preemption
22 defense is directed to in this case.

23 JUSTICE BREYER: What's -- what's your
24 point? If it's not part of the towing law, then it's
25 further removed.

1 MR. BOUFFARD: The reason -- the reason why
2 these claims are preempted, Your Honor, is because they
3 all stem from the towing of the vehicle, which was
4 followed by the storage of the vehicle.

5 JUSTICE BREYER: I mean, I guess you could
6 have thousands of claims across the country, millions of
7 claims where there are all kinds of towing laws.
8 And -- you know, it says in Cambridge, Massachusetts
9 park your car here during a snow emergency, it will be
10 towed. Probably every northeastern country has laws
11 like that. I guess there could be millions of
12 negligence claims when the thing is towed, the guy broke
13 a headlight.

14 MR. BOUFFARD: Well, I think that's a
15 different --

16 JUSTICE BREYER: And are all those things
17 preempted? I would be amazed.

18 MR. BOUFFARD: I don't think so, Your Honor.
19 We're not --

20 JUSTICE BREYER: Then what's the difference
21 between this and -- and what could arise any day of the
22 week? I mean, as I read your brief, I -- are you saying
23 that all the northeast statutes that say your car will
24 be towed if you park here during a snow emergency, what
25 happens? I mean, do they have to go to the Department

1 of Transportation? Boston couldn't function. I know
2 that they do tow cars. I don't know that firsthand, but
3 I've seen it.

4 (Laughter.)

5 JUSTICE BREYER: So how's it supposed to
6 work?

7 MR. BOUFFARD: There's no -- there's no
8 claim in this case, Your Honor, that the abandoned motor
9 vehicle law is preempted, that New Hampshire's abandoned
10 motor vehicle law --

11 JUSTICE BREYER: Well, all right, there
12 isn't in this case, but I'm curious to know how it works
13 because it seemed to me from what you're arguing, all
14 the abandoned motor vehicle laws and all the snow
15 emergency towing and everything else that I see every
16 day would be preempted a fortiori. So you tell me how
17 it all works.

18 MR. BOUFFARD: We are arguing that the
19 causes of action that were pled in this case, which are
20 a Consumer Protection Act claim for damages and
21 attorneys' fees -- treble damages actually in the
22 Consumer Protection Act claim. That claim is predicated
23 on the consumer protection law. It's predicated on the
24 State of New Hampshire's policy protecting consumers.

25 Now, there's -- there's an allegation in the

1 complaint that there was also -- there happened to be a
2 violation of this abandoned vehicle law. But that is a
3 completely meaningless allegation as it relates to the
4 Consumer Protection Act because even if it were a
5 violation of the abandoned vehicle law, that would not
6 make it a violation of the consumer protection law.
7 Consumer protection laws are intended to regulate
8 fairness in business practices. That's what that
9 statute is about.

10 JUSTICE SCALIA: My question is -- is the
11 same as Justice Breyer's. It seems to me you are
12 running in the wrong direction. To the extent you say
13 the case doesn't involve New Hampshire's towing law but
14 involves just its general consumer protection law,
15 it's -- it's even further distant from being preempted.
16 I --

17 MR. BOUFFARD: Well, there's a difference,
18 Your Honor, Justice Scalia, between whether the case is
19 predicated on the New Hampshire towing law and whether
20 or not these causes of action are related to the towing
21 of the vehicle. Our point, and our primary argument, is
22 that all of these claims are related to, within the
23 meaning of this statute, to the towing of the vehicle.

24 JUSTICE SCALIA: Suppose -- I understand.
25 My goodness. Suppose a vehicle -- I pay for somebody to

1 tow -- I agree that somebody will tow my vehicle and I
2 will pay them \$100. And he tows the vehicle, puts it in
3 my garage and says, give me the \$100. And I say, ha,
4 ha, I'm not going to give you \$100.

5 (Laughter.)

6 JUSTICE SCALIA: Now, do you think that that
7 general obligation under State law to pay a debt that
8 you've contracted to pay is eliminated?

9 MR. BOUFFARD: That's a very different set
10 of circumstances, Justice Scalia.

11 JUSTICE SCALIA: Why is that different from
12 normal consumer protection law? I -- I don't see that
13 it's so much different.

14 MR. BOUFFARD: Well, this -- this case
15 involves a nonconsensual tow. This case involves a
16 situation where there was an opportunity, a fair
17 opportunity, to pay for the towing and the storage
18 charges that had been incurred, and --

19 JUSTICE ALITO: What difference does that
20 make? Suppose there was a towing company that lawfully
21 towed cars, but its practice was to hold the car for
22 24 hours and if it wasn't picked up they would
23 immediately sell it for parts.

24 Your argument would be that's preempted by
25 the Federal statute?

1 MR. BOUFFARD: No, we wouldn't --

2 JUSTICE ALITO: The State can't regulate
3 that?

4 MR. BOUFFARD: I -- I think the State could
5 regulate that, Your Honor. What the State -- what
6 the -- what a private plaintiff can't do in a case like
7 this is assert claims like common law negligence
8 claims --

9 JUSTICE ALITO: All right. A private
10 plaintiff could not assert a common law negligence claim
11 if that were done?

12 MR. BOUFFARD: A --

13 JUSTICE ALITO: Lawfully towed, sold for
14 parts within 24 hours because it wasn't picked up.

15 MR. BOUFFARD: I think -- I think a private
16 plaintiff could -- could probably assert that, that
17 negligence claim.

18 JUSTICE ALITO: Well, if that's -- if that
19 is not related to payment for services, then why is this
20 -- why is there such a relationship here?

21 MR. BOUFFARD: That situation doesn't
22 involve a payment dispute, Your Honor. This case -- the
23 case we have before us today, involves a payment
24 dispute. This is really a payment dispute. A person --

25 JUSTICE ALITO: It would involve a payment

1 dispute to the same extent as this. Towed, notice sent
2 out immediately, wasn't picked up within 24 hours, sell
3 it for parts.

4 MR. BOUFFARD: Well, that -- that's not a
5 payment dispute. The parties haven't -- haven't
6 disputed whether or not there -- there is a payment
7 obligation. The part -- this -- this case is about a
8 dispute over whether there is even an obligation to pay
9 for the -- the towing and the storage services. That's
10 what this case is about. This -- this plaintiff had an
11 opportunity to pay for and to discharge his obligation
12 under State law. I -- I feel the need to --

13 JUSTICE GINSBURG: When? When did that
14 opportunity come up? Because I thought that the notice
15 didn't get to the -- to the plaintiff, and then when the
16 lawyer said, I have a client, it's his car, then the
17 towing company went ahead and put it up for auction.
18 And then no bidders, so they sold it, pocketed the
19 money, gave nothing to the car owner. So I don't
20 understand how it's a dispute about payment. This is
21 not a case where the car owner said I won't pay for the
22 towing.

23 MR. BOUFFARD: Well, Justice Ginsburg, we
24 don't agree with that. It is -- it is exactly that kind
25 of case.

1 JUSTICE GINSBURG: At what point did Pelkey
2 say, I won't pay for the towing?

3 MR. BOUFFARD: There -- there's a letter in
4 the record of the New Hampshire Supreme Court, Your
5 Honor, it's -- I believe it's at page 86 and 87 of the
6 record in the New Hampshire Supreme Court, which is a
7 letter from Mr. Shaughnessy, counsel for Mr. Pelkey, to
8 my client. And this letter was written something in the
9 range of 3 months after the towing took place, and --
10 and before the vehicle had been disposed of.

