1   IN THE SUPREME COURT OF THE UNITED STATES

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3   DAN'S CITY USED CARS, INC.,   :

4   DBA DAN'S CITY AUTO BODY,   :

5   Petitioner   : No. 12-52

6   v.   :

7   ROBERT PELKEY   :

8   - - - - - - - - - - - - - - - - - - x

9   Washington, D.C.

10   Wednesday, March 20, 2013

11

12   The above-entitled matter came on for oral

13   argument before the Supreme Court of the United States

14   at 11:11 a.m.

15   APPEARANCES:

16   ANDRE D. BOUFFARD, ESQ., Burlington, Vermont; on behalf

17   of Petitioner.

18   BRIAN C. SHAUGHNESSY, ESQ., Manchester, New Hampshire;

19   on behalf of Respondent.

20   LEWIS S. YELIN, ESQ., Assistant to the Solicitor

21   General, Department of Justice, Washington, D.C.;

22   for United States, as amicus curiae, supporting

23   Respondent.

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1   C O N T E N T S

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1   P R O C E E D I N G S

2   (11:11 a.m.)

3   CHIEF JUSTICE ROBERTS: We will have

4   argument next in Case 12-52, Dan's City Used

5   Cars v. Pelkey.

6   Mr. Bouffard?

7   ORAL ARGUMENT OF ANDRE D. BOUFFARD

8   ON BEHALF OF THE PETITIONER

9   MR. BOUFFARD: Mr. Chief Justice, and may it

10 please the Court:

11   The issue in this case is whether Section

12 14501 of the United States Transportation Code expressly

13 preempts the Respondent's State law consumer protection

14 in tort claims for damages against a tow trucker who

15 towed his vehicle lawfully and then, several months

16 later, disposed of the vehicle after the fees for towing

17 and storage had not been paid.

18   Both of these claims are preempted because

19 they are directed at the conduct -- the type of conduct

20 that tow truck companies all over this country every day

21 engage in, in dealing with a particular type of tow

22 that's referred to in the business as nonconsensual

23 tows.

24   JUSTICE GINSBURG: Mr. Bouffard, this law,

25 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 guess, I mean, I guess

6   you could have thousands of claims across the country,

7   millions of claims where there are all kinds of towing

8   laws. 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 him $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, 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: 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 - the -- any breach of

9 contract claim that might arise on behalf of the plaintiff

10 would not be preempted. That's what the Court decided in

11 the 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 not sure if that's your point.

20 I 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 --

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, is the storage afterward, is not that motor

13 carrier service. And I do believe the -- the language

14 at the 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 is 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 in significance in

14 this 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   JUSTICE BREYER: Correct.

16   MR. SHAUGHNESSY: Right.

17   JUSTICE BREYER: Correct.

18   JUSTICE SCALIA: And he didn't -- he didn't

19 mention Cambridge, did he?

20   MR. SHAUGHNESSY: No.

21   JUSTICE SCALIA: I don't think so.

22   MR. SHAUGHNESSY: I think he did yesterday,

23 too, Your Honor.

24   JUSTICE SCALIA: Yeah, you're both from

25 Boston, Massachusetts.

1   JUSTICE BREYER: And they're -- they're very

2   attractive places except in the winter.

3   But a -- a motor carrier vehicle -- a

4   service, transportation includes related to the movement

5   of passengers or property. Related to the movement of

6   passengers or property. So we have these words "related

7   to" again. I -- well, you've given me a couple of

8   ideas, but I -- maybe they'll turn out not to be

9   relevant, but -- but -- which I hope.

10   JUSTICE SCALIA: I think maybe -- maybe we

11 have to make it up, what the limitation -- I mean,

12 you're quite right, everything's related to everything

13 else. And we've had trouble with the same -- the very

14 same words with ERISA, and -- and started off trying to

15 give it its -- its apparent meaning, "related to," and

16 we finally concluded you can't do that.

17   So what do you want us to make up? What

18 kind of a limitation do you --

19   (Laughter.)

20   MR. SHAUGHNESSY: Well -- Justice Scalia, I

21 don't think you have to make up too much in this

22 particular case. It gets easier to draw the line

23 because of the with respect to transportation of

24 property. So with respect to the FAAAA and motor

25 carriers, we're drawing the line as to only the services

1   of the movement of the property, and that is limiting.

