No. 01-419

In the Supreme Court of the United States

CITY OF COLUMBUS, ET AL., PETITIONERS

v.

OURS GARAGE AND WRECKER SERVICE, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

The Federal Aviation Administration Authorization Act of 1994 provides that "a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or 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) (Supp. V 1999). The Act further provides, however, that the preemption rule established by Section 14501(c)(1) "shall not restrict the safety regulatory authority of a State with respect to motor vehicles." 49 U.S.C. 14501(c)(2)(A) (Supp. V 1999). The question presented in this case is as follows:

Whether the "safety regulatory authority of a State" that is preserved by Section 14501(c)(2)(A) encompasses the authority to delegate regulatory power in matters of safety to municipalities within the State's borders.

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INTEREST OF THE UNITED STATES

Federal law provides that "a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or 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) (Supp. V 1999). Section 14501(c) further provides, however, that the preemption rule established by Section 14501(c)(1) "shall not restrict the safety regulatory authority of a State with respect to motor vehicles." 49 U.S.C. 14501(c)(2)(A) (Supp. V 1999). The question presented in this case is whether the "safety regulatory authority of a State" that is preserved by Section 14501(c)(2)(A) encompasses the authority to delegate regulatory power in matters of safety to municipalities within the State's borders.

The Secretary of Transportation is charged with "ensur[ing] the coordinated and effective administration of the transportation programs of the United States Government"

and with "encourag[ing] cooperation of Federal, State, and local governments, carriers, labor, and other interested persons to achieve transportation objectives." 49 U.S.C. 101(b)(1) and (3). The Secretary is authorized, *inter alia*, to determine whether state or municipal laws pertaining to commercial motor vehicle safety may be enforced or will instead be preempted by federal law. The position of the United States is that 49 U.S.C. 14501(c)(2)(A) (Supp. V 1999) preserves the authority of States to delegate safety regulatory power to municipalities, and of municipalities to exercise that delegated power, subject to review by the Secretary under other provisions of law. That interpretation allows municipalities to supplement federal-and state-level regulatory efforts, while ensuring that municipal regulation does not disrupt interstate commerce. The court of appeals' decision, by contrast, substitutes a categorical rule of preemption that divests municipalities of any role in the furtherance of motor carrier safety.

STATEMENT

1. The Airline Deregulation Act of 1978 (ADA), Pub. L. No. 95-504, 92 Stat. 1705, largely deregulated the domestic airline industry. "To ensure that the States would not undo federal deregulation with regulation of their own," *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992), the ADA preempted state laws "relating to rates, routes, or services of any air carrier." ADA § 4(a), 92 Stat. 1708. As amended in the 1994 reenactment of Title 49, the ADA currently provides that "a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier." 49 U.S.C. 41713(b)(1); see *American Airlines, Inc.* v. *Wolens*, 513 U.S. 219, 223 n.1 (1995) (explaining that "Congress intended the revision to make no substantive change.").

When Congress passed the Federal Aviation Administration Authorization Act of 1994 (FAAA Act), Pub. L. No. 103-305, 108 Stat. 1569, the preemption provision of the ADA served as the model for economic deregulation of the intrastate trucking industry. In its current form, the FAAA Act's preemption provision states in pertinent part as follows:

> (c) Motor carriers of property.—
>
> (1) General rule.—Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier (other than a carrier affiliated with a direct air carrier covered by section 41713(b)(4)) or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.
>
> (2) Matters not covered.—Paragraph (1)—
>
> (A) *shall not restrict the safety regulatory authority of a State with respect to motor vehicles*, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization;
>
> (B) does not apply to the transportation of household goods; and
>
> (C) 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.

49 U.S.C. 14501(c) (Supp. V 1999) (emphasis added).[1] The dispute in this case centers on the italicized language.

2. Petitioner City of Columbus has enacted various provisions regulating the operation of tow trucks within the City. See Pet. App. 36A-47A. *Inter alia*, those ordinances provide that no owner of a tow truck may permit his tow truck to be used, and no tow truck operator may engage in the towing of a vehicle, "unless a valid tow truck operator's license obtained pursuant to this chapter has been issued and is in force for that tow truck operator." *Id.* at 37A (§ 549.02). The licensing requirement applies only when the towed vehicle is picked up within the City. *Id.* at 37A-38A (§ 549.02). Tow truck operators are forbidden to "respond to the scene of an accident, vehicle breakdown or other disabled vehicle * * * unless either summoned by a person having a direct interest in the vehicle or vehicles involved or dispatched thereto as provided in the rules and regulations promulgated by the Safety Director." *Id.* at 40A (§ 549.065). Tow truck operators within the City are required to maintain specified levels of insurance, see *id.* at 44A-45A (§§ 549.14-549.15), and to comply with recordkeeping requirements concerning the vehicles towed, *id.* at 46A-47A (§ 549.17).

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[1] Current 49 U.S.C. 14501(c) (Supp. V 1999) was originally codified in substantially similar form at 49 U.S.C. 11501(h). Section 14501(c)(2)(C) was added to the statute in 1995. See ICC Termination Act of 1995, Pub. L. No. 104-88, Tit. I, § 103, 109 Stat. 899; H.R. Conf. Rep. No. 422, 104th Cong., 1st Sess. 219 (1995).

Administration of petitioner's tow truck ordinances is entrusted to the City's Director of Public Safety, who is authorized to "promulgate a set of rules and regulations to implement [the ordinances] as he deems proper." Pet. App. 47A (§ 549.20). Regulations promulgated by the Director require annual inspections of all tow trucks and specify the equipment that each tow truck must contain. See *id.* at 47A-53A. The regulations also state that "[w]recker operators must display a high proficiency in the operation of their tools and equipment." *Id.* at 48A.