11 And the letter asserts that Mr. Pelkey
12 doesn't believe he should have to pay for any storage
13 fees. He would -- he would pay the towing fees, but he
14 doesn't believe he should have to pay for any of the
15 storage fees. And that's -- that's -- that's really
16 reflective of what this case is really all about. It's
17 about a dispute over payment.

18 And the reason why this case is so
19 significant --

20 JUSTICE SOTOMAYOR: Not payment over towing,
21 payment over storage.

22 MR. BOUFFARD: He -- he offered in this
23 letter to pay the towing fees only. There was never any
24 tender of payment. There was an offer to pay, provided
25 that -- provided that my client would tow the vehicle

1 back to his place of residence because the vehicle
2 wasn't operative at the time.

3 JUSTICE SOTOMAYOR: If this was a consensual
4 contract, he asked -- Justice Scalia's question. They
5 contracted for the tow. What State laws would be
6 preempted under the FAAAA with respect to that private
7 contract? Would there be any?

8 MR. BOUFFARD: The -- any breach of contract
9 claim that might arise on behalf of the plaintiff would
10 not be preempted. That's what the Court decided in the
11 Wolens decision.

12 JUSTICE SOTOMAYOR: How about, do consumer
13 fraud laws apply to that contract between the parties?

14 MR. BOUFFARD: The consumer fraud law
15 might --

16 JUSTICE SOTOMAYOR: That's the basis of his
17 claim here.

18 MR. BOUFFARD: It might apply as a matter of
19 State law, but it would be preempted.

20 JUSTICE SOTOMAYOR: Ah, so you're arguing
21 that those laws would be preempted.

22 MR. BOUFFARD: It would be preempted to the
23 extent that it's a -- the case involves a dispute over
24 payment for the services. This is a -- this case is
25 a --

1 JUSTICE SOTOMAYOR: That gets back to
2 whether the services include storage, which is what the
3 New Hampshire court said it doesn't.

4 MR. BOUFFARD: The New Hampshire --

5 JUSTICE SOTOMAYOR: That the movement of
6 property or towing doesn't include services for storage.

7 MR. BOUFFARD: That's what the New Hampshire
8 Supreme Court said, relying on the minority view that's
9 come out of the Ninth Circuit in the Charas decision.

10 JUSTICE SOTOMAYOR: So why don't you answer
11 that question? As I read the list of things that are
12 preempted, they have to do with storage during
13 transportation. Why should we read it more broadly than
14 that?

15 MR. BOUFFARD: I think -- Justice Sotomayor,
16 I think you are referring to the argument that's been
17 made by my friends with regard to the final phrase in
18 the statute with respect to transportation --

19 JUSTICE SOTOMAYOR: Exactly.

20 MR. BOUFFARD: And the short answer to that
21 question is that the term "transportation" is a defined
22 term in Title 49, and it's defined very broadly for --
23 for good reason because that term is used throughout
24 Title 49. In fact, the term is used to define the scope
25 of jurisdiction of the Department of Transportation, and

1 the definition of transportation is quite broad, and --

2 JUSTICE SCALIA: It -- it includes storage,
3 is the point you are coming to, right?

4 MR. BOUFFARD: That's correct.

5 JUSTICE SCALIA: The definition includes
6 storage. You think it means -- it means storage at the
7 end of the transportation? Suppose you're -- you're a
8 company that moves goods, but we also store goods. You
9 can -- you know, rent -- rent space and we will store
10 your furniture for years. If that company picks up some
11 goods, brings it to its warehouse and leaves it in its
12 warehouse for 3 years, that storage is covered by
13 this -- by this statute, you think?

14 See, I thought the storage was -- was
15 storage in the course of the transportation. Sometimes
16 when you're -- you know, changing the mode of
17 transportation, going from trucks to ships or something,
18 you have to store it temporarily during -- during the
19 course of the transportation. That's how I would read
20 it. But you're saying, even if you're a storage
21 company, if you pick up goods and bring it to the place
22 where you store it, that's covered by -- by this
23 statute.

24 MR. BOUFFARD: No, that's not what I'm
25 saying, Your Honor. I'm saying that if you tow a motor

1 vehicle, you bring the motor vehicle into your
2 possession via towing and, as is the case here, you also
3 store the vehicle. And in particular in a case like
4 this, where the claimant was seeking to have the vehicle
5 returned to his place of business -- to his place of
6 residence, those are the facts of this case.

7 This wasn't necessarily the end of the
8 transportation. The plaintiff here, the Respondent, was
9 asking for further transportation services at the end of
10 the day. So on the facts of this case, the
11 transportation hadn't ended. But even if -- we do have
12 a situation where there would have been no further
13 transportation.

14 The -- the reading that my friends have
15 advocated inserts the word "incidental" to -- to
16 transportation in the statute that doesn't appear in the
17 statute.

18 The definition of "transportation" doesn't
19 include the word -- doesn't say "storage incidental to
20 the movement of property."

21 CHIEF JUSTICE ROBERTS: Let's say you park
22 your tow trucks on somebody else's parking lot, and you
23 don't pay the rent. So they sell your tow truck. Is
24 your claim against your landlord preempted?

25 MR. BOUFFARD: I don't think so, Your Honor,

1 because I don't think that that scenario would fall
2 within what Congress intended by the term "services"
3 there. That -- that claim -- that claim that -- that
4 you've described, Mr. Chief Justice, is a claim that
5 would really be a -- a breach of contract claim between
6 the tow truck owners and his landlord. That would be
7 a -- a contract dispute. It wouldn't -- wouldn't relate
8 to the transportation services of the -- of the tow
9 truck company in a way that is picked up by this
10 preemption statute.

11 It relates to it in a very tangential way,
12 in a very remote way, I suppose, but not -- not in a way
13 that's close enough -- not in a way that -- that relates
14 to the business of a tow truck company in the way that
15 payment disputes over -- over the services relate to the
16 business of the tow truck company.

17 There are any number of different types of
18 disputes that motor carriers, like tow truck companies,
19 could get involved in that wouldn't be preempted here.
20 Motor carriers are involved in lots of different types
21 of business activity that doesn't involve the delivery
22 of their services. They could be involved in a real
23 estate transaction, for example.

24 They may be buying a new -- a new depot, and
25 there may be claims that arise out of disputes in

1 connection with that real estate transaction. Those
2 claims aren't preempted by this statute, even though in
3 a very remote sense, they -- those -- those disputes
4 might be related to the business of -- of the motor
5 carrier. It's very remote, unlike a situation where the
6 claim arises out of the actual delivery of the
7 transportation services.

8 CHIEF JUSTICE ROBERTS: How does -- so if
9 your tow truck is involved in an accident, is that --
10 and a suit is filed for negligence. Is that preempted?

11 MR. BOUFFARD: I don't think that's
12 preempted, Your Honor. I -- I -- and the reason I say
13 that is because there's a whole line of Court of
14 Appeals' decisions in the airline area that deal with
15 negligence claims arising out of the negligent operation
16 of the aircraft. And your scenario is the negligent
17 operation of a tow truck as opposed to an aircraft.

