

THE STATE OF SOUTH CAROLINA  
Supreme Court

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APPEAL FROM ORANGEBURG COUNTY S.C. SUPREME COURT  
Court of Common Pleas  
The Honorable Maite Murphy

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Opinion No. 5686 (S.C. Ct. App. filed October 2, 2019)

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Cortland James Eggleston, ..... Petitioner,

v.

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

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

and

Rebecca McCutcheon, ..... Petitioner,

v.

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

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

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PETITION FOR A WRIT OF CERTIORARI

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## **CERTIFICATE OF COUNSEL**

The Court of Appeals issued its decision on October 2, 2019. (App. p. 1). Counsel for Petitioner certifies that the Petition for Rehearing was made on October 17, 2019, and denied on November 27, 2019. (App. pp. 11, 16).

### **QUESTIONS PRESENTED**

- I. Whether the Court of Appeals erred in finding Petitioners' claims affect Respondent UPS's delivery services?
- II. Whether the Court of Appeals should have ruled on Petitioners' argument that Congress did not intend to preempt claims with no economic or other affect on a motor carrier's services or competition?
- III. Whether the Court of Appeals erred in holding the household goods exception does not apply?

### **STATEMENT OF THE CASE**

This is a consolidated appeal from a circuit court order dismissing Petitioners' complaint on federal preemption grounds. The case arises out of personal injuries suffered by Petitioner Cortland James Eggleston when he did not receive a thyroid medication shipped by the VA Hospital via Respondent United Parcel Service, Inc. ("UPS"). Mr. Eggleston and his wife, Petitioner Rebecca McCutcheon, live in rural Eutawville, South Carolina. (App. pp. 104, 135). Mr. Eggleston is a veteran who receives medical care, including prescription medication, through the VA Hospital in Charleston, South Carolina. (App. p. 105, ¶¶ 5-6; p. 99, ¶¶ 5-7). "For years", Mr. Eggleston received his medications from the VA Hospital by UPS delivery to his home. (App. p. 105, ¶¶ 7-8; p. 99, ¶ 7). At issue in this case is a prescription medication that controlled Mr. Eggleston's thyroid condition. (App. p. 105, ¶ 5).

On April 11, 2013, Petitioners expected to receive a refill of the thyroid medication from the VA Hospital via UPS. (App. p. 99, ¶ 5; p. 105, ¶ 9). On April 15, when the medication had

not arrived, Mr. Eggleston suffered a thyroid storm, including seizures, congestive heart failure, elevated blood pressure, hospitalization, and surgery. (App. p. 106, ¶ 15; p. 98, ¶ 8, 42).

The VA Hospital and Petitioners communicated with UPS numerous times between April 11 and 15, 2013. (App. p. 105, ¶ 11; p. 99, ¶¶ 6, 11-12). Despite many previous medication deliveries by UPS to Mr. Eggleston's home, UPS told Petitioners their home address did not exist or could not be located. (App. p. 105, ¶ 13; p. 99, ¶ 11). Defendant Rick Fogle is the UPS substitute driver who failed to deliver the thyroid medication for over thirteen days. (App. pp. 104-06, ¶¶ 3-4, 12, 14-15; pp. 127, 141). Petitioners did not have transportation or additional funds to get the prescription from another source. *Id.* As a result of UPS's wrongful withholding of the medication, failure to locate Petitioners' home as it had done in the past, and failure to deliver the medication, Mr. Eggleston suffered severe injuries. (App. p. 106, ¶ 15).

Mrs. McCutcheon filed an action for negligence, negligent entrustment, and loss of consortium in September 2014, and Mr. Eggleston filed an action for negligence and negligent entrustment in April 2015. UPS filed motions to dismiss the Complaints under Rules 12(b)(1) and (b)(6), SCRCF, based on a preemption provision in the Federal Aviation Administration Authorization Act ("FAAAA"), 49 U.S.C. § 14501(c). (App. pp. 109-12). UPS argued that Petitioners' actions are based solely on UPS's failure to timely deliver the medication and that delivery is a motor carrier service with respect to the transportation of property that is preempted. Petitioners argued in opposition that the FAAAA is aimed at laws related to a price, route, or service that have an economic effect, Congress did not intend to preempt a common law claim for physical injury such as this case, and the household goods exception to preemption is applicable. (App. pp. 126-53).