By Constitution and statute, the State of Ohio has delegated to its municipal corporations broad authority to regulate the public streets within their borders. Article XVIII, Section 3 of the Ohio Constitution provides that "[m]unicipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws." Ohio Rev. Code Ann. § 715.22(B) (Anderson 2000) authorizes any municipal corporation to "[l]icense and regulate the use of the streets by persons who use vehicles, or solicit or transact business thereon." Section 723.01 states that "[m]unicipal corporations shall have special power to regulate the use of the streets. Except as provided in Section 5501.49 of the Ohio Revised Code Annotated [dealing with lift bridges on state highways within municipal corporations], the legislative authority of a municipal corporation shall have the care, supervision, and control of the public highways, streets, avenues, alleys, sidewalks, public grounds, bridges, aqueducts and viaducts within the municipal corporation." And Sections 4921.02(A)(8) and 4923.02(A)(10) specifically exclude persons and businesses "[e]ngaged in the towing of disabled or wrecked vehicles" from the definition of "motor transportation company" and "common carrier by motor

vehicle," thereby exempting tow truck operators from regulation by the Ohio Public Utilities Commission.

3. In December 1998, respondent Ours Garage and Wrecker Service, Inc., filed suit in the United States District Court for the Southern District of Ohio, seeking a declaratory judgment that petitioner's ordinances and administrative regulations governing the operation of tow trucks within the City are preempted by 49 U.S.C. 14501(c)(1) (Supp. V 1999). Petitioner and two city officials were named as defendants.

The district court found the challenged municipal-law provisions to be preempted "for the reasons set forth in" *R. Mayer of Atlanta, Inc.* v. *City of Atlanta*, 158 F.3d 538, 545-548 (11th Cir. 1998), cert. denied, 526 U.S. 1038 (1999), and *Petrey* v. *City of Toledo*, 61 F. Supp. 2d 674, 677-680 (N.D. Ohio 1999). Pet. App. 34A. Consistent with those decisions, the district court "conclude[d] that, as a matter of statutory construction, the exceptions to the general rule stated in 49 U.S.C. § [14501(c)(1) (Supp. V 1999)] apply only to states, and not municipalities." *Ibid.*

4. Petitioner appealed to the Court of Appeals for the Sixth Circuit. During the pendency of petitioner's appeal, the court of appeals issued its decision in *Petrey* v. *City of Toledo*, 246 F.3d 548 (6th Cir. 2001) (Pet. App. 4A-32A). *Petrey* involved a preemption challenge, under 49 U.S.C. 14501(c)(1) (Supp. V 1999), to tow truck ordinances enacted by the City of Toledo. See 246 F.3d at 552 (Pet. App. 5A). Based on its decision in *Petrey*, the court of appeals in the instant case affirmed the judgment of the district court. *Id.* at 1A-3A.

a. In its preemption analysis, the court of appeals in *Petrey* distinguished between "non-consensual" and "consensual" tows. With respect to the City's provisions applicable solely to "non-consensual" tows—*i.e.*, tows performed at the direction of the Toledo Police Department without the con-

sent of the vehicle's owner—the court found that the City was acting as a proprietor rather than as a regulator. 246 F.3d at 555-559 (Pet. App. 13A-20A). Because "these provisions do nothing more than serve the City's narrow proprietary interest in working with those towing companies who will be most able to meet safely and efficiently the Toledo Police Department's towing needs," the court concluded, they "do not constitute regulation or have the force and effect of law, and thus are not preempted by 49 U.S.C. § 14501(c)(1)." 246 F.3d at 559 (Pet. App. 19A-20A).

b. The *Petrey* court held, however, that Toledo Municipal Code § 765.02(c) (1997), which requires all tow truck drivers in the City to obtain a special towing license, was preempted by 49 U.S.C. 14501(c)(1) (Supp. V 1999). 246 F.3d at 559-564 (Pet. App. 20A-29A). The court rejected the City's contention that Section 765.02(c) was saved from preemption by 49 U.S.C. 14501(c)(2)(A) (Supp. V 1999), which states that the FAAA Act's preemption provision "shall not restrict the safety regulatory authority of a State with respect to motor vehicles." The court explained that in its view, "the safety regulation exception to preemption was not meant to apply to a state's political subdivisions." 246 F.3d at 561 (Pet. App. 23A). The court found it significant that the term "political subdivision[s]" appears repeatedly in other portions of 49 U.S.C. 14501 (Supp. V 1999) but "is not mentioned at all in § 14501(c)(2)(A)." 246 F.3d at 561 (Pet. App. 23A). The court concluded that

> when Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion. Because the term at issue is mentioned so frequently in § 14501, and yet is not mentioned at all in § 14501(c)(2)(A), the use of this presumption seems particularly appropriate in this case. Applying this pre-

> sumption in this case, we hold that, while states may regulate the safety of motor carriers, political subdivisions may not.

Ibid. (Pet. App. 23A-24A) (citations and internal quotation marks omitted).

