No. 12-52

In The Supreme Court of the United States

DAN'S CITY USED CARS, INC. D/B/A DAN'S CITY AUTO BODY,

Petitioner,

v.

ROBERT PELKEY,

Respondent.

On Writ of Certiorari to the
Supreme Court of New Hampshire

BRIEF FOR TOWING AND RECOVERY ASSOCIATION OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

MICHAEL MCGOVERN
THE MCGOVERN LAW FIRM
3021 Tazewell Pike
PO Box 5536
Knoxville, TN 37918
(865)686-4891

ERIK S. JAFFE
(Counsel of Record)
ERIK S. JAFFE, P.C.
5101 34th Street, NW
Washington, DC 20008
(202) 237-8165
jaffe@esjpc.com

Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

INTEREST OF *AMICUS CURIAE* [1]

Towing and Recovery Association of America ("TRAA") is the national association of motor carriers engaged in the towing and recovery of motor vehicles. Through its direct membership and the federation of fifty state towing associations and the towing association of the District of Columbia, TRAA represents the interests of more than 25,000 motor carriers engaged in towing operations involving every type and size of motor vehicle that is operated on our nation's highways. This case is of particular interest to TRAA because a reliable mechanism for disposing of unclaimed towed vehicles – and collecting outstanding fees from the proceeds of such disposition – is an important aspect of most towing businesses.

STATEMENT

As the parties both note, this case comes before the Court on a set of facts that have not been fully and finally determined by a judge or jury, but that are viewed in a light most favorable to the Respondent as the non-moving party defending against a summary judgment motion below.

Amicus will likewise assume the facts as presented, but hastens to add that it takes no position on

---

[1] No counsel for a party authored this brief in whole or in part and no such counsel or a party made a monetary contribution intended to fund the preparation or submission of this brief. Nor did any person or entity, other than *Amicus,* its members, or its counsel, make a monetary contribution intended to fund the preparation or submission of this brief. This brief is filed with the written consent of all parties.

whether those facts are true or how a jury might or should ultimately view the competing claims of the parties. In short, *Amicus* takes no position on whether Petitioner actually committed the wrongs with which it is charged. As an association of towing and recovery operators, *Amicus* certainly hopes the tow operator in this case in fact acted honorably and lawfully, but it believes that question is for a court or jury to decide.

Amicus's primary interest in this case is to ensure the preservation of background rules for the disposition of unclaimed vehicles and the collection of towing and storage fees due on such vehicles. Such background rules protect both the tow companies and consumers and contribute to the efficient functioning of the market. Petitioner in this case, like many TRAA members, is engaged in the business of towing away and storing vehicles. Such towing and storage can be either consensual or nonconsensual. In many cases, the towing and storage involves vehicles that have improperly parked on private property. Real property owners or managers, *e.g.*, owners and managers of apartment complexes or shopping centers, hire and authorize towing companies to remove vehicles that are improperly parked on the property, *e.g.*, parked in fire lanes or designated "no parking" areas, parked in handicapped parking stalls without displaying a valid handicapped placard, blocking garages and/or dumpsters, and blocking snow-removal efforts.

Towing and storage of vehicles also occur as the result of requests from law enforcement agencies. Every year in the United States, hundreds of thousands of abandoned vehicles, wrecked vehicles, vehi-

cles driven by persons who have been arrested, or vehicles seized pursuant to a forfeiture proceeding, are towed and stored at private tow lots at the direction of law enforcement agencies.

And, in some cases, vehicles are towed and stored at the direct request of the vehicle owner, for example, when a vehicle suffers mechanical difficulty away from the owner's home and a garage or other location is not immediately available.

In most states, towing firms that lawfully tow and store motor vehicles enjoy a possessory lien to secure payment of their towing and storage fees.

