THE STATE OF SOUTH CAROLINA
Supreme Court

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

Appellate Case No. 2019-002086

Cortland James Eggleston, ...Petitioner,

v.

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

Of Whom United Parcel Services, 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.

RESPONDENTS' RETURN TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED BY PETITIONERS

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 consolidated appeal arises out of two state law tort cases which allege that United Parcel Service, Inc. ("UPS") delivered a package late, leading to personal injury: (1) Appellant Rebecca McCutcheon ("McCutcheon") seeks recovery for loss of consortium; and (2) Appellant Cortland James Eggleston ("Eggleston") seeks recovery for personal injury.

McCutcheon, Eggleston's wife, filed her underlying Complaint against Respondents UPS and John Doe, an unknown driver for UPS, on September 18, 2014. *See* App. pp. 98-103. Therein, McCutcheon asserts a stand-alone loss of consortium claim against Respondents for UPS's alleged failure to timely deliver a package containing medication to Eggleston. *Id.* at 100-101. McCutcheon claims that the late delivery damaged her marital relationship. *Id.* at p. 102.

On December 12, 2014, UPS filed a Motion to Dismiss McCutcheon's Complaint on the basis that her state law tort claim, based upon the allegation of negligent untimely delivery of a package, was preempted by the FAAAA, codified at 49 U.S.C. §14501(c), and therefore the Complaint should be dismissed for lack of subject matter jurisdiction and/or failure to state a claim.[1] *Id.* at pp. 109-110. On June 15, 2015, McCutcheon filed an Opposition to the Motion to

[1] Respondents' Motion also set forth an alternative argument that McCutcheon's claims were preempted by the Carmack Amendment, codified at 49 U.S.C. §14706; however, that argument is not at issue in this Petition.

Dismiss. (*Id.* at pp. 126-133. Thereafter, on September 10, 2015, UPS filed a Reply in Support of its Motion to Dismiss. *Id.* at pp. 154-161.

Eggleston filed his underlying Complaint against Respondents UPS and UPS driver, Rick Fogle, on April 1, 2015. *See id.* at pp. 104-108. Eggleston asserts a personal injury claim against Respondents for their alleged failure to timely deliver a package containing his thyroid medication, which allegedly led to medical consequences. *Id.* On May 4, 2015, Respondents filed a Motion to Dismiss Eggleston's Complaint, asserting federal preemption. *See id.* at pp. 111-112. On June 15, 2015, Eggleston filed an Opposition to the Motion to Dismiss. *See* id. at pp. 140-147.

Both Motions to Dismiss were heard by the Honorable Maite Murphy on September 28, 2015. *See id.* at pp. 90-95. Thereafter, on February 2, 2016, the trial court issued two separate Orders, granting Respondents' Motions and dismissing the McCutcheon and Eggleston Complaints. *Id.* The trial court held that the state law tort actions were preempted by the FAAAA and consequently dismissed the Complaints with prejudice pursuant to Rules 12(b)(1) and 12(b)(6), SCRCP. *Id.*

On March 3, 2016, Appellants each filed separate (but identical) Rule 59(e), SCRCP, Motions to Reconsider, Alter or Amend the trial court's February 2, 2016 Orders. *See id.* at pp. 188-205. Respondents filed their respective Responses to the Motions to Reconsider on March 21, 2016. *See id.* at pp. 206-233. On March 29, 2016, the trial court issued Orders denying both Motions for Reconsideration. *See id.* at pp. 96-97. Thereafter, on May 4, 2016, Appellants filed their Notices of Appeal, appealing the February 2, 2016 and March 29, 2016 Orders of the trial court. *See id.* at pp. 86-89. The Court of Appeals affirmed the trial court's ruling to dismiss the actions. *See id.* at pp. 1-10. In addition, the Court of Appeals denied Petitioners' request for rehearing.

