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P R O C E E D I N G S

(10:00 a.m.)

CHIEF JUSTICE ROBERTS: Justice Thomas is participating remotely this morning.

We'll hear argument first this morning in Case 20-807, LeDure versus Union Pacific Railroad Company.

Mr. Frederick.

ORAL ARGUMENT OF DAVID C. FREDERICK  
ON BEHALF OF THE PETITIONER

MR. FREDERICK: Thank you, Mr. Chief Justice, and may it please the Court:

In 1904, this Court held in Johnson versus Southern Pacific that a motionless dining car was in use when a worker's hand was crushed while he was trying to couple the car with a locomotive. That case construed "use" under the Safety Appliance Act of 1893. In 1911, Congress incorporated the exact same statutory language in the first version of what became the Locomotive Inspection Act.

In Brady, this Court held that a motionless car was still in use when an inspector was injured. In Lilly, this Court held that a locomotive tender was in use under

1 the Inspection Act when an employee slipped  
2 while servicing a tender that was stationary.  
3 The slipping hazard there violated applicable  
4 regulations, and this Court upheld the worker's  
5 negligence per se claim.

6 In this case, the Seventh Circuit  
7 disregarded those precedents and the statute's  
8 plain meaning of "use." It held that the UP5683  
9 locomotive was not in use because it was  
10 stationary on a sidetrack and part of a train  
11 needing to be assembled before its use in  
12 interstate commerce.

13 Under this Court's precedents and the  
14 statute's plain meaning, a locomotive is in use  
15 when the carrier is employing it for the  
16 railroad's purposes. A brief stop in the middle  
17 of a journey to change crews and to power off  
18 the locomotive does not take the locomotive out  
19 of use. The UP5683 was still available as  
20 backup power to provide an electrical and  
21 hydraulic connection to the rest of the train  
22 and to provide braking capability when the train  
23 resumed its journey.

24 Because this case is in the heartland  
25 of a carrier's use of a locomotive, the Court

1 need not define the precise contours of when a  
2 locomotive is not in use. Brady, nonetheless,  
3 suggests a workable standard: when the  
4 locomotive reaches a place dedicated to repair  
5 or the carrier withdraws the locomotive from  
6 service by making it inoperable.

7 I welcome the Court's questions.

8 If I could just start with the  
9 statutory language --

10 CHIEF JUSTICE ROBERTS: Counsel, you  
11 use precedents under the Safety Appliance Act  
12 and the Locomotive Inspection Act pretty much  
13 interchangeably, but I wonder if that's fair,  
14 because the -- the sense of "use" of a  
15 locomotive strikes me as different than the  
16 sense of "use" of typical railroad cars.  
17 Locomotives, their primary purpose is to move  
18 and move things. Railcars, you know, not -- not  
19 the same way.

20 So I wonder if it's fair to just use  
21 those precedents interchangeably.

22 MR. FREDERICK: I think it is fair,  
23 and there are a number of reasons why, Mr. Chief  
24 Justice. Let me just start with the statute.  
25 The Safety Appliance Act defines rail vehicles

1 to include locomotives. So locomotives are  
2 encompassed within the protections provided by  
3 the Safety Appliance Act.

4 Second, when Congress enacted the  
5 Locomotive Inspection Act, it adopted the very  
6 same words. And using the *in pari materia*  
7 canon, the Court ordinarily would construe the  
8 same words to have the same meaning,  
9 particularly when they cover the same subject,  
10 which is rail safety for the protection of  
11 workers.

12 Doctrinally, the Court has used that  
13 principle and the application of "use" in  
14 multiple cases. I can point you to *Urie*, to  
15 *Lilly*, to *Tipton*, where the Court has said that  
16 the precedents in the SAA context apply equally  
17 to the LIA context.

18 CHIEF JUSTICE ROBERTS: But you can  
19 readily think of situations where -- the point,  
20 of course, of my -- I appreciate your answer,  
21 but the point of the question is that in the  
22 LIA, you're dealing particularly with  
23 locomotives, and, you know, it -- it seems --  
24 suppose I have a car in the driveway. I  
25 wouldn't say the car is being used just because

1 it's sitting there and I might want to use it  
2 later. Its primary purpose is to move some  
3 people around and not sit waiting -- even if  
4 waiting ready to be used later on.

5 MR. FREDERICK: Well, Your Honor, of  
6 course, that hypothetical doesn't describe our  
7 case because our case involved a locomotive  
8 connected to other train cars. It was midway  
9 through a journey.

10 But, to take your notion of "use,"  
11 Congress intended the broadest --

12 CHIEF JUSTICE ROBERTS: No, but I  
13 think, even in that case -- and, you know,  
14 people might have different natural meanings --  
15 even in that situation, I would naturally say  
16 the railcars are being used. They're not used  
17 for anything other than, you know, hauling goods  
18 and they're in the process of that.

19 But the -- you could say easily the  
20 locomotive is not being used because its primary  
21 purpose is to move and it's not doing that.

22 MR. FREDERICK: So let me just stop  
23 there, because I think it's important to know  
24 what "use" has to apply to. The statute says  
25 the carrier may "use" or "allow to be used." So

1 the focus has to be on what the railroad's  
2 purpose is in using or deploying the particular  
3 locomotive at that particular point in time.

4 A locomotive, even dead, has important  
5 hydraulic, electrical, braking functions that it  
6 performs when moving from one place to another.

