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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas
The Honorable Maite Murphy

RECEIVED
OCT 17 2019
SC Court of Appeals

Appellate Case No. 2016-000984

Cortland James Eggleston, Appellant,

v.

United Parcel Service, Inc., and Rick Fogle, Defendants,

Of Whom United Parcel Service, Inc., is the Respondent,

and

Rebecca McCutcheon, Appellant,

v.

United Parcel Service, Inc., and John Doe, Defendants,

Of Whom United Parcel Service, Inc., is the Respondent.

APPELLANTS' PETITION FOR REHEARING

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ARGUMENT FOR REHEARING

Pursuant to Rules 221(a) and 240, SCACR, Appellants Cortland James Eggleston and Rebecca McCutcheon (“Appellants”) petition this Court for rehearing of the Court’s decision in *Cortland James Eggleston and Rebecca McCutcheon v. United Parcel Service, Inc.*, Opinion No. 5686 (S.C. Ct. App. filed October 2, 2019). Appellants submit that the Court misapprehended the law or overlooked the evidence when it affirmed the lower court’s decision to dismiss the claims on the basis of Federal preemption. Appellants respectfully request the Court reconsider its decision for the reasons stated in its briefs, and including the following reasons:

I. The Court Erred in Finding Appellants’ Claims Affect Delivery Services

Appellants argued that Respondent presented no argument or evidence that Appellants’ claims would bind it to a particular service or interfere with competitive market forces. (Br. of App. pp. 10-11; Reply Br. of App. p. 6). The Court’s opinion does not address this argument. “[T]he appropriate inquiry in such a case is whether the provision, directly or indirectly, binds the . . . carrier to a particular price, route or service and thereby interferes with competitive market forces within the . . . industry.” *Sanchez v. Lasership, Inc.*, 937 F. Supp. 2d 730, 740 (E.D. Va. 2013) (internal quotation marks omitted). Respondent failed to articulate how or present any evidence that Appellants’ claims bind them to a particular delivery service in interference with competitive market forces. The Court likewise does not identify any particular service or part of a service that Appellants’ claims will affect. It only summarily concludes the claims “could result” in new or enhanced procedures for package delivery. (Op. p. 8). As explained in Appellants’ briefs, their claims do not have a significant effect on Respondent’s services and do not bind it to a service. (Br. of App. pp. 7-11; Reply Br. of App. pp. 5-9).

It is Respondent's burden to prove preemption. *Eldridge v. City of Greenwood*, 331 S.C. 398, 411, 503 S.E.2d 191, 197 (Ct. App. 1998) (“[T]he party claiming preemption bears the burden of proving it.”). It failed to do so and this Court erred in finding otherwise. There is no proof or evidence in the record that an award in Appellants' case “would result in requiring new and enhanced procedures for . . . delivery of packages.” (Op. p. 8). The Court should grant the petition and reconsider that Respondent has the burden of proof and failed to meet it in this case.

II. The Court Erred in Not Ruling on Whether Congress Intended to Preempt Claims with no Economic or Other Affect on Services or Competition

The Court did not rule on Appellants' argument that their claims are not the type Congress intended the FAAAA to preempt because the claims have no economic regulatory effect on Respondent. “The target at which [the FAAAA preemption provision] aimed was a State's direct substitution of its own governmental commands for competitive market forces in determining (to a significant degree) the services that motor carriers will provide.” *Dan's City Used Cars, Inc. v. Pelkey*, 133 S. Ct. 1769, 1780 (2013) (internal quotation marks omitted). Stated another way, Congress intended to preempt laws that “set prices, mandate or prohibit certain routes, or tell motor carriers what services they may or may not provide, either directly or indirectly.” *Dilts v. Penske Logistics, LLC*, 769 F.3d 367 (9th Cir. 2014). Appellants allege Respondent wrongfully withheld a package that it should have delivered. A jury finding in Appellants' favor would not affect competitive market forces or alter how Respondent operates its business. Appellants' claims do not set prices, mandate or prohibit routes, or tell Respondent what services to provide. They are not the type Congress intended to preempt. The Court should grant the petition and reconsider that Appellants' claims are not the type that Congress intended to preempt.