The vast majority of towed and stored vehicles are retrieved by their owners, prior lienholders, or insurers within a reasonable time after the they are towed. However, thousands of towed and stored vehicles — typically valueless salvage or extremely low-valued vehicles — go unclaimed and are abandoned in private towing lots by their owners or insurers. In those instances, towing companies must foreclose their liens in accordance with the respective state laws relating to unclaimed vehicles. The ability to dispose of unclaimed vehicles efficiently is essential to the financial well-being of towing companies.

The New Hampshire law under which the Petitioner towing company processed Respondent's vehicle is fairly representative of state laws governing the foreclosure of towing liens and the disposal of unclaimed vehicles.

It grants the towing company certain rights and imposes certain responsibilities in connection with the exercise of those rights. Upon satisfaction of those various responsibilities, the vehicle is typically

sold at auction. In most instances, the auction price only partially satisfies the outstanding towing and storage lien. The vast majority of vehicles sold at towing company auctions sell for less than $500. Most are sold for parts, or crushed and recycled.

As noted above, the expedited, cost-efficient method of disposing of unclaimed vehicles provided by most state statutes is crucial to the towing business. Without a non-judicial means of processing unclaimed vehicles, towing yards throughout the nation would overflow with junk and derelict vehicles while towing agencies devote unnecessary time and effort pursuing court orders for vehicle lien foreclosures. The loss of the non-judicial lien foreclosure mechanisms to federal preemption would be crippling to the automotive towing industry.

While *Amicus* TRAA takes no position on the alleged misconduct of Petitioner in the case at bar, it recognizes that errors can, and do, occur in the processing of unclaimed towed vehicles. For example, a required written notice might be delinquent, incomplete, or inadvertently sent to an incorrect address. Such errors result in the failure, or at least delay, of notification to the owner or prior lienholder. If notice is delayed, the owner or prior lienholder incurs additional, unwanted, vehicle storage fees. If a written notice never reaches the owner or lienholder, a vehicle might be sold at auction without the prior knowledge of any interested party.

Regrettably, there are also documented instances in which a towing company fraudulently manipulated the lien foreclosure procedure for financial gain. Although, as noted above, the vast majority of unclaimed

vehicles sold at auctions are of junk value only, occasionally a vehicle with substantial value will be towed to a private tow yard. In those cases, if the vehicle is not redeemed and no outside bidders appear for the auction, a tow truck company could potentially obtain the "windfall" of a high-value vehicle upon a bid of his outstanding towing and storage fees. An unscrupulous tow operator might intentionally misdirect mailed notices or publish incorrect newspaper ads in an effort to circumvent proper notice and avoid outside bidders.

Noting once again that it takes no position on the allegations raised in the complaint filed in this case, *Amicus* believes that it is untenable for a vehicle owner to be without legal recourse for the negligent or intentional failures of a towing company in the unclaimed vehicle lien foreclosure process. Both the tow company and the vehicle owner thus stand to benefit from state background laws governing the disposition of unclaimed vehicles.

SUMMARY OF ARGUMENT

1. It has been difficult for courts consistently to determine which state laws are *sufficiently* related to the prices, routes, and services of motor carriers with respect to the transportation of property to be preempted by 49 U.S.C. § 14501(c)(1). The statutory phrase "related to" is largely indeterminate, potentially endless, and the source of much of the problem. While this Court's cases have attempted to define the scope and limits of that phrase, those efforts have not brought meaningful clarity, and many cases continued to be decided on an *ad hoc* balancing of a variety

of factors often with seemingly conflicting results. The jurisprudence as it stands thus lacks predictability and definition, and contains a large "grey" area – into which the present case falls – in which the outcome of the preemption analysis is regularly uncertain.