The *Petrey* court found support for its interpretation of 49 U.S.C. 14501(c)(2)(A) (Supp. V 1999) in the legislative history and purpose of the FAAA Act's preemption provision. 246 F.3d at 563-564 (Pet. App. 28A-29A). Relying on the Conference Report accompanying the Act, the court observed that "one of the means by which Congress intended to encourage market forces was through the elimination of a myriad of complicated and potentially conflicting state regulations." *Id.* at 563 (Pet. App. 28A). In the court's view, that legislative history "indicat[ed] that yet another level of regulation at the local level would be disfavored." *Ibid.* The *Petrey* court therefore agreed with the Eleventh Circuit that "it is reasonable to assume that Congress decided that safety and insurance ordinances must be enacted on a statewide level, in order to minimize the disturbance to the motor transportation industry that a patchwork of local ordinances inevitably would create." *Ibid.* (quoting *R. Mayer of Atlanta*, 158 F.3d at 546).

c. In the court of appeals, petitioner "concede[d] that *Petrey* control[led] the disposition of this case. Accordingly, [the court of appeals] affirm[ed] the judgment of the district court permanently enjoining the City's enforcement of these towing provisions." Pet. App. 2A.

SUMMARY OF ARGUMENT

A. A State generally possesses "absolute discretion," *Wisconsin Public Intervenor* v. *Mortier*, 501 U.S. 597, 608 (1991), to delegate as much or as little authority as it chooses to its political subdivisions. Congress's express declaration that States retain their existing authority with respect to

specified aspects of motor carrier operations, including "safety," is therefore best understood to preserve the State's traditional power *either* to regulate those matters at the state level *or* to delegate that authority to local governments. The fact that other provisions of Section 14501 refer specifically to "political subdivision[s]," while Section 14501(c)(2)(A) does not, is an insufficient basis for departing from that established understanding of the scope of a State's regulatory authority. Construing Section 14501(c)(2)(A) to preserve a municipality's regulatory authority over the subject matters (including "safety") enumerated therein is consistent with the presumption against preemption of state and local law. The regime contemplated by the court of appeals, in which States would be effectively precluded from delegating their own regulatory powers to municipal governments, is especially anomalous because it would intrude upon the traditional authority of a State to allocate power among its various subordinate units in the manner it sees fit.

B. Other provisions of Title 49 confirm that municipal governments retain the authority to regulate commercial motor carriers with respect to "safety" and the other matters specified in Section 14501(c)(2)(A). Under 49 U.S.C. 31141 (1994 & Supp. V 1999), the Secretary is authorized to conduct review proceedings to determine whether particular state safety laws and regulations governing interstate motor carrier operations may be enforced or will instead be preempted. For purposes of those review proceedings, the terms "State," "State law," and "State regulation" are defined to include "political subdivision[s]" and any law or regulation enacted or prescribed by a "political subdivision." 49 U.S.C. 31132(7)-(9). Thus, the statutory scheme expressly contemplates regulatory proceedings in which the Secretary of Transportation may review municipal ordinances and regulations pertaining to the safety of interstate commercial motor carrier operations. In addition, the Secretary's

administration of the Motor Carrier Safety Assistance Program involves review of state and local motor carrier safety laws pertaining to intrastate as well as interstate operations.

The continued existence of those statutory provisions substantially undermines respondent's contention that local governments are categorically foreclosed from regulating commercial motor carrier safety. The possibility of review by the Secretary also provides a mechanism for ensuring that municipal safety regulation does not unreasonably burden interstate commerce. Other provisions of Title 49 similarly address the remaining subject areas (*e.g.*, highway routing controls for hazardous materials) identified in Section 14501(c)(2)(A). It is to those provisions, rather than to Section 14501(c), that courts should look to determine the permissible scope of municipal regulation in the enumerated areas.

C. The pertinent legislative history supports the conclusion that municipal governments retain authority to regulate motor carrier safety pursuant to delegations of state power. The Conference Report accompanying the FAAA Act reflects Congress's intent to distinguish between preempted and non-preempted regulation on the basis of subject matter—*i.e.*, by preempting economic regulation while leaving other categories (including "safety") of regulation intact—rather than to distinguish between state- and municipal-level regulation.

D. The Department of Transportation has consistently taken the view that local governments retain authority to regulate the safety of tow truck operations. The agency has stated that position in memoranda, prepared and circulated shortly after the FAAA Act's passage, that specifically addressed the Act's preemptive scope. That position is also reflected in the Department's regulations implementing the

MCSAP, and it is entitled to deference from a reviewing court.

ARGUMENT

BY PRESERVING "THE SAFETY REGULATORY AUTHORITY OF A STATE WITH RESPECT TO MOTOR VEHICLES," 49 U.S.C. 14501(C)(2)(A) PRESERVES THE STATES' ABILITY TO DELEGATE REGULATORY AUTHORITY TO MUNICIPALITIES

A. The Text Of Section 14501(c)(2)(A) Does Not Preclude Municipal Safety Regulation With Respect To Motor Vehicles

1. The preemption provision of the FAAA Act states as a "[g]eneral rule" that "a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or 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) (Supp. V 1999). The Act further provides, however, that the general rule of preemption "shall not restrict the safety regulatory authority of a State with respect to motor vehicles." 49 U.S.C. 14501(c)(2)(A) (Supp. V 1999). The question presented in this case is whether a municipal government, acting pursuant to express constitutional and statutory delegations of authority from the State, is permitted to enact and enforce safety regulations pertaining to the carriage of goods by motor vehicle.