7 A locomotive also can be redeployed for the  
8 purpose of satisfying the railroad's various  
9 logistical needs.

10 So I think, Mr. Chief Justice, to  
11 answer the question by defining "use" so  
12 narrowly that you're taking away all the various  
13 purposes and services that a carrier can put to  
14 use for that particular locomotive would be to  
15 significantly diminish the force that Congress  
16 was intending to enact by protecting worker  
17 safety, because workers are on these locomotives  
18 whether they are still or in motion, whether  
19 they were powered on or powered off. Many of  
20 the regulations apply to situations that are  
21 expressly for still locomotives.

22 CHIEF JUSTICE ROBERTS: Well, and  
23 worker safety is protected whether you prevail  
24 or not, right? The FELA applies in this  
25 situation. The only purpose of the railroad

1 statutes is to impose strict liability.

2 MR. FREDERICK: Well, the statute  
3 under the FELA says that contributory negligence  
4 or assumption of the risk do not apply when  
5 there is a violation of the statute. And 54a  
6 under FELA's 45 U.S.C. says that the regulations  
7 are to be treated as statutes for purposes of  
8 FELA protection.

9 Here, the basic problem is the  
10 foreseeability of the risk. And I would submit  
11 that one of the challenges in just bringing a  
12 negligence claim in this circumstance is that  
13 the UP, Union Pacific, had just reacquired  
14 custody over this particular locomotive. It had  
15 not been inspected in a number of days. That  
16 inspection report is in the Joint Appendix.

17 And so the question of where this  
18 particular slipping hazard arose makes a  
19 negligence case particularly hard because one  
20 can't identify where the breach of the duty  
21 occurred. We know that it was in violation of  
22 the regulations. We just don't know how that  
23 happened.

24 And the whole point of having a  
25 negligence per se claim, as this Court has

1 recognized -- and I think Urie is the best case  
2 for this. There's also a Jones Act case called  
3 Kernan in which the Court explained why these  
4 rules violations were particularly important for  
5 worker safety.

6 And, of course, having liability does  
7 both protect the workers' interests in remedying  
8 the particular harm, as well as incentivizing  
9 the carrier to keep up to date in compliance  
10 with those safety rules.

11 JUSTICE SOTOMAYOR: Mr. Frederick, you  
12 said something or you, in response to the Chief  
13 twice, of the functions that a dead locomotive  
14 serves in a train like this.

15 I -- I may have read it too quickly,  
16 but where is it in the record below? Where are  
17 those --

18 MR. FREDERICK: So, Your Honor, there  
19 -- there -- I would say -- I would point you to  
20 a couple of places. There are brake  
21 functionings in the regulations that call on  
22 where -- how dead locomotives are to be treated  
23 for braking functions.

24 The JA is admittedly spartan about  
25 this point. But, if I could point the Court to

1 the connections to the brakes, JA 61 is one  
2 place where that is to be found.

3 But I think the basic operation of the  
4 locomotive requires that it provide a  
5 connection, and that connection is not just  
6 physical, but it is also electrical. It is  
7 hydraulic.

8 And the regulations call for when a  
9 dead locomotive is being transferred to continue  
10 to operate in these various modes so that those  
11 braking and other hydraulic functions can -- can  
12 -- can be --

13 JUSTICE SOTOMAYOR: One argument that  
14 I've been thinking about, and -- and it's in  
15 response to something the Chief said, which is  
16 it does seem odd to treat "in use" differently  
17 for locomotives and railroad cars because an  
18 accident can happen to a worker, and it seems  
19 strange to have a different coverage if the  
20 worker was on the locomotive attaching the  
21 railroad or on the railroad attaching the  
22 locomotive, it seems a little odd to have two  
23 different systems of coverage, isn't it?

24 MR. FREDERICK: I -- I think so, and  
25 that's why, when Congress enacted the Safety

1 Appliance Act, it included locomotives.

2           So it would be odd to suppose that if  
3 a grab iron breaks, a clear violation of the  
4 plain terms of the Safety Appliance Act, on a  
5 locomotive, that locomotive is deemed to be in  
6 use even if it is stationary, it's on a  
7 sidetrack, it is not part of a fully assembled  
8 train.

9           But yet you would say that a  
10 locomotive is not in use when the purpose behind  
11 this particular locomotive engineer's task was  
12 to go onto the locomotive and determine, should  
13 I power it on -- should it stay powered on, or  
14 should I power it off?

15           And that's why I think this case  
16 really is in the heartland. The -- the Seventh  
17 Circuit applied these three features that are  
18 nowhere in this Court's cases, and that's why  
19 this case ultimately must be reversed, because  
20 there's no adherence to this Court's precedents  
21 for the logic behind these three factors that  
22 the Seventh Circuit relied upon.

23           JUSTICE SOTOMAYOR: Mr. Frederick, one  
24 last question: How do you differ from the SG?

25           MR. FREDERICK: I don't think we do.

1 I think the SG has a more sophisticated  
2 understanding of the regulations than our brief  
3 does, but I think the basic core of the position  
4 is the same.

5 We've argued that the words "allow to  
6 be used" also can be encompassed if you were to  
7 find a narrower definition of "use" because,  
8 even in a hauling capacity, this locomotive was  
9 clearly allowed to be used for that purpose if  
10 Mr. LeDure had determined in his judgment it was  
11 necessary to resume the train's passage from  
12 Salem to Dexter.

13 JUSTICE KAGAN: Mr. --

14 JUSTICE SOTOMAYOR: Thank you,  
15 counsel.

16 JUSTICE KAGAN: -- Mr. Frederick, I'm  
17 -- I'm a little puzzled by what you're arguing  
18 or maybe more to the point what you're not.

19 If -- if I understand the point, this  
20 negligence per se action can rely either on a  
21 statutory violation or on a regulatory  
22 violation, is that right?