18 CHIEF JUSTICE ROBERTS: I'm just looking at
19 the statutory language. It says -- you know, "related
20 to a service of a motor carrier with respect to the
21 transportation of property," and you know, your motor --
22 your truck is involved in transporting property. That's
23 the claim against you, that you don't -- you don't
24 render good service because you're negligent in a -- and
25 it just seems to me to fit within the terms of the

1 statute, if you adopt as broad a reading as you adopt.

2 MR. BOUFFARD: Well, literally, I think
3 you're -- you're right, Your Honor, that -- that the
4 scenario you describe could fall within the literal
5 language of the statute, but the Court has said that we
6 can't go -- we can't necessarily go to the literal end
7 of the earth in the reading of the statute, and we have
8 to -- we have to limit this in some fashion. And the
9 limitation that the Court has fashioned --

10 JUSTICE SCALIA: Well, let me tell you how
11 we -- it seems to me we've limited it in -- in the
12 Columbus case, Columbus v. Harrah's Garage and Wrecker
13 Services, Inc. We said that, "The clause -- the
14 clause's limitation to motor carrier services with
15 respect to the transportation of property massively
16 limits the scope of preemption to include only laws,
17 regulations, and other provisions that single out for
18 special treatment motor carriers of property."

19 And here you've told us that this case
20 doesn't involve any law that singles them out for -- for
21 special treatment. To the contrary, it's the general
22 consumer protection law.

23 MR. BOUFFARD: Well --

24 JUSTICE SCALIA: So you want us to eat those
25 words, they were wrong, or -- or somehow you don't come

1 within them?

2 MR. BOUFFARD: Respectfully, Justice Scalia,
3 I think those words came from your dissent in that case.

4 JUSTICE SCALIA: Ah.

5 (Laughter.)

6 JUSTICE SCALIA: I forgot that.

7 (Laughter.)

8 JUSTICE SCALIA: So you say they were wrong,
9 you say?

10 (Laughter.)

11 MR. BOUFFARD: No, no. No, I don't say that
12 they were wrong, Justice Scalia. What I -- what I would
13 though -- do though is I would point the Court to the
14 language of the statute, and not only the -- not only
15 the specific statute involved here, the motor carrier
16 statute, but there's a -- there's a twin statute that
17 applies to air carriers. And it also applies to hybrid
18 air and -- and motor carriers.

19 And I apologize, I haven't sent up a text of
20 this statute in our appendix or anything, but it's --
21 it's Section 41713 of Title 49, and -- and it includes
22 very similar, general -- broad, general, preemptive
23 language. And it does not -- neither of those -- those
24 provisions in 41713 contains limiting language that --
25 that -- that would limit the scope of preemption in any

1 way.

2 The -- the -- and we know from the -- the
3 legislative intent with regard to the statute involved
4 in this case directly that Congress intended that the
5 scope of preemption for all of these different kinds of
6 industries would be coextensive. That's what Congress
7 was trying to achieve with this statute, was to give
8 motor carriers the same breadth of protection through
9 preemption that air carriers enjoy and that hybrid air
10 and motor carriers enjoy.

11 And so if there are no -- if there are no
12 limitations with regard to air carriers and -- and
13 hybrid air motor carriers of -- of the type that are
14 suggested by my friends for motor carriers, then -- then
15 that language at the end of 14501 can't be interpreted
16 in a -- in a strictly limiting fashion.

17 JUSTICE BREYER: No, there's a lot of
18 language in the majority pretty much along the line that
19 Justice Scalia said. And I might mention that point. I
20 mean, Justice Ginsburg wrote the majority, and she said
21 the reference to regulatory authority of a State, which
22 is a different reference, I agree, should be read to
23 preserve, not preempt traditional prerogative for the
24 State.

25 And Justice White said previously that you

1 have to start with the idea that this is -- historic
2 police powers of the State are not going to be
3 superseded by the Act, unless it's a clear manifest
4 purpose of Congress.

5 So I guess the problem is, with a lot of the
6 other things, that you yourself are in an area that is a
7 traditional matter of State regulation. It is, in fact,
8 regulated in a way that applies to everybody. It is
9 indirectly related to the transport itself, and that it
10 takes place on -- about storage that took place after
11 the event. So you have all that working against you.

12 Now, the Columbus case does offer some hope
13 for the other side, I would think. But what do you
14 think?

15 MR. BOUFFARD: Well, Justice Breyer, let me
16 just say, first of all, that -- that consumer protection
17 is -- is -- I'm not sure I would concede that consumer
18 protection is -- is an area of traditional State
19 regulation. In fact, the New Hampshire consumer
20 protection law dates to 1970, and the Federal government
21 has largely occupied the field of motor carrier
22 transportation since 1935 with the enactment of the
23 Motor Vehicle Act in that year. So --

24 JUSTICE SOTOMAYOR: That's your problem,
25 which is, what is it directed to? And that's the real

1 issue in this case. Yes, it's preempted with respect to
2 any towing activity. The issue is, is it -- is it
3 preempted, as the New Hampshire court, said to storage
4 and sale?

5 MR. BOUFFARD: That is what the
6 New Hampshire Supreme Court said, Justice Sotomayor. I
7 would submit that -- that that's an artificial
8 distinction that fails to take into account the broad
9 definition of "transportation" in Federal law.

10 If the Court has no --

11 JUSTICE GINSBURG: But why should the tow
12 operation be treated any different from the garage when
13 they're doing the identical thing, that is, storing and
14 then selling the vehicle?

15 MR. BOUFFARD: Well, if a -- if a person has
16 brought their vehicle into a garage, Justice Ginsburg,
17 there's been no transportation by a motor carrier. The
18 difference is that in this case this whole scenario
19 started out with a transportation by a -- by a motor
20 carrier which also, once it had possession of the
21 vehicle, stored it.

22 And so in a garage scenario, I suppose if a
23 tower towed the vehicle to a garage and then left it,
24 left it at a garage to be worked on, that -- that garage
25 owner wouldn't be in a position to say that I can assert

1 a preemption defense because that garage owner has
2 never -- has never engaged in the kind of transportation
3 activity that triggers this preemption law.

4 I hope that answers the question. May I
5 reserve?

6 CHIEF JUSTICE ROBERTS: Yes. Thank you,
7 counsel.

8 Mr. Shaughnessy?

9 ORAL ARGUMENT OF BRIAN C. SHAUGHNESSY
10 ON BEHALF OF THE RESPONDENT

11 MR. SHAUGHNESSY: Thank you,
12 Mr. Chief Justice, and may it please the Court:
13 Transferring title and disposing of
14 Mr. Pelkey's car against his will and not compensating
15 him for the loss of his personal property is not a
16 service of a motor carrier with respect to
17 transportation of property. The regulation of
18 State-created property interests is a field of
19 traditional State regulation, and the broad sweep
20 advocated by Dan's City Used Auto in this case would
21 create a regulatory vacuum because there are no Federal
22 laws that allow the sale of a motor vehicle.

23 Now, let me address some of the things that
24 my brother has argued that this case is about that we
25 disagree about. My brother has argued that this case is

1 about payment. This case is not about payment. Mr.
2 Pelkey is not challenging that Dan's City Used Car had
3 the ability to tow the vehicle. We are not challenging
4 how it was towed. We are not challenging the price of
5 the tow. None of that is being challenged, and those
6 are all the services of a motor carrier.