In summary, the facts of this tort action against Respondents are simple. The claim is that UPS delivered a package late to Petitioners, which led to medical complications for Petitioner Eggleston. *See id.* at pp. 98-108. Petitioners did not contract with Respondent UPS; Petitioners did not request the medication be sent by Respondent UPS; Petitioners received medication from the Veterans Administration hospital in Charleston; and Respondent UPS delivered those shipments from the VA Hospital. *See id.* at p. 2. The facts pled by Petitioners are as follows:

- On or about April 11, 2013, Petitioners were expecting a delivery of thyroid medication for Petitioner Eggleston from the VA Hospital located in Charleston. *Id.* at p. 99, ¶ 5; p. 105, ¶ 9;

- Between April 11, 2013, and April 15, 2013, there were communications between the VA Hospital and Respondent UPS regarding delivery of said medication and that "on numerous prior occasions" the medication was successfully delivered by Respondent UPS to Petitioner Eggleston at his home address. *Id.* at p. 99, ¶¶ 6-7; p. 105, ¶¶ 8, 11;

- There were communications between Petitioner Eggleston and Respondent UPS regarding the delivery, and Respondent UPS advised that his address could not be located. *Id.* at p. 105, ¶ 13;

- On or about April 15, 2013, the medication still had not been delivered to Petitioner Eggleston. *Id.* at p. 99, ¶ 8;

- Respondent UPS informed Petitioners that their address could not be located. *Id.* at p. 99, ¶ 11; p. 105, ¶ 13;

- Respondent(s) negligently failed to timely deliver the medication. *Id.* at p. 99, ¶ 9;

- As a result of Respondents' failure to timely deliver the medication, Petitioner Eggleston's thyroid condition worsened, resulting in hospitalization and surgical intervention. *Id.* at p. 106, ¶ 15;

- Petitioner McCutcheon claims that as a result of Respondent UPS's negligence and the resulting injuries sustained by her husband, she has suffered a loss because of damage to her marital relationship. *Id.* at p. 102, ¶ 21;

- Petitioner Eggleston claims that as a result of Respondents' "negligence, recklessness, carelessness, willfulness, wantonness, and gross negligence," he sustained injuries, suffered pain and suffering, incurred medical expenses and was unable to work. *Id.* at p. 106, ¶ 16.

ARGUMENT

I. THE COURT OF APPEALS DID NOT ERR IN FINDING THAT PETITIONERS' CLAIMS AFFECT RESPONDENT UPS' DELIVERY SERVICES.

The lower courts as well as Respondents themselves did, in fact, identify the service that Petitioners' claims will affect. The Court of Appeals' opinion is clear that Petitioners' allegations of failing to properly perform a delivery, failing to locate Petitioners, failing to maintain proper policies and procedures, and failing to properly hire, train, supervise, and oversee personnel go to the "heart" of Respondents' delivery service. *Id.* at p. 7. On its face, this affects Respondents' service and the Court of Appeals clarified even further to hold that these claims go to the "heart" of the delivery aspect of Respondents' services. *Id.* The basis of Respondents' business is a delivery service. There is nothing further to determine or discuss.

The FAAAA expressly preempts state laws "related to a price, route, or service of any motor carrier . . . with respect to the transportation of property." *Dan's City Used Cars, Inc.*, 133 S. Ct. at 1772 (quoting 49 U.S.C. § 14501(c)(1)). "A state law tort action against a carrier, where the subject matter of the action is related to the carrier's prices, routes, or services, is a state enforcement action having a connection with or reference to a price, route, or service of any motor carrier, motor private carrier, or air carrier for purposes of the FAAAA." *Deerskin Trading Post, Inc. v. United Parcel Serv. of Am., Inc.*, 972 F. Supp. 665, 672 (N.D. Ga. 1997).

Federal courts throughout the country consistently agree that state-law negligence claims regarding delivery of a package are preempted by the FAAAA, because the delivery of packages are directly "related to" the "service" the carrier provides. *See e.g., Tobin v. Fed. Exp. Corp.*, 775 F.3d 448, 452-457 (1st Cir. 2014) (ADA preempted recipient's common law claims related to incorrectly delivered package); *Wine & Spirits Wholesalers v. Net Contents, Inc.*, 10 F. Supp. 2d

84, 87 (D. Mass. 1998) (tort claim against Federal Express for transporting liquor to Massachusetts from unlicensed out-of-state wholesaler was preempted by ADA because "claim arises directly from the act of, and the method employed in, providing" carrier's services); *Deerskin Trading Post,* 972 F. Supp. at 672 (FAAAA preempted all claims, including negligence, except for portion of breach of contract claim.).[2]

In *Deerskin Trading Post*, the district court thoroughly discussed the legislative history of the FAAAA, finding that Congress intended the preemption provision "to be broad in scope." *Deerskin Trading Post,* 972 F. Supp. at 668 (internal citations omitted). The court explained that a plaintiff's claim against a carrier should be analyzed to determine whether it expressly refers to a motor carrier's prices, routes or services "or would have a significant economic effect" on the carrier's prices, routes or services. *Id.* at 671-72 (internal quotations and citations omitted). Ultimately, the tort claims asserted in *Deerskin* were held to "relate to" the prices charged by UPS for various services because the "core of each claim" was that UPS inappropriately charged the plaintiff. *Id.* at 672.