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

3   JUSTICE SCALIA: Related to -- related to --

4   related to the movement of the property. That's the

5   problem. It's the "related to" words.

6   MR. SHAUGHNESSY: Correct. And then we go

7   back to the instructions in Rowe, which -- which

8   provided the framework that when you're interpreting

9   related to, you go: One, is it direct -- directly

10   regulating or directly affecting service; or, if it's an

11   indirect effect, which obviously it can be, it has to

12   have a significant impact on the services.

13   And then there's the ultimate out of Morales

14   that says if it's -- it could certainly connect, but if

15   it's too far attenuated to the purposes of Congress,

16   it's just not going to be done.

17   I know that doesn't help with the line

18   drawing in -- in connection of the gray area that we're

19   dealing with in this case, but I do believe in this

20   particular case, it is easier because we have that --

21   those words of limitation, "with respect to the

22   transportation of property" are words of limitation, and

23   they are not present in the ADA, and they were not

24   present with the ERISA cases, which deals with a broad

25   regulatory scheme with long history and other things

 1 that apply.

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

 3 the New Hampshire Supreme Court got it right when they

 4 were focusing on actually what is a service of a motor

 5 carrier, and I believe we do have words of limitation in

 6 this particular case.

 7   So what the Supreme Court of New Hampshire

 8 said is, "The manner in which a company in possession of

 9 a towed vehicle may" -- not must -- "may dispose of the

10 vehicle to collect on a debt created by the operation of

11 State law is far removed from Congress's aim of

12 promoting free markets and equalizing the competitive

13 playing -- playing field between motor carriers and air

14 carriers, and help assure transportation rate services

15 reflect maximum reliance on -- on forces."

16   I also believe that the Petitioner has

17 basically given up the case and conceded the case in

18 several places in their brief and in here in oral

19 argument today. If you look at page 34 of the

20 Petitioner's brief, it says that most -- that "The most

21 that Dan's City really can say is that the services

22 within the meaning of Section 14501(c)(1) includes

23 activities that are incidental and distinct from the

24 actual transportation services."

25   So the Petitioner's brief is calling the

1 storage afterwards, after the transportation has

2 stopped. And -- and they call it incidental and

3 distinct.

4   In the reply brief at page 21, they say,

5 "Moreover, criminal laws prohibiting theft are not the

6 kind of burdensome State economic regulation Congress

7 sought to prevent with the FAAAA, nor are abandoned

8 vehicle laws such as New Hampshire Chapter 262 in its

9 regulations which do not hamper the operations of tow

10 truckers. Instead they establish procedures for the

11 efficient handling and disposition of abandoned

12 vehicles."

13   So they're conceding that RSA 262 in this

14 case, the statute does not have a significant impact,

15 so this is not a clear case.

16   I see I have more time, but I think I've

17 made all my points, if there are no more questions.

18   CHIEF JUSTICE ROBERTS: Thank you, counsel.

19   Mr. Yelin, welcome.

20   ORAL ARGUMENT OF LEWIS S. YELIN,

21   FOR THE UNITED STATES, AS AMICUS CURIAE,

22   SUPPORTING THE RESPONDENT

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

24 and may it please the Court:

25   Congress deregulated the trucking industry

1 to eliminate undue interference with market forces and

2 consumer choice. But market forces and consumer choice

3 cannot operate on the sale of nonconsensually towed

4 cars, and there's little reason to think that Congress

5 intended to preempt State laws that regulate that

6 conduct.

7   This Court in this case, as in many

8 preemption cases involving the phrase "related to," must

9 engage in a -- in a process of sensible line drawing.

10   Everything is related to everything else in

11 the literal sense. And the Court in Travelers suggested

12 that the Court should not -- courts should not use

13 uncritical literalism in determining the scope of a

14 preemption provision.

15   I think that this Court does have some work

16 to do in this case, but a lot of the groundwork has

17 already been laid in the Rowe case. In Rowe, this Court

18 held that a State law is related to a motor carrier

19 service if the State law either directly regulates the

20 service or if it has an indirect connection with the

21 service and a significant -- forbidden significant

22 effect on Congress's deregulatory and preemptive

23 objectives. I think --

24   CHIEF JUSTICE ROBERTS: Well, it's -- I

25 asked your friend on the other side the question.