7 Let me also --

8 JUSTICE SCALIA: What about the price of the
9 storage? Are you challenging that?

10 MR. SHAUGHNESSY: We are not challenging the
11 price of the storage. There was a reference to a letter
12 that I had sent to the Dan's City people several
13 months -- but there were two letters. The first letter
14 was actually quite close to, within several weeks of the
15 auction, where we said, no, we are looking to pay for
16 it.

17 The other letter was, I think in June, was
18 saying, you need to account for these proceeds. You
19 sold the vehicle at auction and there is equity in this
20 property, you need to account for these proceeds.

21 So we didn't challenge the storage, but that
22 brings up the issue raised by Justice Sotomayor with
23 respect to the storage. And I would disagree with the
24 characterization of my brother with respect to what RSA
25 262 is. RSA 262 talks about removed vehicles. It

1 actually provides the authority to law enforcement to
2 remove a vehicle that might be in a public way, but it
3 also gives the authority to a private landowner to have
4 a car removed that's on their private property. It does
5 not relate to the motor carrier services of a tow truck
6 operator.

7 CHIEF JUSTICE ROBERTS: But it seems to me
8 that you can't ignore the fact that part of what tow
9 trucks do is store things. I mean, it's a necessary and
10 integral part of the motor service, the transportation
11 of property, that they do. And regulation of the
12 storage will affect the services that they provide.

13 MR. SHAUGHNESSY: Well, we would say --

14 CHIEF JUSTICE ROBERTS: It's not just
15 like -- it's not just like storing anything else.

16 MR. SHAUGHNESSY: Well, respectfully,
17 Mr. Chief Justice, we would say that storage is a
18 separate service altogether. And the act of
19 transportation -- and this is another place where I
20 would disagree with the characterization by my brother
21 with respect to the definition of "transportation." I
22 believe the definition of "transportation" specifically
23 refers to a "motor carrier," meaning a person providing
24 motor vehicle transportation for compensation, but also
25 relates to the movement of the passengers and the

1 property, and the services related to that movement.

2 So the very definition that applies to this
3 case and to the transportation services relate to the
4 movement of the property.

5 Here the movement has stopped. And the
6 storage that we are dealing with in this case is
7 precisely the storage that is in RSA 262, which is the
8 storage charges, not for the movement of the property.
9 So I would clarify, Mr. Chief Justice, that it is our
10 position that the transportation, with respect to the
11 transportation of property which Justice Scalia has
12 aptly pointed out, severely limits the scope of this
13 preemption statute.

14 The services of the motor carrier terminated
15 once the hook was off the tow truck. That is when it
16 stopped.

17 JUSTICE KAGAN: Suppose, Mr. Shaughnessy,
18 that the New Hampshire laws were more onerous than they
19 are. Suppose they said to a towing company, once you've
20 towed this car you have to hold on to it forever. Or
21 suppose they said to the towing company, you have to
22 hire private investigators to go figure out who owns
23 this car. Would any of those be preempted?

24 MR. SHAUGHNESSY: Yes. I believe it's
25 pointed out in the Rowe decision, in order for it to be

1 related to the motor carrier service you have to either
2 directly regulate that service or it has an indirect
3 connection with the service that significantly affects
4 the service.

5 In your example, it would be a direct
6 regulation. You're actually requiring a motor carrier
7 to actually provide a service that the marketplace
8 itself wouldn't provide or that the motor carrier would
9 not otherwise provide. So that is a direct regulation
10 or an example of directly regulating that would be
11 preempted under this statute. But what we are dealing
12 with here, the storage afterward, is not that motor
13 carrier service. And I do believe the language at the
14 end with respect to --

15 JUSTICE SOTOMAYOR: How do we draw the line,
16 that line that you just asked us to draw between direct
17 and indirect? How do we articulate that line?

18 MR. SHAUGHNESSY: The direct --

19 JUSTICE SOTOMAYOR: Because now you're --
20 now you're articulating a different line. You are
21 saying this -- the hypothetical that Justice Kagan
22 posited is not storage-related, it is something
23 else-related. It's towing-related. What's the
24 difference?

25 MR. SHAUGHNESSY: Correct. The way I -- the

1 way I interpreted the hypothetical is the State is then
2 saying in order as a precondition to or as part of the
3 motor carrier service of transporting or towing that
4 vehicle, you also must provide this other service over
5 here, which is actually one of the problems with the
6 Rowe case and under the Maine State statute. Under
7 Maine State law what they were requiring the motor
8 carrier to do in Rowe was actually to provide the
9 verification service. And so that was a direct
10 regulation I believe that this Court found under Rowe.

11 JUSTICE SCALIA: You've just told us
12 anything that significantly affects the transportation
13 service is covered. And I think what your brother's
14 argument is, is that this significantly affects the
15 service, whether he can collect for the storage
16 after -- you know, after the -- after towing it by -- by
17 selling it, and by selling it on terms that are not so
18 onerous as to impinge upon his -- his ability to run the
19 business.

20 MR. SHAUGHNESSY: Well, it may impinge upon
21 his ability or impinge upon how much he can collect. It
22 may impinge upon those things, Your Honor. But it
23 doesn't affect the service of the motor carrier with
24 respect to the transportation of the property because
25 that's the movement of the property.

1 Certainly getting paid is an important part
2 of the service that anybody provides, but that is
3 getting too attenuated, that's getting too far out.
4 That's getting towards --

5 CHIEF JUSTICE ROBERTS: Well, it isn't
6 too -- I mean, this is a provision of course in the
7 Federal Aviation Administration Act. Whatever rule we
8 adopt is going to apply to air transportation as well.

9 And is your position, for example, that
10 things related to a hangar at an airport, that those are
11 not covered by this at all? It seems to me that there
12 the connection between the transportation and the
13 storage, the storage of the airplane, you can see a
14 little bit more clearly how that would affect what the
15 airplane -- you know, can do. A lien -- you can't take
16 the airplane out of the hangar because you didn't pay
17 the rent or whatever.

18 MR. SHAUGHNESSY: There is an effect there,
19 and I do believe that this Court started drawing that
20 line actually in the Travelers case. And when the
21 Travelers case looked at this "related to," that's
22 what's causing the problem, "related to" and what does
23 "related to" mean? And as has been pointed out, if you
24 actually use "related to" to its extreme, everything is
25 related to everything else. That has been said several

1 times in the case law.

2 But "related to" in Travelers, I believe in
3 that case the Court looked at -- there was attention to
4 that type of broad sweep of "related to" and the
5 presumption against preemption, which says we're not
6 going to preempt, but "related to" seems we are
7 preempting everything. So there was a tension.

8 So in Travelers we went to, well, we have to
9 take a look at what the manifest intent of Congress was
10 for the regulatory scheme. You have to look at the
11 intent of Congress, and certainly the best place to look
12 for that intent was first in the words that are used.

13 But once we are looking at the intent, we
14 have to say does the actual thing that is being
15 regulated by the State, and they are putting in their
16 own policies by direct regulation by a positive
17 enactment, does it affect or significantly affect the
18 deregulatory purposes. And I believe that's the line
19 that was adopted in Rowe.