Amicus proposes a partial solution to this problem within that grey area that will add certainty, preserve important background laws that facilitate the efficient functioning of the towing market, and yet still allow towing companies to innovate and compete within the market as Congress intended: for laws falling in the grey area of relatedness – those neither closely connected to price, routes, or service nor having a plainly tenuous relationship to such matters – there should be no preemption *unless* the conduct or activities subject to such laws are included in an agreed-upon contract for towing service between the tow truck operator and the vehicle owner or his agent. Once included in a market-based agreement, the relationship of such subject matter to towing price, route, and service would be closer than if left unaddressed, and state law purporting to regulate such matters would then be preempted. In effect, state laws touching upon such grey areas would provide a default rule that could be modified by the very type of market-based transactions that Congress sought to encourage and insulate.

This proposed rule, though not covering every situation, is far more judicially administrable, provides greater predictability to States and tow truck businesses alike, and preserves as a default many back-

ground laws, such as the one in this case, that are important to the efficient functioning of the market.

2. As applied to this case, the proposed rule would result in affirming the decision below. The disposition of towed vehicles as a means of recovering a tow truck business's unpaid fees for towing and storage services and terminating the provision of such services certainly has *some* relationship to fees and services, but that relationship is attenuated and is likewise comparable to, and a subset of, the more generally applicable areas of debt collection, bailment, and property disposition. Whether the relationship of this post-towing activity is *sufficiently* closely related or instead too tenuously related to prices and service to fall within the statutory notion of "related to" is highly debatable and ultimately a multifaceted policy judgment regarding the towing industry. The laws in this case regulating such matters thus fall well inside the grey area of the preemption provision. That being the case, they would not be preempted absent some alternative agreed to in the towing contract, for which there appears to be no evidence in this case.

Additionally, even if a provision addressing the collection of outstanding fees through sale of the vehicle were included in the contract (or this Court otherwise deemed the laws at issue here to be closely "related" and hence not in the grey area), such matters would be more naturally understood as related to price rather than service (or, at worst, to both price and service). Thus, to the extent the tow in this case was nonconsensual, the relevant law would be excluded from otherwise applicable preemption by 49 U.S.C. § 14501(c)(2)(C), excluding from preemption state law

related to price in the case of nonconsensual tows. Though the tow in this case would seem to have been nonconsensual, there is at least the potential for disagreement on that question and the New Hampshire Supreme Court had no need to consider the those matters. *Amicus* thus takes no position on whether the tow in this case was nonconsensual for purposes of the exemption, merely that if it was, the exemption would apply if the preemption provision applied.

Amicus encourages this Court to avoid some of the more extreme positions offered by both sides. Petitioner's suggestion that essentially anything to do with a towing company's business is related to its services sweeps too far and would likely preempt many laws on which towing companies rely to conduct that very business. It likewise leaves insufficient redress for consumers who, unfortunately, may encounter troubling and injurious conduct by tow truck operators.

Respondent's suggestion that *all* common law is excluded from the preemption provision likewise sweeps too far. This Court has recognized in other contexts that judicially created tort duties have the force and effect of law no less than statutory or regulatory law, and can often have comparable regulatory effects.

Similarly, Respondent's suggestion that the phrase "with respect to the transportation of property" excludes virtually *any* activities once the "movement" of the vehicle is complete also overstates the matter. Transportation as defined in the statute includes storage, handling, and interchange of the property, and hence the disposition of an unclaimed towed ve-

hicle being stored by the tow truck business is at least closely "related to," or actually included in, the transportation of that same vehicle.

Finally, while *Amicus* shares many of the concerns of topside *amicus* California Tow Truck Association ("CTTA"), it disagrees with CTTA's broad and amorphous focus on attenuated effects, highly variable and changing local circumstances and laws, and unmeasurable considerations regarding liability avoidance and similar matters. The different types of laws identified by CTTA present different issues and concerns than the law in this case, and any uncertainty regarding their preemption likely requires different solutions. This is not the case to speculate on such matters.

ARGUMENT

I. State Law Providing Background Rules For Commercial Interaction and Not Closely Related to Prices, Routes, or Services Should Not Be Preempted Absent Contractual Terms Providing for Different Rules and Thereby Creating the Requisite Close Relation.