23 MR. FREDERICK: Correct.

24 JUSTICE KAGAN: And the regulation at  
25 issue here, which is the one about keeping

1 floors clear of slipping hazards, that  
2 regulation does not use the word "use," so why  
3 do we -- why are we talking about the word  
4 "use"?

5 Why is -- if -- if the railroad  
6 violated this regulation, that's the predicate  
7 for a negligence per se action, and there's no  
8 reference to "use" here.

9 MR. FREDERICK: Your Honor, if I could  
10 give you a somewhat more detailed answer than  
11 you might like. This regulation was promulgated  
12 under both the Locomotive Inspection Act and the  
13 Federal Rail Safety Act of 1970.

14 Historically, before the FRSA existed,  
15 injured rail workers would bring claims under  
16 the LIA and the negligence claim recognized in  
17 the Court's cases from the '20s to the '40s, and  
18 so, traditionally, the courts had instructions  
19 about how to instruct for a violation of the  
20 Locomotive Inspection Act and its associated  
21 regulations.

22 I think this case comes out exactly  
23 the same way. It was pleaded as a violation of  
24 the LIA. The courts below decided it on that  
25 basis. The Court granted cert on the basis that

1       there was a violation of the LIA based on the  
2       use requisite.

3                   Is it possible that FELA claims could  
4       be brought directly based on Section 54a as a  
5       violation of regulations promulgated under the  
6       FRSA? I would take the position that they can.

7                   As the case comes to this Court,  
8       however, with the long body of precedent that  
9       has been applied, we would submit that this also  
10      easily satisfies the pre-FRSA world of  
11      Locomotive Inspection Act claims that  
12      historically have been brought and that have  
13      been instructed as such in the lower courts.

14                   JUSTICE KAVANAUGH: What about the  
15      situation where the locomotive's on the side  
16      track for several days, which is one of the  
17      concerns raised by your friend on the other  
18      side, including then also the inspection  
19      requirement? Is it required to be inspected  
20      every day because it's "in use" while it's  
21      sitting there on the side track or similar?

22                   MR. FREDERICK: Well, before a worker  
23      gets on the locomotive, even if it's been  
24      sitting for a couple of days, the railroad is  
25      charged with making sure that the locomotive is

1 a safe place in which to work.

2           And so the fact that it has been there  
3 for a couple of days, but it is still fueled up,  
4 it has all its brake fluids, it has its battery  
5 fluids, it's operating in every meaningful  
6 sense, it is a hazard for any worker who might  
7 need to deploy it quickly, it makes perfect  
8 sense that in that situation it's still deemed  
9 "use" because it is used on the lines of the  
10 railroad under the meaning of the statute.

11           Now are there circumstances in which  
12 the storage might be so prolonged in which the  
13 railroad makes the locomotive functionally  
14 inoperable by locking the brakes or taking out  
15 all the fluids or decompressing all of the  
16 electrical devices and that sort of thing?  
17 Then, yes, I would acknowledge that there would  
18 be ways that the -- the railroad would withdraw  
19 that locomotive from service, and the Court in  
20 Brady recognized that.

21           JUSTICE KAVANAUGH: Right, the repair.  
22 Let me ask you about Brady, because Brady is a  
23 very good case for you, but, as the Chief  
24 Justice's questions point out, how do the -- how  
25 does the SAA interact with the LIA?

1                   And -- and can you give us some more  
2                   about the history there? Because the SAA  
3                   originally covers locomotives and still does.  
4                   The LIA is originally not, and then it --  
5                   locomotives are added to the LIA.

6                   What are we to make of that when we  
7                   think about does Brady win this case for you,  
8                   which I think is your strongest point?

9                   MR. FREDERICK: Well, I think,  
10                  historically, Justice Kavanaugh, it's important  
11                  to recognize that the early railroad cases  
12                  involved defective couplers, grab irons, other  
13                  situations where workers were attempting to work  
14                  on various rail vehicles.

15                  By the 1910s, and the Locomotive  
16                  Inspection Act was enacted in 1911, the  
17                  operation and equipment on railroad cars and  
18                  locomotives had become so sophisticated that  
19                  eventually what Congress realized was that it  
20                  needed to enact and defer to an expert agency to  
21                  promulgate more specific rules for the safe use  
22                  of locomotives. They are much more  
23                  sophisticated pieces of equipment than railcars  
24                  are.

25                  And so the structure that it enacted

1 was to enact regulation -- or to -- to defer to  
2 the ICC, the old Interstate Commerce Commission,  
3 the predecessor of the FRSA, or the FRA, to  
4 promulgate the necessary rules.

5 And the regulations actually are quite  
6 voluminous when they concern locomotives for the  
7 very reason that Congress didn't want to have to  
8 keep up with all the locomotive technology as it  
9 was evolving.

10 And so, structurally, what Congress  
11 enacted was essentially the same sphere of  
12 protecting workers, but it gave to the agency  
13 the authority to promulgate rules for safety.

14 CHIEF JUSTICE ROBERTS: Mr. Frederick,  
15 I have just one more question. Under your  
16 position, if you have a locomotive that is on a  
17 side track and they say on the schedule, you  
18 know, the next time we're going to -- I don't  
19 want to beg the question -- the next time we're  
20 going to use the locomotive or we're going to do  
21 whatever you would say instead of "use" is going  
22 to be in 10 days. You would say that that  
23 locomotive -- well, would you say that  
24 locomotive is in use --

25 MR. FREDERICK: Yes.

1 CHIEF JUSTICE ROBERTS: -- throughout  
2 those 10 days?

3 MR. FREDERICK: Yes, I would. And the  
4 reason is that locomotives are used for many  
5 purposes even before their necessary transiting  
6 functions. A locomotive engineer, like my  
7 client, could have said we need to use the UP --

8 CHIEF JUSTICE ROBERTS: Yeah, yeah.  
9 Well, let's say that's not going on here. No --  
10 none of these other uses are taking place.