20 JUSTICE BREYER: All right. Now, don't lose
21 that. I will ask you this question to, which favors you
22 in a sense but I want the answer really from the
23 Solicitor General who may know. But I'm going to ask it
24 to you too because you've probably both thought about
25 it. He may have -- they may have some experience on it.

1 If you start talking about significant
2 effect, without those last words, "deregulatory purpose"
3 I suddenly worry about the following, that every city in
4 the United States depends upon towing to regulate
5 parking within the city. We couldn't function without
6 it, although none of us like it. We know that it's
7 necessary. And certainly a law that provides for towing
8 does directly regulate the service of the tow truck. It
9 says do it. And then it tells you when not to do it.

10 So what's the -- what happens? Is every
11 traffic law in the United States involving towing
12 suddenly preempted? I can't believe that. How does
13 this work? So there is much more significance in this
14 case than the words we write, perhaps, than in the
15 particular case.

16 And now, do you want to, in light of what my
17 concern is, add anything to what you say. And you may
18 not, the Solicitor General might, but I'd like to hear
19 anything you have to say about that.

20 MR. SHAUGHNESSY: Well, believe -- I believe
21 with respect to RSA 262, which is the statute that is in
22 this case, it doesn't require a tow truck company to do
23 anything.

24 JUSTICE BREYER: No, you -- you can just
25 rest on that, but I'm going to have -- or somebody's

1 going to have to write an opinion. And we could just
2 say that, but I -- I don't see I can -- my own problem
3 is not being able to have an intelligent answer to that
4 without having some answer to the bigger picture. And
5 the bigger picture seems to me horrendously important.
6 And -- and I don't know what that answer is.

7 You seem to be getting there with the words
8 "deregulatory purpose." And I -- and I was thinking how
9 we might try to work with those, but go ahead.

10 MR. SHAUGHNESSY: Well, I think it's -- it
11 is an easier case in this case under the FAAAA --

12 JUSTICE BREYER: Oh, I think it's much
13 harder than this case --

14 MR. SHAUGHNESSY: Well, I --

15 JUSTICE BREYER: -- because the relationship
16 is -- is in the -- in the more general case is more
17 direct to the tow truck. It says "go tow." And
18 that's -- that's why I need some kind of bigger picture.

19 MR. SHAUGHNESSY: I'm getting lost in the
20 "go tow" command, if you will.

21 JUSTICE BREYER: We have a statute which
22 says, if you park your car here for more than 3 hours,
23 you will be towed, okay? And as part of that statute,
24 though we don't see it, there is an arrangement for the
25 service of the city with the tow truck company, which

1 says when the parking person calls you and says -- the
2 meter says red, yellow, purple, green, you are to go
3 there and tow, okay?

4 Doesn't that sound as if it's regulating the
5 service of tow trucks? And I suspect across the
6 country, there is some variation on that theme, but
7 there are thousands of them. And since the words -- I
8 would be repeating it -- the words of this case may
9 affect that situation, I want to know what you know,
10 which may not be very much -- I don't blame you -- about
11 that broader situation.

12 MR. SHAUGHNESSY: Well, thank you for the
13 out, Justice Breyer. But again, I -- I -- the reason
14 I'm getting lost is -- and I understand the -- the
15 example having to do with the City of Cambridge having
16 no -- no parking, and if you're there for 3 hours, that
17 allows -- there is this -- statutes that allow the tow
18 truck operator, the motor carrier, to go and collect
19 that under a nonconsensual tow. And a nonconsensual tow
20 is a special animal, unfortunately, because there are no
21 market forces in play there.

22 But I don't believe that that's affecting
23 the motor carrier service. There is nothing that forces
24 that tow truck carrier to go out and actually undertake
25 that tow. And if they do undertake the tow or do the

1 business or whatnot, then certainly, they would be under
2 whatever obligations that the State has.

3 And that's one of the problems I think we
4 have --

5 JUSTICE SOTOMAYOR: I think that
6 Justice Breyer is -- I may be speaking for him -- he's
7 thinking that that State contract or that State
8 regulation that permits towing companies to do this is
9 preempted in some way. That would be his argument
10 because it affects --

11 JUSTICE BREYER: Or the opposite.

12 JUSTICE SOTOMAYOR: No?

13 JUSTICE SCALIA: He's worried that it'll be
14 preempted.

15 MR. SHAUGHNESSY: Right.

16 JUSTICE SCALIA: And he didn't -- he didn't
17 mention Cambridge, did he?

18 MR. SHAUGHNESSY: No.

19 JUSTICE SCALIA: I don't think so.

20 MR. SHAUGHNESSY: I think he did yesterday,
21 too, Your Honor.

22 JUSTICE SCALIA: Yes, you're both from
23 Boston, Massachusetts.

24 JUSTICE BREYER: And they're -- they're very
25 attractive places except in the winter.

1 But a -- a motor carrier vehicle -- a
2 service, transportation includes related to the movement
3 of passengers or property. Related to the movement of
4 passengers or property. So we have these words "related
5 to" again. I -- well, you've given me a couple of
6 ideas, but I -- maybe they'll turn out not to be
7 relevant, but -- but -- which I hope.

8 JUSTICE SCALIA: I think maybe -- maybe we
9 have to make it up, what the limitation -- I mean,
10 you're quite right, everything's related to everything
11 else. And we've had trouble with the same -- the very
12 same words with ERISA, and -- and started off trying to
13 give it its -- its apparent meaning, "related to," and
14 we finally concluded you can't do that.

15 So what do you want us to make up? What
16 kind of a limitation do you --

17 (Laughter.)

18 MR. SHAUGHNESSY: Well -- Justice Scalia, I
19 don't think you have to make up too much in this
20 particular case. It gets easier to draw the line
21 because of the with respect to transportation of
22 property. So with respect to the FAAAA and motor
23 carriers, we're drawing the line as to only the services
24 of the movement of the property, and that is limiting.

25 And I do -- I would agree with your dissent.

1 JUSTICE SCALIA: Related to -- related to --
2 related to the movement of the property. That's the
3 problem. It's the "related to" words.

4 MR. SHAUGHNESSY: Correct. And then we go
5 back to the instructions in Rowe, which -- which
6 provided the framework that when you're interpreting
7 related to, you go: One, is it direct -- directly
8 regulating or directly affecting service; or, if it's an
9 indirect effect, which obviously it can be, it has to
10 have a significant impact on the services.

11 And then there's the ultimate out of Morales
12 that says if it's -- it could certainly connect, but if
13 it's too far attenuated to the purposes of Congress,
14 it's just not going to be done.

15 I know that doesn't help with the line
16 drawing in -- in connection of the gray area that we're
17 dealing with in this case, but I do believe in this
18 particular case, it is easier because we have that --
19 those words of limitation, "with respect to the
20 transportation of property" are words of limitation, and
21 they are not present in the ADA, and they were not
22 present with the ERISA cases, which deals with a broad
23 regulatory scheme with long history and other things
24 that apply.

25 We don't have that in this case. I believe

1 the New Hampshire Supreme Court got it right when they
2 were focusing on actually what is a service of a motor
3 carrier, and I believe we do have words of limitation in
4 this particular case.

5 So what the Supreme Court of New Hampshire
6 said is, "The manner in which a company in possession of
7 a towed vehicle may" -- not must -- "may dispose of the
8 vehicle to collect on a debt created by the operation of
9 State law is far removed from Congress's aim of
10 promoting free markets and equalizing the competitive
11 playing -- playing field between motor carriers and air
12 carriers, and help assure transportation rate services
13 reflect maximum reliance on -- on forces."