Petitioners argue that their claims against Respondents – negligent untimely delivery of a package containing medication – are not "related to" a particular service that, thereby, interferes with competitive markets. *See* Petition for Writ of Certiorari pp. 3-4. Delivery of packages is the

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[2] Federal courts have also addressed the issue through unpublished opinions. *See Rockwell v. United Parcel Serv., Inc.*, No. 2:99 CV 57, 1999 WL 33100089, at *2 (D. Vt. July 7, 1999) (claims for negligent intake and delivery protocol, which "go to the heart of the services that UPS provides" were preempted); *Vieira v. United Parcel Serv., Inc.*, No. C–95–04697 CAL ARB, 1996 WL 478686 at *1 (N.D. Cal. Aug 5, 1996) (negligence and conversion claim arising from lost UPS package related to "service" provided by UPS and was therefore preempted by FAAAA); *Rowe v. United Parcel Serv., Inc.*, No. CV–S–96–862–PMP, 1996 U.S. Dist. LEXIS 11266, at *1 (D. Nev. July 31, 1996) (dismissing state law claims for intentional and negligent infliction of emotional distress and defamation, which were based on alleged defamatory statements made by UPS employee who was investigating the contents of a package, based on FAAAA); *Wagman v. Fed. Exp. Corp.*, No. 94-1422, 1995 WL 81686, at *2 (7th Cir. Feb. 17, 1995) (affirming dismissal on preemption grounds of constructive fraud and other claims based on allegations of misleading advertising arising from late delivery of plaintiff's package).

quintessential service UPS provides to its customers. As they have done in all previous briefs, Petitioners simply cherry-pick limited quotations from a case, without any context or correct interpretation of the law. Further, the allegation that the Court of Appeals did not "identify any particular service or part of a service" is unfounded. *Id.*

First, the case quoted in Petitioners' Petition is a district court case, *Sanchez v. Lasership, Inc.,* 937 F. Supp. 2d 730 (E.D. Va. 2013), in which the Eastern District of Virginia was tasked with evaluating a specific state regulation of wage and independent contractor laws and Petitioners incorrectly apply a specific sentence from the case, based on an entirely different factual scenario as their basis for this alleged error by the Court of Appeals. The Court's Opinion expressly states that the First Circuit's ruling in *Tobin*, correctly, applies in this case. *See* App. pp. 7-8. For Petitioners to prevail in this matter, they would have to prove that UPS' procedures were inadequate or carelessly carried out by UPS employees. A determination that UPS' "procedures were inadequate would have the significant effect of requiring new and enhanced procedures for labeling, verification, and delivery of packages". *Tobin* at 455. By using their state law tort claims "as a blunt instrument to prescribe protocols for package [ ] verification, and delivery, the claims presented [by Appellants] would regulate how [UPS] operates its core business." *Id.* at 456 (citing *Rowe v. New Hampshire Motor Transp. Assn.*, 552 U.S. 364, 372–73 (2008); *Bower*, 731 F.3d at 96). Allowing Petitioners' claims to proceed and potentially result in a damages award against UPS "could result in fundamental changes to [UPS'] service." *Id.*

The case cited by Petitioner does not involve an allegation of a late package delivery – UPS' quintessential service – but the Court of Appeals as well as the appropriately applied case law (*Tobin*) expressly defines the particular service and its interference with UPS' competitive

market forces. Petitioners' argument is weak and unfounded and therefore, should not be considered.[3]

II. THE COURT OF APPEALS EFFECTIVELY RULED ON PETITIONERS' ARGUMENT REGARDING CONGRESS' INTENT WITH PREEMPTION IN REGARDS TO ECONOMIC OR OTHER EFFECTS ON SERVICES OR COMPETITION.

Petitioners argue that Congress did not intend to preempt their negligence claims because those claims have no effect, economic or otherwise, on Respondent UPS' services or competitiveness; however, Petitioners' argument overlooks the clear language set forth in the FAAAA, and also disregards the effect that allowing such claims to proceed would have on motor carriers, such as Respondent UPS. Therefore, Petitioners' argument that the Court of Appeals should have specifically ruled that Congress did not intend to preempt claims with no economic or other effect on services or competition should be rejected by this Court.