After a hearing, the lower court granted UPS's motions in almost identical orders. The court held Petitioners' negligence actions are based on delivery, which relates directly to a service UPS provides. (App. pp. 90-95). Therefore, the court found the FAAAA preempted the state law negligence claims and dismissed the cases under Rules 12(b)(1) and (b)(6), SCRCP. *Id.* After the lower court denied Petitioners' motions to reconsider, they filed an appeal to the Court of Appeals. (App. pp. 86-89).

The Court of Appeals affirmed the lower court's decision to dismiss the cases. It found the allegations of "failing to properly deliver", "failing to properly" locate Petitioners, "failing to maintain proper policies and procedures for delivering parcels", and "failing to properly hire, train, supervise, and oversee personnel" "go to the heart of the delivery service UPS offers" and are, therefore, preempted. (App. p. 8). The Court also found the household goods exemption to preemption does not apply. (App. pp. 8-10). The Court denied Petitioners' petition for rehearing, and Petitioners now seek a writ of certiorari from this Court.

## **ARGUMENT**

### **I. The Court of Appeals Erred in Finding Petitioners' Claims Affect Delivery Services**

Respondent presented no argument or evidence that Petitioners' claims would bind UPS to a particular service or interfere with competitive market forces. (App. pp. 30-31, 76). The Court of Appeals' 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 Petitioners' claims bind them to a particular delivery service in interference with competitive market forces. The Court likewise did not identify any particular service or part of a service that Petitioners' claims will affect. It

only summarily concludes the claims “could result” in new or enhanced procedures for package delivery. (App. p. 8). As explained in Petitioners’ briefs to the Court of Appeals, their claims do not have a significant effect on Respondent’s services and do not bind it to a service. (App. pp. 27-31, 75-79).

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 the Court of Appeals erred in finding otherwise. There is no proof or evidence in the record that an award in Petitioners’ case “would result in requiring new and enhanced procedures for . . . delivery of packages.” (App. p. 8). The Court should grant the petition and reverse the Court of Appeals’ opinion.

**II. The Court of Appeals Should Have Ruled on Petitioners’ Argument that Congress did Not Intend to Preempt Claims with no Economic or Other Affect on Services or Competition**

The Court did not rule on Petitioners’ 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). Petitioners allege Respondent wrongfully withheld a package that it should have delivered. A jury finding in Petitioners’ favor would not affect competitive market forces or alter how Respondent operates its business. Petitioners’ 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 find that Petitioners' claims are not the type that Congress intended to preempt.

#### **IV. The Court of Appeals Erred in Holding the Household Goods Exception Does Not Apply**

The Court of Appeals' holding as to the household goods exception is a misinterpretation of the applicable law. It relied on the definition of "household goods motor carrier", which is not part of the FAAAA, and, as a result, changed 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.

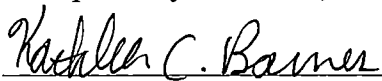
49 U.S.C. § 13102(10) (emphasis added). The emphasized words show that the exception applies to, *inter alia*, property that a householder purchases directly from a factory or store to be used in his dwelling and for which he requests transportation. Transportation of a good from a factory or

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 grant the petition and reverse the Court of Appeals by applying the plain language of the household goods exception to this case.

#### CONCLUSION

For the reasons stated above and those in Petitioners' briefs to the Court of Appeals, the Court should grant the petition for writ of certiorari and reverse the Court of Appeals' opinion.

Respectfully submitted,



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PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing *Petition for a Writ of Certiorari* and *Appendix* have been served upon the following counsel of record by mailing one copy by United States Mail, addressed as shown below on December 19, 2019.

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