14 I also believe that the Petitioner has
15 basically given up the case and conceded the case in
16 several places in their brief and in here in oral
17 argument today. If you look at page 34 of the
18 Petitioner's brief, it says that most -- that "The most
19 that Dan's City really can say is that the services
20 within the meaning of Section 14501(c)(1) includes
21 activities that are incidental and distinct from the
22 actual transportation services."

23 So the Petitioner's brief is calling the
24 storage afterwards, after the transportation has
25 stopped. And -- and they call it incidental and

1 distinct.

2 In the reply brief at page 21, they say,
3 "Moreover, criminal laws prohibiting theft are not the
4 kind of burdensome State economic regulation Congress
5 sought to prevent with the FAAAA, nor are abandoned
6 vehicle laws such as New Hampshire Chapter 262 in its
7 regulations which do not hamper the operations of tow
8 truckers. Instead they establish procedures for the
9 efficient handling and disposition of abandoned
10 vehicles."

11 So they're conceding that RSA 262 in this
12 case, the statute does not have a specific impact, so
13 this is not a clear case.

14 I see I have more time, but I think I've
15 made all my points, if there are no more questions.

16 CHIEF JUSTICE ROBERTS: Thank you, counsel.

17 Mr. Yelin, welcome.

18 ORAL ARGUMENT OF LEWIS S. YELIN,

19 FOR THE UNITED STATES, AS AMICUS CURIAE,

20 SUPPORTING THE RESPONDENT

21 MR. YELIN: Thank you, Mr. Chief Justice,
22 and may it please the Court:

23 Congress deregulated the trucking industry
24 to eliminate undue interference with market forces and
25 consumer choice. But market forces and consumer choice

1 cannot operate on the sale of nonconsensually towed
2 cars, and there's little reason to think that Congress
3 intended to preempt State laws that regulate that
4 conduct.

5 This Court in this case, as in many
6 preemption cases involving the phrase "related to," must
7 engage in a -- in a process of sensible line drawing.

8 Everything is related to everything else in
9 the literal sense. And the Court in *Travelers* suggested
10 that the Court should not -- courts should not use
11 uncritical literalism in determining the scope of a
12 preemption provision.

13 I think that this Court does have some work
14 to do in this case, but a lot of the groundwork has
15 already been laid in the *Rowe* case. In *Rowe*, this Court
16 held that a State law is related to a motor carrier
17 service if the State law either directly regulates the
18 service or if it has an indirect connection with the
19 service and a significant -- forbidden significant
20 effect on Congress's deregulatory and preemptive
21 objectives. I think --

22 CHIEF JUSTICE ROBERTS: Well, it's -- I
23 asked your friend on the other side the question.
24 Storage is part of what tow trucks do. Maybe in a way
25 that -- you know, cross-country trucks don't. And it

1 seems to me if you have a local jurisdiction who figures
2 out, well, this is a great way to make a lot of money
3 or -- you know, to give -- or the other way -- you know,
4 you can charge -- charge a lot because we want to keep
5 subsidized tow trucks. I mean, why isn't that fairly
6 directly related to the service they provide?

7 MR. YELIN: It's certainly a foreseeable
8 service that could be provided. The question is whether
9 it has a sufficient locus to the transportation itself.

10 I think there are indications in the statute
11 itself and the statutory purposes which suggest that the
12 Court should view service as a separate type of service,
13 independent and distinct from transportation, at least
14 in the towing context where the motor transportation has
15 ceased.

16 The reason for that, Your Honor --

17 JUSTICE SCALIA: I don't understand what you
18 just said. Say it again.

19 MR. YELIN: Yes, sir. I think that there
20 are reasons in the statutory text itself and in the
21 statutory objectives for viewing service as
22 independent -- excuse me, storage --

23 JUSTICE SCALIA: Service where? Service
24 where?

25 MR. YELIN: I misspoke, Justice Scalia.

1 Storage --

2 JUSTICE SCALIA: Storage, ah. I see.

3 MR. YELIN: -- as independent of
4 transportation. And the reasons for that are as
5 follows: First, let me start with the statutory text.
6 The statute defines "transportation" as "services
7 related to the transportation of property." And storage
8 has been in the Interstate Commerce Act for over
9 100 years, the term "storage." And for over 100 years
10 this Court has construed disputes concerning storage and
11 considered whether or not Federal law governed or State
12 law governed.

13 When the storage was before delivery of a
14 package, for example, the storage was considered to be
15 storage in transit and it was part of the transportation
16 itself. But if the storage occurred after delivery,
17 that was a separate service not connected with the
18 transportation.

19 JUSTICE KAGAN: Mr. Yelin, I gave
20 Mr. Shaughnessy a couple of hypotheticals about very
21 onerous regulations involving storage after the towing
22 that might very conceivably have an effect on the tower,
23 drive up the tower's prices, conceivably even drive the
24 tower out of the market. So how do we draw the line as
25 between this and those kinds of things?

1 MR. YELIN: So I have two points that I
2 would like to make with respect to that, Your Honor.
3 The first is that I think the hypotheticals you gave are
4 much more difficult cases and could very well cross the
5 line if a State tried to indirectly influence towers.
6 For example, let's assume, if I may elaborate on your
7 hypothetical, that a State really disliked the practice
8 of nonconsensual towing, and really wanted to try and
9 reign it in and so imposed certain conditions on towers
10 that would discourage them from engaging in this
11 particular type of service.

12 I think that would be an indirect type of
13 regulation, but it would, as a matter of fact, it really
14 would impair the ability or the interest of towers to
15 provide this service to --

16 JUSTICE SCALIA: How do we discover that?
17 Do we look into the city council hearings or what?

18 MR. YELIN: I think in part, Your Honor --

19 JUSTICE SCALIA: No, I want to be able to
20 look at the law and say the law is preempted or the law
21 isn't preempted. Don't tell me -- you know, the purpose
22 of the law is this or that. That's not something I am
23 able to do.

24 MR. YELIN: Your Honor, I think some of
25 these preemption questions necessarily are factual in

1 part in nature. The Court, to consider whether or not a
2 service of the motor carrier is affected by an indirect
3 statute is --

4 JUSTICE SCALIA: Yes, that's factual. But
5 whether the intent of the city council was this or that
6 is not factual.

7 MR. YELIN: Oh, no. That's right, Your
8 Honor. And I didn't mean to suggest that that would be
9 part of the inquiry.

10 JUSTICE SCALIA: I thought that is what you
11 meant.

12 MR. YELIN: No, Your Honor. The question is
13 whether it would have that effect, that factual effect.
14 And if I may, I think it's critical in this case to
15 point out that Petitioner has conceded at page 21 of its
16 reply brief that laws like Chapter 262 do not hamper
17 towing industry practices. And Respondent's amicus
18 Towing and Recovery Association explains that laws like
19 this provide a critical backbone for nonconsensual
20 towing services. In the absence --

21 CHIEF JUSTICE ROBERTS: Well, but I mean,
22 maybe these, but you can easily imagine that these types
23 of laws would be subject to abuse and would have an
24 adverse impact on the towing company and, therefore, on
25 the transportation of property.