11 MR. FREDERICK: It is there to be  
12 deployed by the railroad --

13 CHIEF JUSTICE ROBERTS: Right.

14 MR. FREDERICK: -- on schedule in  
15 order to meet its logistics needs.

16 CHIEF JUSTICE ROBERTS: Ten -- even  
17 though it's 10 days?

18 MR. FREDERICK: Even though it's 10  
19 days.

20 CHIEF JUSTICE ROBERTS: Okay.  
21 Justice Thomas, any questions?

22 JUSTICE THOMAS: Thank you, Mr. Chief  
23 Justice. Just a couple.

24 Mr. Frederick, you seem to put a lot  
25 of weight on the fact that the -- it's suggested

1 in your last question to -- last answer to --  
2 that the availability of the -- of the  
3 locomotive, even if it's not actually being used  
4 as -- to haul, to pull the train, is also a use.

5 Now the most analogous -- I was just  
6 thinking about that as you gave that answer --  
7 on my motor coach, I pull my car, and it -- the  
8 brakes operate, the lights operate, there's a  
9 braking function, et cetera.

10 When I'm towing that car, under your  
11 approach, is that car in use?

12 MR. FREDERICK: Yes. No one else can  
13 use it, Justice Thomas, and the carrier, if I  
14 could analogize you to a carrier, would be  
15 having the exclusive purpose of that particular  
16 car at that particular time. So you are using  
17 it.

18 And I assume that you've also  
19 connected the electricals so that when the brake  
20 lights of the motor home go on -- you -- you  
21 deploy the brakes on the motor home, the lights  
22 on the car behind also deploy so that the  
23 persons following along behind know from the red  
24 lights on both the motor home and on the car  
25 that a braking action is occurring.

1 JUSTICE THOMAS: Yeah, I understand  
2 all -- you know, that answer, but that -- the  
3 point of the car is not to be hauled behind the  
4 motor home. You haul the -- the car in order to  
5 use it when you come to a location. So that's  
6 -- I think it's just sort of -- that's sort of  
7 an odd use of the term "use."

8 The -- let me ask you one other  
9 question. What if -- you would say you're still  
10 using the locomotive even if your client had  
11 already tagged -- let's say he'd gone in and  
12 tagged the locomotive for non-operation and  
13 slipped on the way out.

14 Would you still say, subsequent to the  
15 tagging, that it was still in use?

16 MR. FREDERICK: Yes. And the reason  
17 is that use is designed to serve the purposes of  
18 the railroad, tagging it for a particular point  
19 in time to signal to other workers that this is  
20 a dead locomotive or that it is not to be  
21 entered. There are various tags that give  
22 different clues to different workers for  
23 different purposes.

24 But the point of the rules -- and I  
25 think that this is best reflected in Brady --

1       there, it was an inspector -- and -- and if you  
2       apply that with Lilly, where there was a  
3       slippage on a tender, the same kind of scenario  
4       has occurred.

5                   It would defeat the safety purposes of  
6       this entire regime, Justice Thomas, to say that  
7       somehow the worker controlled when the statute  
8       applied. That would be the most anomalous kind  
9       of holding the Court could enact.

10                   JUSTICE THOMAS: One final question.  
11       The -- you did not mention, in subsection 1 of  
12       the LIA, there is the -- it refers -- it -- it  
13       says that -- it uses the term "safe to operate."

14                   What do you make -- that seems to  
15       suggest that the purpose of the -- of this whole  
16       provision is to make sure that use is actually  
17       when the locomotive is operative, not when it's  
18       non-operative.

19                   MR. FREDERICK: Justice Thomas, I  
20       think that that constrains the term "use" really  
21       to functionally gut the operation of the  
22       statute. Of course, locomotives are primarily  
23       for hauling, but they serve so many other  
24       functions, and the carrier has the discretion in  
25       terms of how it is to be used or allowed to be

1 used. And -- and we all recognize that more  
2 than half of the injuries that occur to rail  
3 workers are when the locomotive is stationary.

4 And so the idea that it is only using  
5 the phrase "safe to operate" and so, therefore,  
6 that's the only way in which "use" is going to  
7 be construed would be contrary to a long line of  
8 this Court's decisions, including in the  
9 criminal context for drugs, where this Court  
10 said that using a gun could mean to trade it for  
11 drugs, which, of course --

12 JUSTICE THOMAS: No, I think that's --

13 MR. FREDERICK: -- I think we would  
14 agree --

15 JUSTICE THOMAS: -- not my point. I'm  
16 not asking you to read it as to totally cancel  
17 out the term "use." I'm asking you, what work  
18 does it do if we use the term "use" as broadly  
19 as you want us to?

20 MR. FREDERICK: Well, I think that  
21 there are ways that -- and we've described them  
22 -- for a carrier to take a locomotive out of use  
23 by making it in a repair -- by putting it in a  
24 repair shop, where it's not to be deployed on  
25 the line, where it is in a condition that it

1 can't operate in any meaningful way because it  
2 doesn't have the fuel or the fluids, et cetera.

3 But the point of the rules is, of  
4 course, to make sure that they're safe to  
5 operate. The idea behind that is that there are  
6 many, many processes that go into that to ensure  
7 worker safety while the locomotive is being  
8 serviced, it is being prepared for its journey,  
9 it is -- it is being active on the line.