The federal preemption provision at issue in this case, 49 U.S.C. § 14501(c)(1), prohibits States or their political subdivisions from enacting or enforcing any "law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier * * * with respect to the transportation of property."

The statutory phrase "*related to* a price, route, or service," however, is notoriously indeterminate and

undefined, and has led to much of the difficulty in applying the provision. *See, e.g.*, Pet. 12 (summarizing conflicting outcomes and reasoning in cases regarding extremely similar facts); *Travel All Over the World, Inc.* v. *Kingdom of Saudi Arabia*, 73 F.3d 1423, 1433 (CA7 1996) ("courts have reached divergent results regarding whether claims for slander and defamation are preempted by the ADA" * * *. [citations omitted] *Morales* does not permit us to develop broad rules concerning whether certain types of common-law claims are preempted by the ADA. Instead, we must examine the underlying facts of each case to determine whether the particular claims at issue 'relate to' airline rates, routes or services.").

Because of such indeterminacy and the potentially limitless sweep of the concept "related to," this Court has recognized that the proper question is not whether state law is related to price, route, or service in any conceivable sense, but whether the relationship to such matters is sufficiently close, or too tenuous, to come within the preemptive reach of the statute. *See Rowe* v. *New Hampshire Motor Transport Association*, 552 U.S. 364, 375 (2008) ("[F]ederal law does not pre-empt state laws that affect rates, routes, or services in 'too tenuous, remote, or peripheral a manner.' ") (quoting *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 390 (1992)).; *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995) (analogous "relate to" language in the ERISA preemption clause cannot extend "to the furthest stretch of its indeterminacy" because "then for all practical purposes preemption would never run its course").

This formulation of the preemption question thus creates a significant grey area in which laws having some relationship to towing and other transportation activities must be measured against a variety of factors whose application and weight is anything but clear and predictable.

This case falls squarely within that grey area of the law, with the parties debating whether the sale or disposal of a towed vehicle in order collect an unpaid fee for towing and storage is "related to" the price or services of a tow truck operator and comes within the broad, but not unlimited, scope of preemption under § 14501(c)(1). Both sides, however, take an overly simplified view of the case – each advancing categorical arguments as to why the disposition of unclaimed towed vehicles is either necessarily related to towing services or plainly not included in such services but rather a discrete activity entirely separate from such services. *Compare, e.g.,* Pet. Br. 21 ("It defies logic to suggest that the actions of the tow trucker in connection with disposition of the vehicle are not associated or connected with the towing and storage services in the first instance."), *with* Resp. Br. 25-26 ("Pelkey is not challenging how Dan's City arranged for the tow of his vehicle, or how it delivered, handled, or interchanged his vehicle. He is challenging actions related to how it *disposed* of his vehicle, that is, how it purported to extinguish his property rights and transferred his property to someone else."). Both parties are partially wrong – and partially right.

The disposition of an unclaimed towed vehicle as a means of collecting fees owed for towing and storage, and in order to terminate the towing company's con-

tinued, uncompensated, storage of the vehicle, certainly has *some* relationship to the preceding act of towing the vehicle, the appurtenant storage of the vehicle pending delivery to its owner, and the price charged yet unpaid for those activities. The issue however, is not the existence of a relationship *vel non*, but whether that relationship is sufficiently close to trigger statutory preemption. That question is nowhere near as clear-cut as either Petitioner or Respondent would have it. Simply asserting categorical labels for the relevant activities – "service" versus "sale of property" or "debt collection" – adds little to the otherwise policy-based balancing arguments the parties also offer. The reality is that the disposition of an unclaimed towed vehicle has aspects of each of the claimed categorizations and this Court must determine whether the law governing such dispositions treads strongly enough on protected activities as to warrant preemption.