1   Storage is part of what tow trucks do. Maybe in a way

2   that -- you know, cross-country trucks don't. And it

3   seems to me if you have a local jurisdiction who figures

4   out, well, this is a great way to make a lot of money

5   or -- you know, to give -- or the other way -- you know,

6   you can charge -- charge a lot because we want to keep

7   subsidized tow trucks. I mean, why isn't that fairly

8   directly related to the service they provide?

9   MR. YELIN: It's certainly a foreseeable

10   service that could be provided. The question is whether

11   it has a sufficient locus to the transportation itself.

12   I think there are indications in the statute

13   itself and the statutory purposes which suggest that the

14   Court should view service as a separate type of service,

15   independent and distinct from transportation, at least

16   in the towing context where the motor transportation has

17   ceased.

18   The reason for that, Your Honor --

19   JUSTICE SCALIA: I don't understand what you

20   just said. Say it again.

21   MR. YELIN: Yes, sir. I think that there

22   are reasons in the statutory text itself and in the

23   statutory objectives for viewing service as

24   independent -- excuse me, storage --

25   JUSTICE SCALIA: Service where? Service

1   where?

2   MR. YELIN: I misspoke, Justice Scalia.

3   Storage --

4   JUSTICE SCALIA: Storage, ah. I see.

5   MR. YELIN: -- as independent of

6   transportation. And the reasons for that are as

7   follows: First, let me start with the statutory text.

8   The statute defines "transportation" as "services

9   related to the transportation of property." And for –

10   and storage has been in the Interstate Commerce Act for

11   over 100 years, the term "storage." And for over 100

12   years this Court has construed disputes concerning

13   storage and considered whether or not Federal law

14   governed or State law governed.

15   When the storage was before delivery of a

16   package, for example, the storage was considered to be

17   storage in transit and it was part of the transportation

18   itself. But if the storage occurred after delivery,

19   that was a separate service not connected with the

20   transportation.

21   JUSTICE KAGAN: Mr. Yelin, I gave

22   Mr. Shaughnessy a couple of hypotheticals about very

23   onerous regulations involving storage after the towing

24   that might very conceivably have an effect on the tower,

25   drive up the tower's prices, conceivably even drive the

1   tower out of the market. So how do we draw the line as

2   between this and those kinds of things?

3   MR. YELIN: So I have two points that I

4   would like to make with respect to that, Your Honor.

5   The first is that I think the hypotheticals you gave are

6   much more difficult cases and could very well cross the

7   line if a State tried to indirectly influence towers.

8   For example, let's assume, if I may elaborate on your

9   hypothetical, that a State really disliked the practice

10   of nonconsensual towing, and really wanted to try and

11   reign it in and so imposed certain conditions on towers

12   that would discourage them from engaging in this

13   particular type of service.

14   I think that would be an indirect type of

15   regulation, but it would, as a matter of fact, it really

16   would impair the ability or the interest of towers to

17   provide this service to --

18   JUSTICE SCALIA: How do we discover that?

19   Do we look into the city council hearings or what?

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

21   JUSTICE SCALIA: No, I want to be able to

22   look at the law and say the law is preempted or the law

23   isn't preempted. Don't tell me -- you know, the purpose

24   of the law is this or that. That's not something I am

25   able to do.

1   MR. YELIN: Your Honor, I think some of

2   these preemption questions necessarily are factual in

3   part in nature. The Court, to consider whether or not a

4   service of the motor carrier is affected by an indirect

5   statute is --

6   JUSTICE SCALIA: Yes, that's factual. But

7   whether the intent of the city council was this or that

8   is not factual.

9   MR. YELIN: Oh, no. That's right, Your

10 Honor. And I didn't mean to suggest that that would be

11 part of the inquiry.

12   JUSTICE SCALIA: I thought that is what you

13 meant.

14   MR. YELIN: No, Your Honor. The question is

15 whether it would have that effect, that factual effect.

16 And if I may, I think it's critical in this case to

17 point out that Petitioner has conceded at page 21 of its

18 reply brief that laws like Chapter 262 do not hamper

19 towing industry practices. And Respondent's amicus

20 Towing and Recovery Association explains that laws like

21 this provide a critical backbone for nonconsensual

22 towing services. In the absence --

23   CHIEF JUSTICE ROBERTS: Well, but I mean,

24 maybe these, but you can easily imagine that these types

25 of laws would be subject to abuse and would have an

1 adverse impact on the towing company and, therefore, on

2 the transportation of property.