"The principle is well settled that local governmental units are created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them in its absolute discretion." *Wisconsin Pub. Intervenor* v. *Mortier*, 501 U.S. 597, 607-608 (1991) (ellipsis, brackets, and internal quotation marks omitted). Accord, *e.g.*, *Sailors* v. *Board of Educ.*, 387 U.S. 105, 107-108 (1967) ("Political subdivisions of States * * * have been traditionally

regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions.") (quoting *Reynolds* v. *Sims*, 377 U.S. 533, 575 (1964)); *Hunter* v. *City of Pittsburgh*, 207 U.S. 161, 178 (1907). In *Mortier*, the Court applied that principle in construing 7 U.S.C. 136v(a), a provision of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). Section 136v(a) provides that "[a] State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter." 501 U.S. at 606. The Court in *Mortier* rejected the contention that Section 136v(a)'s express authorization of regulation by "[a] State" impliedly precluded regulation of pesticides by local governmental units. The Court explained:

> The exclusion of political subdivisions cannot be inferred from the express authorization to the "State[s]" because political subdivisions are components of the very entity the statute empowers. Indeed, *the more plausible reading of FIFRA's authorization to the States leaves the allocation of regulatory authority to the "absolute discretion" of the States themselves, including the option of leaving local regulation of pesticides in the hands of local authorities.*

Id. at 608 (emphasis added).

The same analysis applies in this case. Congress declared that States retain their existing "safety regulatory authority," as well as their existing "authority" with respect to other specified aspects of motor carrier operations, including "highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo," and "minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization." 49 U.S.C. 14501(c)(2)(A) (Supp. V 1999). Congress's declaration that the "authority of a State" in those specified

areas remains unaffected is best understood to preserve the State's traditional power *either* to regulate the pertinent subject matter at the state level *or* to delegate that authority to local governments. Indeed, that inference is stronger here than in *Mortier* itself. Because the FAAA Act was enacted approximately three years after the decision in *Mortier*, it is particularly appropriate to read the phrase "authority of a State" to encompass the States' traditional prerogative of conferring on local governments all powers that might have been exercised at the state level. Cf. *Director, OWCP* v. *Perini N. River Assocs.*, 459 U.S. 297, 319, 320 (1983) (holding that because Congress is presumed to be familiar with existing law, the statutory phrase "employees traditionally covered" should be construed "to refer to those employees included in the scope of coverage under" this Court's prior decisions).

2. In adopting a contrary reading of 49 U.S.C. 14501(c)(2)(A) (Supp. V 1999), the court of appeals in *Petrey* noted that the term "political subdivision" is used repeatedly in other parts of Section 14501(c). 246 F.3d at 561 (Pet. App. 23A). Relying on the interpretive canon that "when 'Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion,'" *ibid.* (quoting *Russello* v. *United States*, 464 U.S. 16, 23 (1983)), the court inferred from the omission of the term from Section 14501(c)(2)(A) that "Congress did not intend to exempt political subdivisions from preemption when they attempt to engage in safety regulation," *id.* at 26A. That reasoning is unpersuasive.

a. This Court in *Russello* did not invoke the interpretive canon described above as a basis for departing from the literal import of the statutory text. The question presented in *Russello* was "whether profits and proceeds derived from

racketeering constitute an 'interest' within the meaning of [18 U.S.C. 1963(a)(1)] and are therefore subject to forfeiture." 464 U.S. at 20. The petitioner "contend[ed] that § 1963(a)(1) reaches only 'interests in an enterprise' and does not authorize the forfeiture of mere 'profits and proceeds.'" *Ibid.* This Court first surveyed various dictionary definitions and found it "apparent that the term 'interest' comprehends all forms of real and personal property, including profits and proceeds." *Id.* at 21. Only after concluding that the term "interest" was most naturally understood to encompass profits and proceeds (*id.* at 21-22) did the Court state that it was "fortified in this conclusion by * * * the structure of the RICO statute" (*id.* at 22), including references in other statutory subsections to particular categories of "interest[s]" (*id.* at 22-23). Thus, in *Russello* itself, the thrust of the analysis was that a court should be particularly reluctant to infer a limitation on facially unqualified statutory language if an analogous limitation is expressly stated in a different provision of the statute.

In *Petrey*, by contrast, the court of appeals invoked the *Russello* canon not to buttress the natural reading of Section 14501(c)(2)(A), but to support a construction that is at odds with the statutory language. Section 14501(c)(2)(A) states categorically that the general preemption rule of Section 14501(c)(1) "shall not restrict the safety regulatory authority of a State with respect to motor vehicles." As interpreted by the *Petrey* court, however, Section 14501(c)(1) *would* "restrict" the States' "safety regulatory authority" in this area by precluding a State from exercising its traditional discretion to delegate its regulatory powers to local governmental units.

b. Other interpretive canons support the view that "the safety regulatory authority of a State" that is preserved by 49 U.S.C. 14501(c)(2)(A) (Supp. V 1999) includes the authority to delegate regulatory power to units of local govern-

ment. Preemption analysis "start[s] with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 485 (1996) (quoting *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)); accord, *e.g.*, *Mortier*, 501 U.S. at 605. That presumption is fully applicable to cases in which federal law is claimed to preempt a municipal ordinance. See *ibid.* ("It is * * * axiomatic that 'for the purposes of the Supremacy Clause, the constitutionality of local ordinances is analyzed in the same way as that of statewide laws.'") (quoting *Hillsborough County* v. *Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985)). The presumption is especially compelling in the present context, since "the regulation of health and safety matters is primarily, and historically, a matter of local concern." *Hillsborough County*, 471 U.S. at 719.

The language of 49 U.S.C. 14501(c) (Supp. V 1999) does not reflect a "clear and manifest" congressional intent to preempt municipal safety regulation with respect to commercial motor carriers. To the contrary, Section 14501(c)(2)(A) is most naturally read to preserve a municipality's traditional authority to protect the public safety within its borders pursuant to an express delegation of power from the State. The natural import of Section 14501(c)(2)(A)'s language, buttressed by the presumption against preemption of state and municipal law, overcomes any negative implication that might be created by the express references to "political subdivision[s]" in other portions of Section 14501.