This Court's current jurisprudence does not provide a satisfying or predictable answer to this and other questions dealing with the grey area of preemption. The cases too often turn on debatable and case-specific judgments regarding the impact of different laws, or the tenuousness or closeness of a relationship – determinations that are, quite frankly, not well-suited for judicial determination, not conducive to predictable and consistent outcomes, and seem overly legislative rather than legal in character.

The ambiguity and uncertainty of current jurisprudence serves nobody – it creates legal and commercial uncertainty for both States and tow-truck operators, it allows considerable interference with tow

truck operations and market forces, and it creates a variety of conflicting decisions in the courts, which ultimately will have to be resolved on an *ad hoc* basis. What would be better is a simpler and clearer rule for addressing cases falling within the grey area of preemption under § 14501(c)(1) that allows States to provide background default rules that enhance efficiency in commercial transactions, yet still allows for the operation of market forces when such background rules genuinely impinge upon tow-truck prices, routes, and services.

Amicus respectfully suggests that an appropriate rule within the grey area is a default presumption that generally applicable state background rules governing commercial transactions be deemed insufficiently related to prices, routes, and service to trigger preemption *unless* those background rules are altered by a contract defining the terms and related conditions of the prices, routes, and services provided by the operator transporting a vehicle. Put differently, state law will *not* be preempted unless the subject matter to which that law applies has been addressed in the contract between the tow truck operator and its customer and thereby been made "related to" the price, route, or service of the operator through the very market mechanisms envisioned by Congress.

This approach respects both the general right of the States to set rules for commercial transactions, the presumption against preemption of state law, the interests of both tow-truck operators and consumers in having reliable and predictable rules to fall back in situations for which they have not otherwise provided, and Congress's purpose in allowing the market to

dictate prices and services related to the transport of property by motor carrier. *American Airlines, Inc.* v. *Wolens,* 513 U.S. 219, 230 (1995) (the parallel ADA "was designed to promote 'maximum reliance on competitive market forces.' [Citation omitted.]"); *Morales,* 504 U.S. at 378 ("Congress, determining that 'maximum reliance on competitive market forces' would best further 'efficiency, innovation, and low prices" as well as "variety [and] quality * * * of air transportation services,' enacted the Airline Deregulation Act (ADA).") (citations omitted).

This proposed rule, though not covering every situation, is far more judicially administrable than an ill-defined inquiry into the magnitude of the relationship to prices, routes, and services in grey-are cases, provides greater predictability to States and tow truck businesses alike, and preserves as a default many background laws, such as the one in this case, that are important to the efficient functioning of the market. Indeed, the proposed rule would wholly alleviate the significant concern of *Amicus* that preemption would create a legal gap that would interfere with tow truck operators' ability to dispose of unclaimed cars, and collect their owed fees, in an orderly manner. *See* Resp. Br. at 32 ("If the FAAAA preempts state-law claims relating to the disposal of towed vehicles, however, it must also preempt positive state regulation of such disposal."); *id.* at 33 ("Such regulation is not necessary only to protect ve-

hicle owners, but also to protect towing companies in possession of abandoned cars.").[2]

II. Application of the Proposed Preemption Rule to this Case Results in Affirming the Decision Below.

Applied to this case, the proposed rule would result in affirming the decision below. As discussed in the previous section, the disposition of towed vehicles as a means of recovering a tow truck business's unpaid fees for towing and storage services and terminating the provision of such services certainly has *some* relationship to fees and services, but that relationship is somewhat attenuated. The law governing the disposition of unclaimed vehicles is of general application, includes bailment rules and statutory prohibitions against deception in commercial transactions, and thus consists of background rules without which the market would not function efficiently. The laws in this case regulating such matters thus fall well inside the grey area of the preemption provision. That be-

---

[2] The rule also avoids unnecessary transaction costs where state laws strike a suitable balance on issues that can then be left unaddressed, and preserves the requisite freedom to change such background rules where market conditions and competition make such changes worthwhile and acceptable to the parties buying and selling towing services. A rule that presumed preemption and then placed the burden on market participants to affirmatively opt in by contract to state background rules would have far higher transaction costs and would leave open the likelihood of disruptive gaps and unprovided-for cases where if state law was preempted there would be no law to apply.

ing the case, they would not be preempted absent some alternative agreed to in the towing contract.