10 And Congress used very broad words,  
11 "use," in order to describe an intent for --  
12 that all of these operations would be covered by  
13 the ambit of worker safety.

14 JUSTICE THOMAS: Well, the anomaly,  
15 though, is that you would say it's in use as  
16 you're hauling it to maintenance, and -- but you  
17 say, once it makes it to maintenance, it's not  
18 in use. It's in the same condition.

19 MR. FREDERICK: Yeah, but it still  
20 also presents a -- a hazard to the  
21 transportation crew that is moving it --

22 JUSTICE THOMAS: Okay.

23 MR. FREDERICK: -- to a place of  
24 repair.

25 JUSTICE THOMAS: Yes.

1                   MR. FREDERICK:  And that's why in  
2                   Court -- the Court in Brady and other cases have  
3                   said that while that transportation crew is at  
4                   risk, we're going to deem the locomotive or the  
5                   railcar to be in use for these --

6                   JUSTICE THOMAS:  Thank you.

7                   MR. FREDERICK:  -- safety purposes.

8                   JUSTICE THOMAS:  Thank you.

9                   CHIEF JUSTICE ROBERTS:  Justice  
10                  Breyer?

11                  JUSTICE BREYER:  The trouble I'm  
12                  having initially with the case is it often  
13                  happens in law you have a word in a statute, and  
14                  then lawyers propose tests which consist of  
15                  other words, and those other words don't get you  
16                  any further than the initial word.

17                  And I think "use" is somewhat  
18                  ambiguous.  And I think the tests -- for  
19                  example, you use the word "available to be  
20                  deployed."  Well, our engine is in the  
21                  locomotive engineering factory.  Joe, is it  
22                  ready to be deployed?  Yep, ready, send it to  
23                  the railroad.

24                  Now you'll have a way of saying we're  
25                  not covering that.  But, I mean, so let's use

1 "use" and not cover it, but -- but, I mean,  
2 okay. Now, as soon as I think that -- I'm not  
3 sure I think that, but I'm thinking I think  
4 that. As soon as I think that, I think, well,  
5 what about this case? And here is where I have  
6 a problem.

7           It sounds as if your client has said:  
8 Look, it arrived in Salem 10 minutes ago, it's  
9 ready to leave in an hour, and it's still  
10 running. And they say: No, that isn't so.

11           But this was summary judgment. How  
12 did they ever get summary judgment in their  
13 favor when there seemed to be a dispute as to  
14 the facts, which are, I would think, highly  
15 relevant facts? What happened?

16           MR. FREDERICK: Well, I agree with you  
17 that the court below applied the wrong test and  
18 should not have rendered summary judgment. In  
19 fact, the only evidence and the only testimony  
20 was that this locomotive was on and that Mr.  
21 LeDure's role was to turn it off.

22           JUSTICE BREYER: Right. So what was  
23 your view, the test that could apply that would  
24 say it's not in use when it's arrived in 10  
25 minutes, it's leaving an hour from now, and the

1 motor's running?

2 MR. FREDERICK: Well, I -- I think  
3 that question is --

4 JUSTICE BREYER: What test did he  
5 apply?

6 MR. FREDERICK: -- better addressed to  
7 my friend --

8 JUSTICE BREYER: Yeah, I will.

9 MR. FREDERICK: -- on the other side.

10 JUSTICE BREYER: I want both sides of  
11 the inquiry.

12 MR. FREDERICK: To me, this is a  
13 heartland case of the use. These kinds of  
14 operations happen all the time. Crew changes  
15 occur for crew safety. There are refueling  
16 stops. Those things do not take a locomotive  
17 out of use simply because there is a temporary  
18 stop along the line.

19 Now I proposed a test based on this  
20 Court's decisions that say that when the  
21 railroad has put the locomotive out on its line  
22 -- and that would distinguish the hypothetical  
23 that you started with, Justice Breyer, there, it  
24 was not on its line when it is in the facility  
25 -- that it remains available for use, it remains

1 serving the purposes of the railroad until it's  
2 sent to a dedicated place of repair.

3 JUSTICE BREYER: All right. So you  
4 think I'm just copping out and you don't like it  
5 if I were to say: Look, if what your client  
6 said is true, it is in use. Now go have your  
7 trial.

8 MR. FREDERICK: Here is the problem  
9 with that, Justice Breyer: The -- Union Pacific  
10 is now putting on devices to its locomotives for  
11 fuel safety purposes that automatically shut off  
12 its locomotives after a particular point in  
13 time. So do we really want to say that the  
14 statute goes on and off on the basis of an  
15 automatic turn-off switch?

16 JUSTICE BREYER: No, I wouldn't say  
17 that. I'd say --

18 MR. FREDERICK: That makes no sense.

19 JUSTICE BREYER: -- this -- this  
20 case -- we'll worry about the next case, next  
21 case -- this is a perfect example of a common  
22 law approach. The word is "use" and it's not  
23 going to get us any further to say "available"  
24 because available is going to be sometimes you  
25 win this case, but you lose some other case.

1 Who knows? Okay.

2 So common law. Look at use. Look at  
3 the cases. And this case, you need the trial  
4 because of the affidavit.

5 MR. FREDERICK: Well, certainly --

6 JUSTICE BREYER: Suppose we said that.  
7 Now I don't think you'll like it. But, I mean,  
8 I want to know what you --

9 MR. FREDERICK: Well, I -- I -- I -- I  
10 think, certainly, we win this case under that  
11 standard, Justice Breyer. There's no question  
12 about that.