The regime contemplated by the court of appeals, in which commercial motor carriers are subject to state-level safety regulation but not to substantively identical requirements adopted by municipalities, is especially anomalous because it would intrude upon the traditional authority of a State to allocate power among its various governmental units in the

manner it sees fit. "How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself." *Highland Farms Dairy, Inc.* v. *Agnew*, 300 U.S. 608, 612 (1937); cf. *Gregory* v. *Ashcroft*, 501 U.S. 452, 460 (1991) ("Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign."). As with the establishment of federal qualifications for state officers, Congress's power to prohibit the delegation of state regulatory authority to municipalities "is a power that [the Court] must assume Congress does not exercise lightly." *Ibid.*[2]

B. Other Provisions Of Title 49 Confirm That Municipal Governments Retain The Authority To Regulate Commercial Motor Carriers With Respect To The Subject Areas Specified In Section 14501(c)(2)(A)

Section 14501(c)(2), it should be emphasized, does not say that state regulation within the specified areas is not preempted. Rather, it says that "*Paragraph (1)*"—*i.e.*, 49 U.S.C. 14501(c)(1) (Supp. V 1999)—"shall not restrict the * * * authority of a State" with respect to the enumerated

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[2] In construing Section 14501(c)(2)(A) not to authorize municipal safety regulation, the Ninth Circuit stated that "a contrary reading of the safety exception would lead to the absurd result that Congress can never preempt local regulations and simultaneously leave a state's ability to regulate intact." *Tocher* v. *City of Santa Ana*, 219 F.3d 1040, 1051 (9th Cir. 2000), cert. denied, 531 U.S. 1146 (2001). That analysis is misconceived. Congress possesses *power* to preempt municipal regulation without preempting state-level regulation, just as it possesses power to preempt other state-law provisions governing the relationship between the State and its localities. Cf. *Lawrence County* v. *Lead-Deadwood Sch. Dist.*, 469 U.S. 256, 260-270 (1985) (statute providing federal funds to local governments in lieu of payment of local taxes on federally owned property held to preempt state-law restrictions on the manner in which localities could spend the money). Exercise of that authority is sufficiently unusual, however, that such an intent should not lightly be imputed to Congress.

subject matters. Accordingly, to construe the phrase "authority of a State" in Section 14501(c)(2)(A) to encompass delegations of power to municipal governments would not leave municipal regulation in the defined areas unconstrained by federal law. It simply means that the propriety of municipal regulation regarding those matters is to be determined by reference to other federal statutory provisions that specifically address preemption in the pertinent subject areas. That reading is confirmed by the legislative history. The Conference Report accompanying the FAAA Act emphasized that nothing in Section 14501(c)(2)(A) "amends other Federal statutes that govern the ability of States to impose safety requirements" or to regulate the other subject matters identified in that Section. H.R. Conf. Rep. No. 677, 103d Cong., 2d Sess. 84 (1994); see *ibid.* (FAAA Act leaves state authority in those areas "unaffected"); *id.* at 85 (state authority "unchanged").[3]

1. Issues of motor carrier safety, including standards for preemption, are addressed elsewhere in federal law. The Motor Carrier Safety Act of 1984, Pub. L. No. 98-554, Tit. II, 98 Stat. 2832, required the Secretary to issue or reissue

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[3] The Conference Report noted the "concern" that Section 14501(c)(2)(A) "may be construed as granting States additional authority to regulate in those enumerated areas [including safety] rather than simply stressing that the preemption provisions do not apply to those areas." H.R. Conf. Rep. No. 677, *supra*, at 84. The Conference Report then "emphasize[d] that nothing in [Section 14501(c)(2)(A)] contains a new grant of Federal authority to a State to regulate commerce and nothing in [that Section] amends other Federal statutes that govern the ability of States to impose safety requirements, hazardous materials routing matters, truck size and weight restrictions or financial responsibility requirements." *Ibid.* The Conference Report thus reflects Congress's awareness that state regulation of motor carriers with respect to the matters described in Section 14501(c)(2)(A) was subject to pre-existing federal statutory limitations, and its intent that those limitations would remain unchanged.

regulations pertaining to commercial motor vehicle safety, and it established a mechanism by which the agency may determine whether state and local safety regulations governing interstate motor carrier operations are preempted. Regulations adopted by the Secretary with regard to commercial motor vehicle safety are "minimum" safety standards. 49 U.S.C. 31136 (1994 & Supp. V 1999). States remain free to adopt their own regulations on commercial motor vehicle safety, subject to review and possible preemption by the Secretary. 49 U.S.C. 31141 (1994 & Supp. V 1999). "If the Secretary decides a State law or regulation is additional to or more stringent than a regulation prescribed by the Secretary" under Section 31136, that "State law or regulation" may not be enforced if the Secretary determines that "the State law or regulation has no safety benefit"; "the State law or regulation is incompatible with the regulation prescribed by the Secretary"; or "enforcement of the State law or regulation would cause an unreasonable burden on interstate commerce." 49 U.S.C. 31141(c)(4) (1994 & Supp. V 1999). "To review a State law or regulation on commercial motor vehicle safety under this section, the Secretary may initiate a regulatory proceeding on the Secretary's own initiative or on petition of an interested person (including a State)." 49 U.S.C. 31141(g) (Supp. V 1999); see 49 C.F.R. 389.31.