"The Court's analysis begins, and usually ends, with the language of the statute." *Deerskin Trading Post,* 972 F. Supp. at 667; *see also Fox v. Moultrie*, 379 S.C. 609, 614, 666 S.E.2d 915, 917 (2008) (noting that in interpreting a statute, the court "must look to the plain meaning" and "[i]f the statute is clear and unambiguous, 'that is the end of the matter for the court'") (internal citations omitted). The FAAAA clearly provides that no state shall "enact or enforce any law,

[3] Claims based on delayed delivery go to the heart of a carrier's service and are thus preempted under the FAAAA. For example, *Forman v. Federal Express Corp.*, 753 N.Y.S.2d 348, 351-52 (N.Y. Civ. Ct. 2003) ("Plaintiff fails to demonstrate how the failure to deliver the contents of a package — *arguably the princip[al] service provided by Fed Ex* — somehow does not relate to Fed Ex's 'services.' Thus, it must come within the ambit of the ADA's preemption provision." (emphasis added)) *Au-Yang v. United Parcel Service, Inc.*, No. 175013 VFS (Cal. Super. Ct. Jan. 6, 1999) (Consignee asserted claims for intentional and negligent interference with economic relationships alleging consistent and deliberate delay in delivery of her packages. Court sustained UPS's demurrer on grounds of FAAAA preemption, holding that the timely or untimely delivery of packages relates to service, in particular to the "schedules . . . of the point-to-point transportation . . . of cargo" and is like "the frequency and scheduling of transportation."). *Vieira v. United Parcel Service, Inc.*, No. C-95-04697 CAL ARB, 1996 U.S. Dist. LEXIS 11223 (N.D. Cal. Aug. 5, 1996) (Shipper asserted claims for negligence, conversion, and breach of contract arising from lost package. Court granted UPS's motion for summary judgment, holding all claims preempted by the FAAAA.).

regulation, or any other provision having the force and effect of law related to a price, route, or service of any motor carrier." 49 U.S.C. § 14501(c)(1).

"Congress intended for the preemption provision of the FAAAA—which employs identical language to the preemption provision of the ADA—to be broad in scope and that the FAAAA's preemption provision precludes any state enforcement action having a connection with or reference to any price, route, or service of any motor carrier, motor private carrier, or air carrier." *Deerskin Trading Post*, 972 F. Supp. at 668. That intent is driven by the desire to further "efficiency, innovation, and low prices" as well as "variety [and] quality" of services and to ensure that the states do not "undo federal deregulation with regulation of their own." *Tobin*, 775 F.3d at 455 (analyzing broad preemptive scope of ADA).

Outlining one of the same cases relied upon by the Court of Appeals in its Opinion, in *Tobin v. Fed. Exp. Corp.*, the First Circuit evaluated a plaintiff's common law tort claims arising out of an incorrectly delivered package by Fed Ex and determined that said claims were preempted by the ADA. *Id.* at 452-457. Specifically, in that case, the plaintiff alleged, and Fed Ex admitted, that the subject package was mislabeled and misdelivered. *Id.* at 454. After establishing that the plaintiff's claims implicated Fed Ex's services within the meaning of the ADA, the court analyzed whether the claims "related to" those services, noting that the "language of the ADA is meant to be construed broadly, consistent with **Congress's intention** that ADA **preemption should have an expansive reach**." *Id.* (internal citation omitted) (emphasis added). The First Circuit Court of Appeals went on to analyze whether the state common law would "directly substitute[] the state's own policies for competitive market forces" and thereby "produce precisely the effect the preemption clause seeks to avoid: 'a patchwork of state service-determining laws, rules, and

regulations'" and ultimately concluded that plaintiff's common law claims would have such an effect. *Id.* at 455 (citing *Rowe*, 552 U.S. at 372).

Here, Petitioners' state law tort claims against Respondent UPS would have such an effect. Similar to the analysis in *Tobin,* for Petitioners "to prevail on [their] common law negligence claims, [they] would have to prove," for example, "that [UPS' delivery] procedures were inadequate or that those procedures, though adequate, were carried out carelessly by [UPS'] employees." *Id.* In the former instance, "a finding that [UPS' delivery] procedures were inadequate would have the significant effect of requiring new and enhanced procedures" for verification and delivery of packages, UPS' main business. *Id.* "**That effect would not be tenuous, remote, or peripheral.**" *Id.* (emphasis added); *see also Bower*, 731 F.3d at 96 (preempting common law claims whose enforcement would impose a "fundamentally new set of obligations on airlines" including "heightened and qualitatively different procedures" for passenger booking and boarding).