1 MR. YELIN: And if there were such abusive
2 laws, Your Honor, and if they do impair the
3 transportation of property and the services that a tower
4 was willing to provide, I think that the Court would
5 likely consider those cases and consider those --

6 CHIEF JUSTICE ROBERTS: Well, now we only --
7 now we not only have to decide whether this type of law
8 is related to it, but once we say some of those laws
9 might be and some won't be, depending upon the impact in
10 a particular case.

11 MR. YELIN: Your Honor, I think every law
12 has to be considered in its application, and I think
13 that, for example, in Morales, the Court just didn't
14 consider --

15 CHIEF JUSTICE ROBERTS: Every law doesn't
16 have to be considered in its application. If you say
17 you can't speak out on the sidewalk, it doesn't matter
18 whether they apply it, you can consider that law
19 absolutely.

20 MR. YELIN: Fair enough, Your Honor. My
21 comment was too broad. What I would say is some laws
22 will be obvious. Those that directly regulate towing
23 industries, for example, a State law that flatly
24 prohibits nonconsensual towing would be the type of
25 direct regulation which is proscribed by this preemption

1 clause.

2 When you are talking about indirect
3 regulation, however, that perhaps is where I think one
4 needs to consider it on an as-applied basis because
5 indirect regulation by definition is not going to have
6 an obvious direct limit on towing services and the
7 question the Court will have to consider is whether the
8 indirect regulation is sufficiently onerous that it does
9 impair the provision of towing services.

10 JUSTICE BREYER: It seems to me we have two
11 choices. In Morales, since I can mock my own opinions,
12 I wrote at the end, "it's not -- when it's too tenuous,
13 remote or peripheral." That's singularly unhelpful.

14 (Laughter.)

15 JUSTICE BREYER: It seems to -- there --

16 JUSTICE SCALIA: I thought so at the time.

17 (Laughter.)

18 JUSTICE BREYER: Yes, you were right.

19 There are two directions you could go. But
20 first I would like to know, it seems my guess is it is
21 universally thought by cities that this Act does not
22 preempt their normal parking regulations. Am I right
23 about that?

24 MR. YELIN: You are right about that, Your
25 Honor.

1 JUSTICE BREYER: Okay. Then we either have
2 to take this tenuous, et cetera, this is too much, this
3 isn't too much, da, da, da, or you've given -- there is
4 another thought being thrown out and that is you relate
5 it to the basic purposes of the deregulation act and you
6 say that where the city is regulating something that
7 never was, could not be, and is not part of a regulated
8 or deregulated market, i.e. has nothing to do with the
9 subject matter, then it is not preempted.

10 Now, do you want us to take that approach?
11 Should we punt and just use the words like "tenuous"
12 or -- and if we take the implicit suggestion, what's the
13 right way to do it?

14 MR. YELIN: Your Honor, I think the two
15 alternatives you sketched are not mutually exclusive.
16 In fact, I think they support each other. I believe
17 that when a State law does not have a significant effect
18 on Congress's deregulatory and preemptive objectives, it
19 is by definition going to be too tenuously connected to
20 the motor carrier services.

21 I would propose, Your Honor, that in this
22 context, where the Department of Transportation would
23 have no regulatory authority and where there is no
24 private market that could fill the vacuum that would be
25 created by the removal of State laws creating the

1 structure for the private choices that are undertaken
2 here, this would be a prime example.

3 JUSTICE SCALIA: So it would depend upon how
4 severe the consumer protection law is, is that right?
5 If it's a consumer protection law that really whacks the
6 tow truck operator, that would be different from a
7 moderate, benign consumer protection law? We have to
8 examine each consumer protection law on its own, is that
9 it?

10 MR. YELIN: I think the answer has to be
11 yes, Justice Scalia. In Morales, for example, the Court
12 considered the application of the consumer protection
13 law where the States were trying to use specific
14 guidelines.

15 CHIEF JUSTICE ROBERTS: Well, why doesn't
16 this one really whack them, though? It's treble damages
17 and all that.

18 You can answer my question, yes.

19 (Laughter.)

20 MR. YELIN: Thank you, Mr. Chief Justice.

21 Your Honor, the Consumer Protection Act
22 claims that are asserted here are premised on Chapter
23 262, which structures the background organization of the
24 nonconsensual towing services altogether. There will be
25 no treble damages if the substantive provisions wee

1 satisfied. If they are not, that would be a different
2 question.

3 And, Your Honor, there has been no evidence
4 suggested here that in fact treble damages for a
5 violation of the background laws which structure the
6 standards that tow truck companies are supposed to
7 undertake would have that harm.

8 CHIEF JUSTICE ROBERTS: Thank you, counsel.

9 Mr. Bouffard, you have 3 minutes remaining.

10 REBUTTAL ARGUMENT OF ANDREW D. BOUFFARD

11 ON BEHALF OF THE PETITIONER

12 MR. BOUFFARD: Thank you.

13 Let me take a couple of moments to try to
14 address some of the questions that seem to be troubling
15 some of the Justices.

16 Justice Breyer, the simple answer to why
17 local traffic safety laws wouldn't be preempted is that
18 there's an exemption for the safety regulatory authority
19 of States in the statute.

20 JUSTICE BREYER: Thank you.

21 MR. BOUFFARD: And, Justice Kagan, the
22 reason why this -- this case goes over the line and is
23 preempted is because what the Plaintiff's damages claims
24 in this case seek to do is they seek to enforce duties
25 that go well beyond what even the New Hampshire

1 abandoned vehicle law requires.

2 They seek to impose duties of reasonable
3 care to seek out the owner of the vehicle; they --
4 the -- the -- the negligence claim seeks to impose a
5 duty to act -- a duty of reasonable care in disposing of
6 the vehicle; and -- and a duty of reasonable care to
7 return the vehicle to Mr. Pelkey.

8 And those duties and what has been a breach
9 of those duties will be determined by a jury. And so
10 when tow truckers are faced in the future with having to
11 live up to those sets of duties, they will never know
12 whether or not, in any given situation, their conduct
13 will be second-guessed as having been not reasonable by
14 a jury and they will be subjected to damages claims by
15 plaintiffs. Under the -- the abandoned vehicle law, the
16 rule is very simple in New Hampshire and under -- and in
17 many other jurisdictions -- pay, or your vehicle can be
18 sold. It's a very simple rule. And --

19 JUSTICE GINSBURG: But it also tells how the
20 vehicle will be sold -- sold, and your client is
21 invoking that statute in order to be able to sell the
22 car, but wants to have enforced only the parts that are
23 favorable to the tow operation. And the -- the regime
24 in New Hampshire is, yes, you can sell the vehicle, but
25 this is how you do it. And it seems to me that that's

1 not how it was done here.

2 MR. BOUFFARD: Well, Justice Ginsburg,
3 actually, the -- the tower here wasn't invoking the law,
4 the tower was simply following what the law says in
5 terms of the process. This is a mandatory process.
6 When -- when a person comes into possession of another's
7 vehicle in New Hampshire and -- and there's no claim
8 made for the vehicle, the law requires that the tow
9 trucker report that fact to the Department of Motor
10 Vehicles.

11 And the Department of Motor Vehicles then
12 looks at the information that's provided and then
13 instructs the tower about the process of whether or not
14 the vehicle can -- can be sold without notice, or if
15 it -- if notice is required, what notice is required.