3   MR. YELIN: And if there were such abusive

4 laws, Your Honor, and if they do impair the

5 transportation of property and the services that a tower

6 was willing to provide, I think that the Court would

7 likely consider those cases and consider those --

8   CHIEF JUSTICE ROBERTS: Well, now we only --

9 now we not only have to decide whether this type of law

10 is related to it, but once we say some of those laws

11 might be and some won't be, depending upon the impact in

12 a particular case.

13   MR. YELIN: Your Honor, I think every law

14 has to be considered in its application, and I think

15 that, for example, in Morales, the Court just didn't

16 consider --

17   CHIEF JUSTICE ROBERTS: Every law doesn't

18 have to be considered in its application. If you say

19 you can't speak out on the sidewalk, it doesn't matter

20 what they apply it, you can consider that law

21 absolutely.

22   MR. YELIN: Fair enough, Your Honor. My

23 comment was too broad. What I would say is some laws

24 will be obvious. Those that directly regulate towing

25 industries, for example, a State law that flatly

1   prohibits nonconsensual towing would be the type of

2   direct regulation which is proscribed by this preemption

3   clause.

4   When you are talking about indirect

5   regulation, however, that perhaps is where I think one

6   needs to consider it on an as-applied basis because

7   indirect regulation by definition is not going to have

8   an obvious direct limit on towing services and the

9   question the Court will have to consider is whether the

10 indirect regulation is sufficiently onerous that it does

11 impair the provision of towing services.

12   JUSTICE BREYER: It seems to me that there --

13 we have two choices. In Morales, since I can mock my own

14 opinions, I wrote at the end, "it's not -- when it's too

15 tenuous, remote or peripheral." That's singularly unhelpful.

16   (Laughter.)

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

18   JUSTICE SCALIA: I thought so at the time.

19   (Laughter.)

20   JUSTICE BREYER: Yes, you were right.

21   There are two directions you could go. But

22 first I would like to know, it seems my guess is it is

23 universally thought by cities that this Act does not

24 preempt their normal parking regulations. Am I right

25 about that?

1   MR. YELIN: You are right about that, Your

2   Honor.

3   JUSTICE BREYER: Okay. Then we either have

4   to take this tenuous, et cetera, this is too much, this

5   isn't too much, da, da, da, or you've given -- there is

6   another thought being thrown out and that is you relate

7   it to the basic purposes of the deregulation act and you

8   say that where the city is regulating something that

9   never was, could not be, and is not part of a regulated

10   or deregulated market, i.e. has nothing to do with the

11   subject matter, then it is not preempted.

12   Now, do you want us to take that approach?

13   Should we punt and just use the words like "tenuous"

14   or -- and if we take the implicit suggestion, what's the

15   right way to do it?

16   MR. YELIN: Your Honor, I think the two

17   alternatives you sketched are not mutually exclusive.

18   In fact, I think they support each other. I believe

19   that when a State law does not have a significant effect

20   on Congress's deregulatory and preemptive objectives, it

21   is by definition going to be too tenuously connected to

22   the motor carrier services.

23   I would propose, Your Honor, that in this

24   context, where the Department of Transportation would

25   have no regulatory authority and where there is no

1   private market that could fill the vacuum that would be

2   created by the removal of State laws creating the

3   structure for the private choices that are undertaken

4   here, this would be a prime example.

5   JUSTICE SCALIA: So it would depend upon how

6   severe the consumer protection law is, is that right?

7   If it's a consumer protection law that really whacks the

8   tow truck operator, that would be different from a

9   moderate, benign consumer protection law? We have to

10   examine each consumer protection law on its own, is that

11   it?

12   MR. YELIN: I think the answer has to be

13   yes, Justice Scalia. In Morales, for example, the Court

14   considered the application of the consumer protection

15   law where the States were trying to use specific

16   guidelines.

17   CHIEF JUSTICE ROBERTS: Well, why doesn't

18   this one really whack them, though? It's treble damages

19   and all that.

20   You can answer my question, yes.

21   (Laughter.)