In the latter situation, "a finding that the actions of [UPS'] employees breached a state-law duty of care would also produce a significant forbidden effect. Such a finding would effectively supplant market forces with [South Carolina] common-law definitions of reasonableness and, thus, create the very patchwork of state-based regulations that [FAAAA] preemption is meant to preclude." *Tobin*, 775 F.3d at 455. In addition, "the risk of a patchwork effect is heightened where, as here, the claims are of the sort typically tried to a jury." *Id.*; *see also DiFiore v. Am. Airlines, Inc.*, 646 F.3d 81, 88 (1st Cir. 2011) (warning that "detailed, ad hoc compliance schemes" could arise not just state by state, but verdict by verdict).

In sum, Congress' intent was that the FAAAA's preemptive scope be interpreted and applied broadly, and therefore, there is nothing further or different for this Court to consider under the Petition.

III. THE COURT OF APPEALS DID NOT ERR IN HOLDING THE HOUSEHOLD GOODS EXCEPTION DOES NOT APPLY.

The Court of Appeals affirmed the trial court's holding that Petitioners' claims are preempted by the FAAAA and not exempted by the household goods exception. There was no error in this holding. Petitioners allege that Congress should have written language into the FAAAA itself. *See* Petition at p. 5. While Petitioners are attempting to craft their own interpretation of the law, Congress did, in fact, clarify that the exemption applies to household goods motor carriers, which generally refers to the services of moving companies. App. at pp. 9-10; *see also United Parcel Serv., Inc. v. Flores-Galarza*, 385 F.3d 9 (1st Cir. 2004) (holding, in part, that the transportation of household goods generally refers to the services of moving companies and further, any exception granting Puerto Rico regulatory authority over packages that contain household goods would swallow the rule of preemption, which Congress intended to eliminate through the FAAAA).

Petitioners, again, attempt to place their own interpretation on settled law in their request for this Court's review. Petitioner correctly states that the Court of Appeals relied on *United Parcel Serv., Inc. v. Flores-Galarza* from the First Circuit, which explains that "household goods" are defined at 49 U.S.C. § 13102 "Definitions" within the title section of "Transportation". *See* 49 U.S.C. § 13102 and *United Parcel Serv.* at 14. Just as the courts stated in *United Parcel Serv., Inc. v. Flores-Galarza*, UPS would have to identify the contents of the packages being delivered to determine which packages, if any, were "household goods", which "impermissibly affect[s] UPS's prices, routes, and services in part because it require[s] UPS to identify the contacts of the

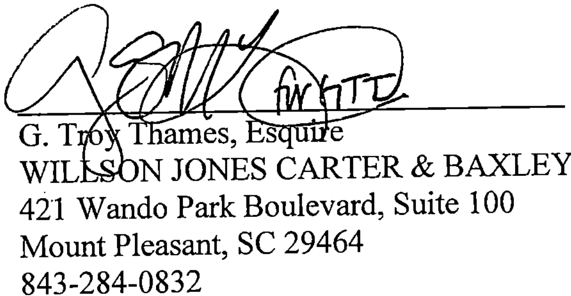
packages." *Id.* at 14. The South Carolina Court of Appeals correctly applied the analysis given under the First Circuit case.

Further, Petitioners' claims do not arise out of any South Carolina law regarding the regulation of intrastate transportation of household goods; rather, they arise from South Carolina's tort law. Therefore, under the plain language of the FAAAA, the so-called "household goods" exception is inapplicable to Petitioners' state law tort claims for personal injury and loss of consortium. Therefore, Petitioners' claims are preempted by the FAAAA and not exempted by the household goods exception as both lower courts have already stated and affirmed. There is nothing for this Court to reconsider.

CONCLUSION

For all of the aforementioned reasons, this Court should deny Petitioners' Petition for Writ of Certiorari.

Respectfully submitted,



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PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing *Respondents' Return to Petition for Writ of Certiorari* has been served upon the following counsel of record by mailing one copy by United States Postal Service, addressed as show below, on January 17, 2020.

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