There is no indication in this case that the disposal of towed vehicles was made part of any towing contract. There certainly was no contract between Petitioner and Respondent, and consequently no agreed alternative to the state-law procedures for disposing of a vehicle in order to collect the fee for towing and storing the towed vehicle. The record likewise does not reflect any contract between Petitioner and the property owner that requested the tow, certainly no contract that provided for disposal rules different from the background state law, and no indication that the property owner was authorized to act as Respondent's agent regarding the terms and conditions of towing.

Apart from being spared preemption by *Amicus*'s proposed rule, the law at issue here might still preserved under the limited exception for nonconsensual tows. That clause, 49 U.S.C. § 14501(c)(2)(C), provides that preemption "does not apply to the authority of a State or a political subdivision of a State to enact or enforce a law, regulation, or other provision relating to the price of for-hire motor vehicle transportation by a tow truck, if such transportation is performed without the prior consent or authorization of the owner or operator of the motor vehicle."

To the extent that he tow in this case was nonconsensual, it would seem that the disposal of a vehicle in order to collect the price of towing and storage relates at least as much to *price* as to service. Although the proposed rule would lead to the conclusion that the challenged law is not sufficiently "related to"

either price or service, if this Court disagrees, or if there turns out to be an applicable contract addressing such matters, the laws might likewise fall within the exception for laws relating to the price of a nonconsensual tow as well. *Amicus* takes no position on whether the tow in this case was nonconsensual. While that would seem to be the case, the issue was not addressed by the court below and there are at least conceivable arguments to the contrary. If necessary the issue can be reconsidered when this case goes back on remand.

As a final matter, *Amicus* urges this Court not to resolve this case based on some of the more extreme legal claims offered by the parties.

For example, Petitioner's suggestion, at 34-35, that essentially anything "incidental" to a towing company's activities is sufficiently "related to" its services sweeps too far and would likely preempt many laws on which towing companies rely to conduct that very business. It likewise leaves insufficient redress for consumers who, unfortunately, may encounter troubling and injurious conduct by tow truck operators.

Amicus likewise disagrees with Respondent's suggestion, at 12, 28-31, that common-law claims are *per se* exempt from preemption because they are not a law or regulation. State courts "make" law and a judicially created rule is no less law than a legislatively or administratively created rule, and certainly has the force and effect of law. Indeed, free-wheeling application of so-called common-law duties could readily morph into a full-blown regulatory scheme anchored by nothing more substantial than an amorphous requirement of fairness in commercial dealings or some

steroidal interpretation of a duty of good-faith and fair dealing. *See Riegel* v. *Medtronic, Inc.*, 552 U.S. 312, 324 (2008) (a tort judgment "establishes that the defendant has violated a state-law obligation. * * * And while the common-law remedy is limited to damages, a liability award " 'can be, indeed is designed to be, a potent method of governing conduct and controlling policy.' ") (quoting *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504, 521 (1992) (plurality), in turn quoting *San Diego Building Trades Council* v. *Garmon,* 359 U.S. 236, 247 (1959)); *Cipollone*, 505 U.S. at 522 ("we have recognized the phrase 'state law' to include common law as well as statutes and regulations"); *Deerskin Trading Post, Inc.* v. *United Parcel Serv. of Am., Inc.*, 972 F. Supp. 665, 668 (N.D. Ga. 1997) (Congress intended motor carrier provision to have the same preemptive scope as the airline provision, and "Circuit courts applying the Supreme Court's decisions in *Morales* and *Wolens* have given the ADA's preemption provision a broad scope and, for the most part, have preempted state law tort actions where the subject matter of the action related to the price, route, or service of an airline."); *cf* 29 U.S.C. §§ 1144(a) and (c)(1) (ERISA preemption provision applicable to "any and all State laws" covers "all laws, decisions, rules, regulations, or other State action having the effect of law").