III. The Court Erred in Holding the Household Goods Exception Does Not Apply

The Court's holding as to the household goods exception is a misinterpretation of the applicable law. The Court's reliance on the definition of "household goods motor carrier", which is not part of the FAAAA, changes the meaning of the household goods exception. If Congress meant for the exception to apply to "household goods motor carrier[s]", it could easily have written that language into the statute. However, it did not. *See, e.g., S.C. Dep't of Consumer Affairs v. Rent-A-Center, Inc.*, 345 S.C. 251, 256, 547 S.E.2d 881, 883-84 (Ct. App. 2001) ("The canon of construction *expressio unius est exclusio alterius* or *inclusio unius est exclusio alterius* holds that to express or include one thing implies the exclusion of another, or of the alternative." (internal quotation marks omitted)).

The preemption provision, "Paragraph (1)-- . . . does not apply to the intrastate transportation of household goods." 49 U.S.C. § 14501(c)(2)(B).

The term "household goods", as used in connection with transportation, means personal effects and property used or to be used in a dwelling, when a part of the equipment or supply of such dwelling, and similar property if the transportation of such effects or property is--

(A) arranged and paid for by the householder, except such term ***does not include property moving from a factory or store, other than*** property that the householder has purchased with the intent to use in his or her ***dwelling*** and is transported at the request of, and the transportation charges are paid to the carrier by, the householder; or

(B) arranged and paid for by another party.

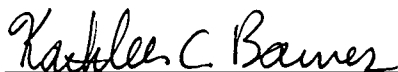
49 U.S.C. § 13102(10) (emphasis added). The emphasized words show that the exception applies to, *inter alia*, property that a householder purchases directly from a factory or store to be used in his dwelling and for which he requests transportation. Transportation of a good from a factory or store to a home is not a moving-company service and shows the error of this Court's interpretation of the exception. Further, a review of *UPS v. Flores-Galarza*, 385 F.3d 9 (1st Cir. 2004), which

this Court relied upon, and its reliance on *UPS v. Flores-Galarza*, 275 F. Supp. 2d 155 (D.P.R. 2003), shows an interpretation of “household goods” as including delivery to a “home or office.” 275 F. Supp. 2d at 160 (internal quotation marks omitted). The FAAAA household goods exception does not apply to an “office” but only to property to be used in a “dwelling.” Therefore, the law related to a separate Act is not directly applicable to the FAAAA exception. The Court should reconsider its decision and apply the plain language of the household goods exception to this case.

CONCLUSION

For the reasons stated above and those in Appellants’ briefs, the Court should grant the petition for rehearing and find Appellants’ action are not preempted.

Respectfully submitted,



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Attorneys for Appellants
October 15, 2019

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Rebecca McCutcheon, Appellant,

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Of Whom United Parcel Service, Inc., is theRespondent.

PROOF OF SERVICE

The undersigned certifies that a copy of *Appellants' Petition for Rehearing* has been served upon the following counsel of record by mailing a copy of the same by United States Mail, addressed as shown below this 15th day of October, 2019.

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Dated: October 15, 2019

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By: Kathleen C. Barnes

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BARNES
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Kathleen C. Barnes
Admitted: Georgia | South Carolina

October 15, 2019

Via U.S. Mail

The Honorable Jenny Abbott Kitchings
Clerk of Court for the Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

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Re: *Cortland James Eggleston and Rebecca McCutcheon v. United Parcel Service, Inc.*
Consolidated Appellate Case No. 2016-000984

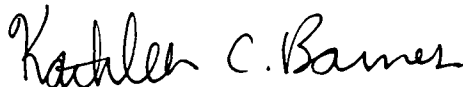
Dear Ms. Kitchings:

Please find enclosed for filing the original and seven copies of *Appellants' Petition for Rehearing*, in the above-referenced matter. Also enclosed is proof of service and the \$50.00 filing fee. Please return the additional copy to me in the enclosed self-addressed, stamped envelope.

By copy of this letter, I am serving all counsel of record with a copy of the same. Thank you.

With kind regards, I am,

BARNES LAW FIRM, LLC



Kathleen C. Barnes

Enclosures

cc: G. Troy Thames
Ryan R. Corkery
Justin T. Bamberg
Shane M. Burroughs (via e-mail)

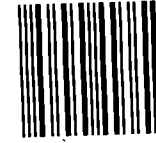
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