16 JUSTICE KAGAN: But it's a process that
17 allows you in certain circumstances to sell the car and
18 to take the money. And what Justice Ginsburg is
19 suggesting is -- you know, you have to take the bitter
20 with the sweet.

21 CHIEF JUSTICE ROBERTS: Please.

22 MR. BOUFFARD: Well, I -- I think
23 that the -- the New Hampshire law is the New Hampshire
24 law, and what we have here is -- is a tow trucker that
25 was just making a good faith -- a good faith attempt to

1 comply with the law. And if -- if tow truckers that are
2 making good faith attempts to comply with the law are
3 faced with Consumer Protection Act claims and negligence
4 claims and the kinds of remedies that come with Consumer
5 Protection Act claims, that will have a significant
6 impact on the business of these motor carriers.

7 CHIEF JUSTICE ROBERTS: Thank you, counsel.

8 The case is submitted.

9 (Whereupon, at 12:10 p.m., the case in the
10 above-entitled matter was submitted.)

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<p style="text-align: center;">A</p> <p>abandoned 4:7,7 4:12,15,17,24 5:2,4,7,11,14 5:18,18 7:8,9 7:14 8:2,5 39:5 39:9 50:1,15</p> <p>ability 25:3 29:18 29:21 43:14</p> <p>able 33:3 43:19 43:23 50:21</p> <p>above-entitled 1:12 52:10</p> <p>absence 44:20</p> <p>absolutely 45:19</p> <p>abuse 44:23</p> <p>abusive 45:1</p> <p>accident 18:9</p> <p>account 23:8 25:18,20</p> <p>achieve 21:7</p> <p>act 7:20,22 8:4 22:3,23 26:18 30:7 42:8 46:21 47:5 48:21 50:5 52:3,5</p> <p>action 5:20,21 7:19 8:20</p> <p>activities 38:21</p> <p>activity 17:21 23:2 24:3</p> <p>actual 18:6 31:14 38:22</p> <p>ADA 37:21</p> <p>add 32:17</p> <p>address 24:23 49:14</p> <p>adequately 5:17</p> <p>Administration 30:7</p> <p>adopt 19:1,1 30:8</p> <p>adopted 31:19</p> <p>adverse 44:24</p> <p>advocated 16:15 24:20</p>	<p>affect 26:12 29:23 30:14 31:17,17 34:9</p> <p>afterward 28:12</p> <p>agree 9:1 11:24 21:22 36:25</p> <p>ah 13:20 20:4 42:2</p> <p>ahead 11:17 33:9</p> <p>aim 38:9</p> <p>air 20:17,18 21:9 21:9,12,13 30:8 38:11</p> <p>aircraft 18:16,17</p> <p>airline 18:14</p> <p>airplane 30:13 30:15,16</p> <p>airport 30:10</p> <p>ALITO 9:19 10:2 10:9,13,18,25</p> <p>allegation 7:25 8:3</p> <p>allegations 5:4</p> <p>allow 24:22 34:17</p> <p>allows 34:17 51:17</p> <p>alternatives 47:15</p> <p>altogether 26:18 48:24</p> <p>amazed 6:17</p> <p>amicus 1:22 2:10 39:19 44:17</p> <p>ANDRE 1:16 2:3 2:13 3:7</p> <p>ANDREW 49:10</p> <p>animal 34:20</p> <p>another's 51:6</p> <p>answer 14:10,20 31:22 33:3,4,6 48:10,18 49:16</p> <p>answers 24:4</p> <p>anybody 30:2</p> <p>apologize 20:19</p>	<p>apparent 36:13</p> <p>Appeals 18:14</p> <p>appear 16:16</p> <p>APPEARANC... 1:15</p> <p>appendix 20:20</p> <p>application 4:21 45:12,16 48:12</p> <p>applies 4:1 20:17 20:17 22:8 27:2</p> <p>apply 4:2,9,22 13:13,18 30:8 37:24 45:18</p> <p>approach 47:10</p> <p>aptly 27:12</p> <p>area 18:14 22:6 22:18 37:16</p> <p>argued 24:24,25</p> <p>arguing 7:13,18 13:20</p> <p>argument 1:13 2:2,5,8,12 3:4,7 8:21 9:24 14:16 24:9 29:14 35:9 38:17 39:18 49:10</p> <p>arises 5:13 18:6</p> <p>arising 18:15</p> <p>arrangement 33:24</p> <p>articulate 28:17</p> <p>articulating 28:20</p> <p>artificial 23:7</p> <p>asked 13:4 28:16 40:23</p> <p>asking 16:9</p> <p>assert 10:7,10 10:16 23:25</p> <p>asserted 48:22</p> <p>asserts 12:11</p> <p>Assistant 1:20</p> <p>Association 44:18</p> <p>assume 43:6</p>	<p>assure 38:12</p> <p>as-applied 46:4</p> <p>attempt 51:25</p> <p>attempts 52:2</p> <p>attention 31:3</p> <p>attenuated 30:3 37:13</p> <p>attorneys 7:21</p> <p>attractive 35:25</p> <p>auction 11:17 25:15,19</p> <p>authority 21:21 26:1,3 47:23 49:18</p> <p>Auto 1:4 24:20</p> <p>automobile 4:2</p> <p>Aviation 30:7</p> <p>a.m 1:14 3:2</p> <hr/> <p style="text-align: center;">B</p> <p>back 13:1 14:1 37:5</p> <p>backbone 44:19</p> <p>background 48:23 49:5</p> <p>basic 47:5</p> <p>basically 38:15</p> <p>basis 13:16 46:4</p> <p>behalf 1:16,19 2:4,7,14 3:8 13:9 24:10 49:11</p> <p>believe 12:5,12 12:14 26:22 27:24 28:13 29:10 30:19 31:2,18 32:12 32:20,20 34:22 37:17,25 38:3 38:14 47:16</p> <p>benign 48:7</p> <p>best 31:11</p> <p>beyond 49:25</p> <p>bidders 11:18</p> <p>bigger 33:4,5,18</p>	<p>bit 30:14</p> <p>bitter 51:19</p> <p>blame 34:10</p> <p>BODY 1:4</p> <p>Boston 7:1 35:23</p> <p>Bouffard 1:16 2:3,13 3:6,7,9 3:24 4:6,11,23 6:1,14,18 7:7 7:18 8:17 9:9 9:14 10:1,4,12 10:15,21 11:4 11:23 12:3,22 13:8,14,18,22 14:4,7,15,20 15:4,24 16:25 18:11 19:2,23 20:2,11 22:15 23:5,15 49:9,10 49:12,21 51:2 51:22</p> <p>breach 13:8 17:5 50:8</p> <p>breadth 21:8</p> <p>Breyer 5:23 6:5 6:16,20 7:5,11 21:17 22:15 31:20 32:24 33:12,15,21 34:13 35:6,11 35:24 46:10,15 46:18 47:1 49:16,20</p> <p>Breyer's 8:11</p> <p>BRIAN 1:18 2:6 24:9</p> <p>brief 6:22 38:16 38:18,23 39:2 44:16</p> <p>bring 15:21 16:1</p> <p>brings 4:3 15:11 25:22</p> <p>broad 15:1 19:1 20:22 23:8 24:19 31:4</p>
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