For purposes of Section 31141, the term "State" is defined to include "a political subdivision of a State." 49 U.S.C. 31132(7). The terms "State law" and "State regulation" are likewise defined to include a law or regulation enacted or prescribed "by a political subdivision of a State." 49 U.S.C. 31132(8) and (9). Thus, the statutory scheme expressly contemplates regulatory proceedings in which the Secretary of Transportation may review municipal ordinances and regulations pertaining to the safety of interstate commercial

motor carrier operations and then determine whether those provisions may be enforced.

Additional federal review of state and local motor carrier safety standards occurs under the Motor Carrier Safety Assistance Program (MCSAP or Program), which was first authorized by the Surface Transportation Assistance Act of 1982, Pub. L. No. 97-424, §§ 401-404, 96 Stat. 2154-2157. The statutory provisions governing the MCSAP are presently codified at 49 U.S.C. 31101 *et seq*. Under that Program, the Secretary of Transportation is authorized to "make grants to States for the development or implementation of programs for the enforcement of regulations, standards, and orders of the United States Government on commercial motor vehicle safety and compatible State regulations, standards, and orders." 49 U.S.C. 31102(a) (1994 & Supp. V 1999). In implementing the MCSAP, "[t]he Secretary shall prescribe regulations specifying tolerance guidelines and standards for ensuring compatibility of intrastate commercial motor vehicle safety laws and regulations with [federal] motor carrier safety regulations." 49 U.S.C. 31104(h) (Supp. V 1999). The Secretary's administration of the grant Program thus involves scrutiny of state and local motor carrier safety laws pertaining to intrastate as well as interstate operations. See 49 C.F.R. 350.335-350.345, 355.21.

Those statutory frameworks for the review of state and municipal laws were not altered by the FAAA Act, and they are therefore significant in two related respects. First, the continued existence of express statutory authority for the Secretary of Transportation to review municipal laws pertaining to commercial motor carrier safety substantially undermines respondent's contention that such laws are categorically preempted by 49 U.S.C. 14501(c) (Supp. V 1999). Section 31141's express provision for review of municipal safety regulation should not be deemed superflu-

ous absent very clear evidence that such was Congress's intent.

Far from precluding municipal regulation of motor carrier safety, the FAAA Act explicitly *preserved* the "safety regulatory authority of a State with respect to motor vehicles" (49 U.S.C. 14501(c)(2)(A) (Supp. V 1999))—a phrase that is naturally understood to encompass the State's traditional discretion to delegate regulatory power to local governmental units. See pp. 11-13, *supra*. The court of appeals' textual justification for finding blanket preemption of municipal safety regulation was based on negative inferences drawn from references to "political subdivision[s]" in other parts of Section 14501. It is implausible to suppose, however, that Congress would have impliedly superseded the existing statutory review framework in so oblique a fashion, and the legislative history shows that Congress did not intend to do so. See H.R. Conf. Rep. No. 677, *supra*, at 84 (nothing in Section 14501(c)(2)(A) "amends other Federal statutes that govern the ability of States to impose safety requirements"); p. 17 & n. 3, *supra*.[4]

Second, the availability of review by the Secretary under Section 31141 and under the MCSAP belies the *Petrey* court's conclusion, see 246 F.3d at 563 (Pet. App. 28A), that preemption of *all* municipal motor carrier safety regulation is necessary to prevent disruption of interstate commerce. Section 31141 expressly contemplates the review of safety

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[4] In 1998, Congress amended Section 31141 to eliminate the prior provisions (see 49 U.S.C. 31141(b)) for review of state safety laws by the Commercial Motor Vehicle Safety Regulatory Review Panel and to modify the procedures for review by the Secretary. See Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, Tit. IV, § 4008(d) & (e), 112 Stat. 404. The same 1998 legislation amended the definition of "commercial motor vehicle" contained in Section 31132(1). See § 4008(a), 112 Stat. 404. Congress did not, however, delete or alter the references to "political subdivision[s]" contained in the existing definitions (see 49 U.S.C. 31132(7)-(9)) of "State," "State law," and "State regulation."

measures adopted by political subdivisions to determine, *inter alia*, whether enforcement of such measures "would cause an unreasonable burden on interstate commerce." 49 U.S.C. 31141(c)(4)(C) (1994 & Supp. V 1999). As a condition of assistance under the MCSAP, States must ensure that their own safety regulations and those of their political subdivisions are "compatible" with federal standards. The Title 49 provisions that specifically address motor carrier safety allow municipalities to supplement federal and state-level efforts to enhance motor carrier safety, while preventing enforcement of municipal laws that have unacceptable economic effects.

2. Congress has also specifically addressed the other subjects identified in 49 U.S.C. 14501(c)(2)(A) (Supp. V 1999). See 49 U.S.C. 5112 (highway routing of hazardous materials); 49 U.S.C. 31111 (1994 & Supp. V 1999) (motor vehicle length and width limitations); 49 U.S.C. 31114 (commercial motor vehicle access to interstate and federal aid highways); 49 U.S.C. 31138 & 31139 (1994 & Supp. V 1999) (minimum motor carrier financial responsibility). It is to those statutory provisions, not to Section 14501(c), that courts should look to determine the permissible scope of municipal regulatory authority with respect to the enumerated subject areas.