13 I think, for clarity of the law, we  
14 proposed a test that this -- derives from this  
15 Court's decisions because it's been one that the  
16 railroad industry has basically adhered to when  
17 it knows that there is dedicated storage.

18 And you can look at the Union  
19 Pacific's annual reports and they talk about  
20 which one -- which of their locomotives are in  
21 storage and which ones are being actively used.

22 The ones that are actively used may be  
23 temporarily halted for a particular short period  
24 of time, but they're still fueled up and ready  
25 to go. And if an engineer needs to use it for a

1 particular purpose around the railyard, it's  
2 there to be used.

3 CHIEF JUSTICE ROBERTS: Justice Alito?

4 JUSTICE ALITO: Well, our decision to  
5 grant review in this case will not have achieved  
6 very much if all we do is to decide that this  
7 particular locomotive was or was not in use  
8 based on the particular facts of this case.

9 And I think all the lawyers have a  
10 difficult line-drawing problem. So would you  
11 explain to me why the instances where a  
12 locomotive in your view is in use should be  
13 treated differently from those in which you  
14 think it is not in use?

15 What is the -- what is the feature  
16 that distinguishes those two cases -- those two  
17 categories and justifies a regime of strict  
18 liability in one and a negligence regime --  
19 regime in the other?

20 MR. FREDERICK: Justice Alito, I think  
21 that the best way to think about it is whether  
22 the locomotive could be operated, is operable.  
23 If it's been de-fueled, if it's in a repair  
24 facility, if it's in storage and it has been  
25 denuded of its capability to operate, I don't

1 think it can be used in the way that the  
2 railroad intends to serve the various functions  
3 that the railroad might have.

4 And that's why that kind of standard  
5 is one that basically comports also with the  
6 regulations because the regulations for periodic  
7 inspection require that the -- the locomotive be  
8 in a place where a worker could get underneath  
9 it.

10 And if it's -- and if the worker is  
11 underneath a locomotive, it's because it's  
12 either been jacked up or there has been some  
13 well created underneath it. And that locomotive  
14 is not performing any of the normal services  
15 that the railroad bought the locomotive to  
16 perform.

17 JUSTICE ALITO: But if you have a -- I  
18 see the difference between a locomotive that's  
19 moving and one that's stationary, and I see the  
20 difference between instances in which a  
21 locomotive is used or available for use for  
22 something that is distinctive about a locomotive  
23 as opposed to a locomotive that's been turned  
24 into a museum piece, for example, or a little  
25 restaurant.

1           But, if a locomotive is not moving for  
2 whatever reason and somebody slips -- a -- a  
3 railroad worker slips and falls, I -- I don't  
4 really see the difference between the two  
5 situations that you're talking about, why  
6 anybody would think that there should be a  
7 strict liability scheme for one and a negligence  
8 scheme for the other.

9           MR. FREDERICK: Because the purpose of  
10 the rules is to ensure that when the worker gets  
11 on the motionless locomotive, it'll be a safe  
12 place to work, that there won't be a slipping  
13 hazard, that there won't be these other problems  
14 of electric shock or some other kind of grievous  
15 way that a worker could be injured.

16           And that's different when the  
17 locomotive is on the railroad's line and is  
18 capable of operation in every meaningful way.  
19 Just because it's stopped doesn't decrease the  
20 danger to the worker.

21           If anything, that's when it's more  
22 dangerous, because the worker has to encounter  
23 hazards that may have arisen as a result of the  
24 latest transit.

25           JUSTICE ALITO: All right. Thank you.

1 CHIEF JUSTICE ROBERTS: Justice  
2 Sotomayor?

3 JUSTICE SOTOMAYOR: Mr. Frederick, I'm  
4 not sure that you fully answered Justice Alito.

5 His question -- and -- and I'm curious  
6 about the answer too -- is why does one call for  
7 strict liability and the other doesn't?

8 And you gave a partial answer, I  
9 thought, earlier, which was the whole purpose of  
10 these acts is to protect railroad workers,  
11 correct?

12 MR. FREDERICK: Yes.

13 JUSTICE SOTOMAYOR: And so is there a  
14 difference between the railroad workers who are  
15 working on this dead locomotive to -- to be part  
16 of the hauling mechanism and the guys who are in  
17 the shop or who are walking around the -- the  
18 storage yard -- I think that's Justice Alito's  
19 question -- what's the difference that would  
20 give strict liability coverage for workers when  
21 in your definition of service but not when it's  
22 in the repair shop or on the side motionless?

23 MR. FREDERICK: I think that the  
24 clearest way to think about it is that the  
25 dangers are unknown to the transportation crew,

1       whereas, when the locomotive is put in a repair  
2       facility, the repair workers have a much greater  
3       understanding of the problems with a locomotive  
4       that has been turned off, that doesn't have  
5       electrics running through it.

6                   JUSTICE SOTOMAYOR:  That -- that --  
7       that makes sense to me.  But how about the  
8       workers in a storage yard?

9                   MR. FREDERICK:  The workers in the  
10       storage yard, I think, are a harder case, but I  
11       think, when the locomotive has been  
12       de-operationalized, there's certainly lower risk  
13       to the workers in that situation in getting it  
14       back up and running.

15                   But the point is that in drawing a  
16       line, I think it's an appropriate place to draw  
17       a line where you would be able to distinguish  
18       between the risks to the worker of an active  
19       on-the-line locomotive versus one that had been  
20       mothballed essentially.

21                   And there are actually very few cases  
22       involving workers injured in storage facilities.  
23       I looked, and I couldn't find them.  And so,  
24       when you look at where the case law has  
25       developed, where there are actual injuries and

1 harms, they tend to be in the situations very  
2 much like this one, where the locomotive is on  
3 the line, it is temporarily stopped, it is about  
4 to move on to its journey, and someone gets  
5 hurt.