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

23   Your Honor, the Consumer Protection Act

24   claims that are asserted here are premised on Chapter

25   262, which structures the background organization of the

1   nonconsensual towing services altogether. There will be

2   no treble damages if the substantive provisions were

3   satisfied. If they are not, that would be a different

4   question.

5   And, Your Honor, there has been no evidence

6   suggested here that in fact treble damages for a

7   violation of the background laws which structure the

8   standards that tow truck companies are supposed to

9   undertake would have that harm.

10   CHIEF JUSTICE ROBERTS: Thank you, counsel.

11   Mr. Bouffard, you have 3 minutes remaining.

12   REBUTTAL ARGUMENT OF ANDREW D. BOUFFARD

13   ON BEHALF OF THE PETITIONER

14   MR. BOUFFARD: Thank you.

15   Let me take a couple of moments to try to

16   address some of the questions that seem to be troubling

17   some of the Justices.

18   Justice Breyer, the simple answer to why

19   local traffic safety laws wouldn't be preempted is that

20   there's an exemption for the safety regulatory authority

21   of States in the statute.

22   JUSTICE BREYER: Thank you.

23   MR. BOUFFARD: And, Justice Kagan, the

24   reason why this -- this case goes over the line and is

25   preempted is because what the Plaintiff's damages claims

1   in this case seek to do is they seek to enforce duties

2   that go well beyond what even the New Hampshire

3   abandoned vehicle law requires.

4   They seek to impose duties of reasonable

5   care to seek out the owner of the vehicle; they --

6   the -- the -- the negligence claim seeks to impose a

7   duty to act -- a duty of reasonable care in disposing of

8   the vehicle; and -- and a duty of reasonable care to

9   return the vehicle to Mr. Pelkey.

10   And those duties and what has been a breach

11   of those duties will be determined by a jury. And so

12   when tow truckers are faced in the future with having to

13   live up to those sets of duties, they will never know

14   whether or not, in any given situation, their conduct

15   will be second-guessed as having been not reasonable by

16   a jury and they will be subjected to damages claims by

17   plaintiffs. Under the -- the abandoned vehicle law, the

18   rule is very simple in New Hampshire and under -- and in

19   many other jurisdictions -- pay, or your vehicle can be

20   sold. It's a very simple rule. And --

21   JUSTICE GINSBURG: But it also tells how the

22   vehicle will be sold -- sold, and your client is

23   invoking that statute in order to be able to sell the

24   car, but wants to have enforced only the parts that are

25   favorable to the tow operation. And the -- the regime

1   in New Hampshire is, yes, you can sell the vehicle, but

2   this is how you do it. And it seems to me that that's

3   not how it was done here.

4   MR. BOUFFARD: Well, Justice Ginsburg,

5   actually, the -- the tower here wasn't invoking the law,

6   the tower was simply following what the law says in

7   terms of the process. This is a mandatory process.

8   When -- when a person comes into possession of another's

9   vehicle in New Hampshire and -- and there's no claim

10   made for the vehicle, the law requires that the tow

11   trucker report that fact to the Department of Motor

12   Vehicles.

13   And the Department of Motor Vehicles then

14   looks at the information that's provided and then

15   instructs the tower about the process of whether or not

16   the vehicle can -- can be sold without notice, or if

17   it -- if notice is required, what notice is required.

18   JUSTICE KAGAN: But it's a process that

19   allows you in certain circumstances to sell the car and

20   to take the money. And what Justice Ginsburg is

21   suggesting is -- you know, you have to take the bitter

22   with the sweet.

23   CHIEF JUSTICE ROBERTS: Please.

24   MR. BOUFFARD: Well, I -- I think

25   that the -- the New Hampshire law is the New Hampshire

1   law, and what we have here is -- is a tow trucker that

2   was just making a good faith -- a good faith attempt to

3   comply with the law. And if -- if tow truckers that are

4   making good faith attempts to comply with the law are

5   faced with Consumer Protection Act claims and negligence

6   claims and the kinds of remedies that come with Consumer

7   Protection Act claims, that will have a significant

8   impact on the business of these motor carriers.

9   CHIEF JUSTICE ROBERTS: Thank you, counsel.

10   The case is submitted.

11   (Whereupon, at 12:10 p.m., the case in the

12   above-entitled matter was submitted.)

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