This Court's decision in *Sprietsma* v. *Mercury Marine*, 537 U.S. 51, 63 (2002), does not require a contrary result. As an initial matter, the language at issue here is broader than the language in *Sprietsma*, and includes in the scope of preemption the phase "other provision having the force and effect of law."

49 U.S.C. § 14501(c)(1). That language can and should be read to cover more than just positive enactments by the legislative or executive branches, but also requirements created and imposed by the judiciary – *i.e.*, the common law. Furthermore, including the common law as part of this latter phrase avoids the fault thought to exist in *Sprietsma* of rendering the word " 'regulation' * * * superfluous." 537 U.S. at 63. Rather, it rounds out the categories to now encompass legal requirements imposed by bodies other than the legislature (laws) or the executive (regulations).[3]

A judge-made rule – in the name of fairness or equity – that regulated or constrained the prices that could be charged, for example, should be no less subject to preemption that a statute requiring such fairness or equity (as then determined by judges or juries).

Similarly, Respondent's suggestion, at 23-26, that the phrase "with respect to the transportation of property" excludes virtually *any* activities occurring after the "movement" of the vehicle is complete also overstates the matter. Even the definition of transportation cited by Respondent, at 25, includes storage, handling, and interchange of the property that has been moved. The storage, handling, and transfer

---

[3] And given that the preemption clause applies by its terms to the laws and regulations of political subdivisions as well, it is difficult to imagine what else the final phrase could encompass if not the common law. It thus would be Respondent's interpretation that renders the final phrase "superfluous," in contrast to the problem in *Sprietsma*.

of a towed vehicle – until it is delivered to its final recipient, whether the vehicle owner recovering the vehicle or a buyer if the vehicle is unclaimed – is at least closely "related to," if not squarely encompassed within the "transportation" of that same property. Recall that state law need not regulate the actual prices or services "with respect to the transportation of property," in order to be preempted, it merely needs to regulate matters sufficiently related to prices, routes, and services for the transportation of property. While certainly the relationship here is more attenuated that a direct effort to regulate the price of a tow or the specific service provided to the customer, the relationship to those activities still falls within the grey area of "related to."

Lastly, while topside *amicus* CTTA raises many legitimate problems facing the towing industry and the regulatory challenges it must confront in areas with multiple jurisdictions, it does not identify a workable solution to those problems. Merely "considering" a laundry-list of factors, many of which will change on a case-to-case basis, does not provide certainty, does not provide a judicially manageable rule, and will not reduce continued litigation over the scope of preemption or conflicts among the decisions arising from such litigation. CTTA Amicus Br. 29 ("Those factors include the magnitude of the impact, the extent to which other cumulative or conflicting laws govern the same motor carrier conduct, and the extent to which it is commercially reasonable to manage the risk that would flow from imposing liability."). A clearer and more workable rule is required. While *Amicus* is thus sympathetic to many of the is-

sues raised by the CTTA, we must differ with its legal approach.

In any event, the different types of laws identified by CTTA present different issues and concerns than the law in this case, and any uncertainty regarding their preemption likely requires different solutions. This is not the case to speculate on such matters.

CONCLUSION

For the reasons above, this Court should affirm the decision below.

Respectfully submitted,

ERIK S. JAFFE
(Counsel of Record)
ERIK S. JAFFE, P.C.
5101 34th Street, N.W.
Washington, D.C. 20008
(202) 237-8165
jaffe@esjpc.com

MICHAEL MCGOVERN
THE MCGOVERN LAW FIRM
3021 Tazewell Pike
PO Box 5536
Knoxville, TN 37918
(865)686-4891

Counsel for Amicus Curiae

Dated: February 28, 2013