6 JUSTICE SOTOMAYOR: Thank you.

7 CHIEF JUSTICE ROBERTS: Justice Kagan?  
8 Justice Gorsuch?

9 JUSTICE GORSUCH: No, thank you.

10 CHIEF JUSTICE ROBERTS: Justice  
11 Kavanaugh?

12 JUSTICE KAVANAUGH: Yeah, just to  
13 follow up on what I see as the tension in this  
14 case and get your thoughts about how to resolve  
15 it, because I think the questions have  
16 illustrated that if we were just looking at use,  
17 how we normally think of the word "in use," that  
18 you would have a problem, in part because it's  
19 not moving. Of course, Congress in 1924 took  
20 out moving, so that helps you.

21 So I think just the ordinary  
22 understanding of "use" is not great for you, as  
23 the hypotheticals have illustrated.

24 What helps you is the precedent of the  
25 SAA cases, which basically said that's not the

1 way the term is being used in these statutes.  
2 And I think what also helps you is the point  
3 that most of the injuries on locomotives are  
4 when they're stationary, because otherwise we'd  
5 be gutting the statute.

6 But the question then becomes, why  
7 take the SAA precedent, which helps you  
8 tremendously, and bring it into the LIA when, as  
9 a lot of the questions have illustrated, the LIA  
10 has a different focus?

11 To me, that's -- it's a tough case for  
12 that reason, so if you can help me out.

13 MR. FREDERICK: Well, I think, to  
14 start with the word "use," when -- before the  
15 LIA and the SAA were enacted, "use" had a  
16 meaning that included clothes in a wardrobe that  
17 were not being worn, and this Court had  
18 recognized that as a use, an actual use of  
19 clothing.

20 In the 1990s, when the Court decided  
21 cases involving the use of guns, it said that  
22 one use of a gun could be trading it for drugs.  
23 You don't have to discharge the gun in order to  
24 use it. You can use it for many different  
25 purposes.

1                   Now that's -- that's a technical --  
2                   JUSTICE KAVANAUGH: Well, but assume,  
3                   -- I guess my question assumed that I'm not  
4                   completely buying that, but you do have the SAA  
5                   precedent --

6                   MR. FREDERICK: Yes.

7                   JUSTICE KAVANAUGH: -- which is very  
8                   helpful. What problems would be created, I  
9                   guess, maybe is another way to ask it. What  
10                  problems would be created by saying the SAA  
11                  precedent "in use" means one thing, the LIA  
12                  precedent "in use" means something different?  
13                  Would there be problems created by doing that?

14                 MR. FREDERICK: Yes, I think so. I  
15                 mean, here, even just using the LIA as an  
16                 example, and let's take the Lilly case, that was  
17                 a case involving a tender, which is a car used  
18                 to help refuel a locomotive, but the slippage  
19                 that occurred was while the -- the tender was  
20                 stationary.

21                 I don't think there's any argument  
22                 that a tender in that circumstance was in use.  
23                 It was performing a function. It would be odd  
24                 to suppose, though, that the tender was not in  
25                 use because it wasn't performing any function

1 when it was traveling to the place where it was  
2 going to do a refueling operation.

3 And so having too constrained a  
4 definition of "use," Justice Kavanaugh, I think  
5 would really promote a lot of litigation over  
6 fairly simple examples where workers get hurt.  
7 And the reason why this Court very early on  
8 adopted the principle, the *in pari materia*  
9 canon, was because these statutes were really  
10 intended to be amendments to the FELA and to  
11 promote worker safety and worker recoveries when  
12 they are injured.

13 JUSTICE KAVANAUGH: Thank you.

14 CHIEF JUSTICE ROBERTS: Thank you,  
15 counsel.

16 Ms. Sinzduk.

17 ORAL ARGUMENT OF COLLEEN E. R. SINZDAK  
18 FOR THE UNITED STATES, AS AMICUS CURIAE,  
19 SUPPORTING THE PETITIONER

20 MS. SINZDAK: Mr. Chief Justice, and  
21 may it please the Court:

22 A typical diesel engine weighs  
23 approximately 400,000 pounds and may contain up  
24 to 5,000 gallons of diesel fuel, in addition to  
25 an engine, an electric generator, and multiple

1 starting batteries. For obvious reasons, such a  
2 powerful and complex machine presents a risk to  
3 employees working on and around it, whether the  
4 locomotive is hauling freight or being put to  
5 one of the numerous other purposes that  
6 locomotives serve, from supplying power as a  
7 backup generator, to moving cars around a yard,  
8 to standing ready to rescue a nearby passenger  
9 train if its engine goes down.

10 Accordingly, as this Court has long  
11 recognized, once a carrier puts a rail vehicle  
12 into use, that rail vehicle remains in use until  
13 the carrier affirmatively withdraws it from  
14 active service for repair, storage, or  
15 retirement.

16 This Court should reject Respondent's  
17 invitation to retreat from its precedents and  
18 preserve the full scope of the safety  
19 protections that Congress enacted.

20 CHIEF JUSTICE ROBERTS: Ms. Sinzduk,  
21 if I understand your -- the proposal you just  
22 made about what we should do, if you have a  
23 locomotive that is used to -- to drive -- to  
24 carry trains and -- you know, cars, and then you  
25 decide, you know, we don't really need this one,

1     why don't we sort of put it off to the side, you  
2     know?  And Justice Alito says you often see  
3     these.  It'll be a little restaurant for people  
4     who want to come and, you know, have a nice  
5     railroad experience, and -- but, if we ever need  
6     it, it's going to be there, and it's going to be  
7     ready, and, you know, by the way, it generates  
8     electricity and we can use that to run, you  
9     know, the lights out on the -- on the porch.