Section 5112, for example, clearly presupposes that local governments have a role (subject to standards prescribed by the Secretary under Section 5112(b)) in the establishment of highway route controls for hazardous materials. See 49 U.S.C. 5112(b)(1)(H)(i) (State is responsible "for ensuring that political subdivisions of the State comply with standards prescribed under this subsection"). Under 49 U.S.C. 5125(d)(1), the Secretary is authorized to determine whether a hazardous materials transportation "requirement of a State, political subdivision, or tribe * * * is preempted." See 49 C.F.R. 397.203(a) (standards for determining whether

a "highway routing designation established, maintained, or enforced by a State, political subdivision thereof, or Indian tribe is preempted"); 49 C.F.R. 397.201-397.225 (procedures for resolving preemption questions); 66 Fed. Reg. 37,260, 37,264 (2001) (reviewing, and holding to be preempted, Morrisville, Pennsylvania highway routing designation for hazardous waste); *id.* at 29,867-29,876 (reviewing restrictions on the transportation of explosives imposed by Cleveland, Ohio, and concluding that some but not others are preempted). As with the provisions for review of municipal laws governing safety, Section 14501(c)(2)(A) does not impliedly supersede that carefully crafted scheme. See H.R. Conf. Rep. No. 677, *supra*, at 84 (explaining that if a State exercises authority over the routing of hazardous materials by motor carrier, it must do so in a manner consistent with 49 U.S.C. 5101-5127, and that "[t]he intention of the conferees is solely to identify certain areas that are not preempted by the preemption provision" in Section 14501(c)(1)).

C. The Legislative History Of The FAAA Act Supports The Conclusion That Section 14501(c)(2)(A) Preserves The Authority Of Local Governments To Regulate Motor Vehicle Safety Pursuant To Delegations Of State Power

In *Petrey*, the court of appeals relied in part on the following passage from the Conference Report accompanying the FAAA Act:

> [T]he conferees believe preemption legislation is in the public interest as well as necessary to facilitate interstate commerce. State economic regulation of motor carrier operations causes significant inefficiencies, increased costs, reduction of competition, inhibition of innovation and technology and curtails the expansion of markets * * *. The sheer diversity of these regulatory schemes is a huge problem for national and regional

> carriers attempting to conduct a standard way of doing business.

H.R. Conf. Rep. No. 677, *supra*, at 87 (quoted in *Petrey*, 246 F.3d at 563 (Pet. App. 28A)). From Congress's "inten[t] to encourage market forces * * * through the elimination of a myriad of complicated and potentially conflicting state regulations," the court inferred "that yet another level of regulation at the local level would be disfavored." 246 F.3d at 563 (Pet. App. 28A). The court agreed with the Eleventh Circuit that in drafting Section 14501(c)(2)(A), "Congress decided that safety and insurance ordinances must be enacted on a statewide level, in order to minimize the disturbance to the motor transportation industry that a patchwork of local ordinances inevitably would create." *Ibid.* (quoting *R. Mayer of Atlanta*, 158 F.3d at 546). That analysis is misconceived.

In describing the type of regulation that had been found to burden interstate commerce, the Conference Report referred specifically to "[*s*]*tate economic regulation* of motor carrier operations." H.R. Conf. Rep. No. 677, *supra*, at 87 (emphasis added). The italicized language is significant in two respects. First, that language is clearly intended to describe the category of regulation that is subject to the general rule of preemption established by Section 14501(c)(1). Because the general rule established by Section 14501(c)(1) is expressly made applicable both to "State[s]" and to "political subdivision[s]," the Conference Report's reference to "state economic regulation" necessarily encompasses municipal ordinances. The Conference Committee's use of the term "state economic regulation" in that manner undermines the court of appeals' conclusion that Congress intended the phrase "authority of a State" in Section 14501(c)(2)(A) to *exclude* the exercise by municipalities of delegated regulatory power. See also H.R. Conf. Rep. No. 677, *supra*, at 85 (stating that Section 14501(c)(1) "preempts

State regulation of prices, routes and services of motor carriers").

Second, the Conference Report referred to the deleterious effects not of state motor carrier regulation generally, but of "state *economic* regulation." Congress's decision to preserve state regulatory authority with respect to the subject matters (such as "safety") specified in Section 14501(c)(2)(A) is no less central to the statutory scheme than its determination that economic regulation should be pre-empted. There is consequently no reason to construe the phrase "authority of a State" to deprive a State of its customary discretion to delegate whatever regulatory power the State itself possesses to municipalities within its borders.[5]

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[5] The Conference Report explained that

> [t]he conferees do not intend the regulatory authority which the States may continue to exercise * * * to be used as a guise for continued economic regulation as it relates to prices, routes or services. There has been concern raised that States, which by this provision are prohibited from regulating intrastate prices, routes and services, may instead attempt to regulate intrastate trucking markets through [their] unaffected authority to regulate matters such as safety, vehicle size and weight, insurance and self-insurance requirements, or hazardous materials routing matters. The conferees do not intend for States to attempt to de facto regulate prices, routes or services of intrastate trucking through the guise of some form of unaffected regulatory authority.

H.R. Conf. Rep. No. 677, *supra*, at 84. The Conference Committee thus recognized the danger that the reserved authority of States to regulate some aspects of motor carrier operations might be exercised in a way that would burden commerce and thus disserve the purposes of the Act. The Committee addressed that danger, however, by emphasizing the distinction between those *subject areas* that did and those that did not remain subject to state regulatory authority—not by distinguishing between state- and municipal-level regulation.

D. The Department Of Transportation Has Consistently Taken The View That Local Governments Retain Authority To Regulate The Safety Of Tow Truck Operations

1. A March 1995 Department of Transportation memorandum specifically addressing the FAAA Act's preemptive scope explained that, while "[t]ow truck operators are considered to be motor carriers of property" under Title 49, "State actions that are legitimately grounded in public safety considerations are exempt from [FAAA Act preemption]. For example, we believe that State or local regulations governing the towing of damaged or abandoned vehicles that are public safety hazards would fall within this exemption, assuming * * * that such regulations are not a guise for broader economic restrictions." *Intrastate Trucking Deregulation: An Analysis and Interpretation of Title VI, Federal Aviation Administration Authorization Act of 1994, P.L. 103-305* at 2. In *Ace Auto Body & Towing, Ltd.* v. *City of New York*, 171 F.3d 765 (2d Cir.), cert. denied, 528 U.S. 868 (1999), the Second Circuit relied in part on that agency memorandum in holding that municipal laws regulating tow truck safety are not preempted by Section 14501(c)(1). See *id.* at 775-776.

Another, contemporaneous Department of Transportation memorandum, developed in consultation with the Interstate Commerce Commission and used to furnish guidance to public officials and others, explained:

> The [FAAA] Act does not attempt to completely deregulate the motor carrier industry. In fact, the new law specifically reserves the States' (*and local governments['] to the extent that they derive power from the States*) authority to regulate with respect to safety, financial responsibility and other non-economic matters. Therefore, State and local bodies may be able to control tow truck operators and other motor carriers subject to

> the FAAA Act as a matter of public safety or as an exercise of their police powers.

Memorandum re: Federal Aviation Administration Authorization Act of 1994 at 2 (Jan. 1995) (emphasis added). Those memoranda reflect the agency's consistent view, first articulated a few months after the FAAA Act's enactment, that States retain their traditional discretion to delegate to municipal governments those powers reserved by Section 14501(c)(2)(A).

2. The same view is reflected in regulations governing the Secretary's implementation of the MCSAP. See 49 C.F.R. Pts. 350 and 355. Those regulations provide that, to facilitate the Secretary's administration of the Program, "[e]ach State shall annually analyze its laws and regulations, *including those of its political subdivisions*, which pertain to commercial motor vehicle safety to determine whether its laws and regulations are compatible with the Federal Motor Carrier Safety Regulations." 49 C.F.R. 355.21(a) (emphasis added). The Secretary's regulations thus presume that municipal governments retain the authority to enact laws governing commercial motor vehicle safety.[6]

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[6] The agency regulations governing transportation of hazardous materials (see pp. 21-22, *supra*) likewise presume that municipal governments retain regulatory authority in that area. See, *e.g.*, 49 C.F.R. 397.69(a) (for purposes of specified regulatory provisions, "any highway routing designation affecting the highway transportation of NRHM [non-radioactive hazardous material], made by a political subdivision of a State is considered as one made by that State"); 49 C.F.R. 397.203(a) (standards for determining whether a "highway routing designation established, maintained, or enforced by a State, political subdivision thereof, or Indian tribe is preempted"); 49 C.F.R. 397.205(a) ("Any person * * * directly affected by any highway routing designation of another State, political subdivision, or Indian tribe, may apply to the [Federal Motor Carrier Safety] Administrator for a determination of whether that highway routing designation is preempted.").

The Secretary's determination is entitled to deference under the principles announced in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Although the FAAA Act itself does not confer rulemaking authority on the Secretary of Transportation, the Secretary is charged generally with "ensur[ing] the coordinated and effective administration of the transportation programs of the United States Government" and with "encourag[ing] cooperation of Federal, State, and local governments, carriers, labor, and other interested persons to achieve transportation objectives." 49 U.S.C. 101(b)(1) and (3). Moreover, the Motor Carrier Safety Act of 1984 provides that "[a] State may not enforce a State law or regulation on commercial motor vehicle safety that the Secretary of Transportation decides under this section may not be enforced," 49 U.S.C. 31141(a), and it authorizes the Secretary to conduct "regulatory proceeding[s]" to determine whether a "State law or regulation on commercial motor vehicle safety" may be enforced, 49 U.S.C. 31141(g) (Supp. V 1999). For purposes of those provisions, the terms "State," "State law," and "State regulation" are defined to include "a political subdivision of a State" and any law or regulation enacted or prescribed by a political subdivision. 49 U.S.C. 31132(7)-(9); see pp. 18-19, *supra.*

In determining whether municipal motor carrier safety regulations may be enforced, the Secretary must necessarily consider not only the terms of 49 U.S.C. 31141 (1994 & Supp. V 1999) itself, but also whether such regulations are precluded by some other provision of federal law. Because the Secretary's assessment of the FAAA Act's preemptive scope is integrally related to the performance of his responsibilities under Section 31141, it is entitled to judicial deference. See *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 493-494 (1996); cf. *Lawrence County* v. *Lead-Deadwood School Dist.*, 469 U.S. 256, 261-262 (1985).

E. The Judgment Of The Court Of Appeals Should Be Reversed, And The Case Should Be Remanded For Further Proceedings

Because the courts below found Section 14501(c)(2)(A) to be inapplicable to safety measures adopted at the local level, they held the challenged ordinances and regulations to be preempted. For the reasons stated above, that holding was erroneous. The judgment of the court of appeals should therefore be reversed.

That disposition would not necessarily mean that all aspects of the challenged municipal provisions would ultimately escape preemption. Although the phrase "safety regulatory authority of a State" encompasses municipal safety regulations adopted pursuant to a delegation of power from the State, the City's mere *assertion* of a safety purpose does not by itself resolve the preemption question. See H.R. Conf. Rep. No. 677, *supra*, at 84 ("The conferees do not intend the regulatory authority which the States may continue to exercise [under Section 14501(c)(2)(A)] to be used as a guise for continued economic regulation as it relates to prices, routes or services."); note 5, *supra*. Because the courts below construed Section 14501(c)(2)(A) as inapplicable to municipal ordinances and regulations, they did not determine whether the provisions at issue in this case are appropriately regarded as exercises of "safety regulatory authority." That question may be open to the court of appeals on remand.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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