10                 That locomotive would be considered in  
11     use under your definition?

12                 MS. SINZDAK:  I -- I believe -- until  
13     you said the last point, I believe that that  
14     locomotive would be in storage.  And the FRA has  
15     long recognized --

16                 CHIEF JUSTICE ROBERTS:  Why?  It's --  
17     it's there.  You could use it.  You -- I mean,  
18     if they wanted to, they said, you know, kick out  
19     the diners and grab -- put some cars on it, and  
20     off it goes.

21                 MS. SINZDAK:  I think there are a  
22     number of steps that would have to be taken in  
23     order to render that locomotive operable again.  
24     And so, no, it's not going to be in use.  It's a  
25     -- it's a -- it's a -- it's a restaurant.  It's

1 in storage.

2           Again, the FRA has long recognized  
3 that when a carrier decides that it doesn't need  
4 to keep using the locomotive, that it isn't  
5 going to be in active service anymore, it can  
6 put it in storage and it can put it in storage  
7 for a --

8           CHIEF JUSTICE ROBERTS: Well, but you  
9 -- you said that until I said about the -- about  
10 the batteries. So you're saying everything else  
11 is the same, but if they're using its generator  
12 to power lights in the car, that would make it  
13 different?

14           MS. SINZDAK: Well, there -- there is  
15 a really -- a very real concern. And, frankly,  
16 I haven't asked FRA about this, and so I want to  
17 make sure because I know that FRA is very  
18 concerned about its safety regulations applying  
19 when the locomotive's engine is on. And that's  
20 because many of the safety regulations are  
21 designed to ensure that, you know, we don't have  
22 electrical accidents, we don't have explosions,  
23 all of those sorts of things.

24           So that's the only reason I'm -- I'm  
25 hedging a little bit here. In general, I would

1 say that once it has been withdrawn from active  
2 service as a locomotive, it's no longer in use.

3 CHIEF JUSTICE ROBERTS: Well, I guess  
4 I'm just troubled by that "withdrawn from active  
5 service." It's there. It's ready to be used.  
6 Is that active service?

7 MS. SINZDAK: I think I would say it  
8 is not ready to be used because it is currently  
9 functioning --

10 CHIEF JUSTICE ROBERTS: Okay. Let's  
11 say it's there and it's used to advertise the --  
12 the railroad. You know, a road goes by and it's  
13 nice to look at the locomotive and that's the  
14 only thing they're planning on, but it's ready  
15 to be used if it's needed.

16 MS. SINZDAK: Again, I think "active  
17 service" is very helpful here, and the 1924  
18 statute, of course, referred to safety for use  
19 in active service. Active service has long been  
20 understood in the railroad capacity to be when a  
21 -- a locomotive is still being regularly used.

22 And once it's retired from active  
23 service, for example, to become a restaurant or  
24 maybe to become a historical artifact, then it's  
25 no longer in use within the meaning of the

1 statute.

2 JUSTICE BREYER: Well, suppose it  
3 hasn't gotten into the service yet?

4 MS. SINZDAK: Then it's not in use.

5 JUSTICE BREYER: Oh, not in use.  
6 Okay.

7 MS. SINZDAK: It's once -- once the  
8 locomotive is placed in service.

9 JUSTICE BREYER: So we have a yard and  
10 the company puts all the locomotives in the  
11 yard, that they make one every three months, and  
12 there are now 15 in that yard, and they're all  
13 ready to go, and somebody calls from the train  
14 station and says can we take any of those?  
15 Sure, take them. Take them whenever you want.  
16 And occasionally they do. Okay? In use or not?

17 MS. SINZDAK: So, once the locomotive  
18 is placed into service, then, yes, it is --

19 JUSTICE BREYER: What does that mean,  
20 "placed into service"?

21 MS. SINZDAK: Well, usually, it means,  
22 for example --

23 JUSTICE BREYER: It's there, sitting  
24 in the yard.

25 MS. SINZDAK: Well, it needs to be

1 filled with fuel. I mean, the 5,000 gallons of  
2 fuel is a pretty --

3 JUSTICE BREYER: Oh, it has to be  
4 filled with fuel. So it's not used -- in other  
5 words, a locomotive is not used when it's  
6 sitting somewhere and doesn't have fuel in it?

7 MS. SINZDAK: That is correct. So the  
8 FRA generally --

9 JUSTICE BREYER: Oh, well, you -- what  
10 happened to the thing about you used but until  
11 you withdraw it from service? It's not been  
12 withdrawn from service, it --

13 MS. SINZDAK: The FRA considers that a  
14 locomotive is withdrawn from service once its  
15 fluids have been drained and its battery has  
16 been detached. So, for example --

17 JUSTICE BREYER: Oh, it hasn't  
18 detached the battery, but what they did was they  
19 withdrew -- they didn't have fuel in it because  
20 we don't need fuel until next month because  
21 there's a big snowstorm and that won't be  
22 cleared up until next month.

23 MS. SINZDAK: Right. So the FRA's  
24 basic --

25 JUSTICE BREYER: So what my point is

1 is you want to say that is in use. And what  
2 you're doing is not following the words in your  
3 brief. You're following what is your  
4 common-sense view of sort of what's in use or  
5 not. And that's why I say, if it's in your  
6 brief, hey, you don't say anything in the brief  
7 of not having yet gone into service, I don't  
8 think. You talk about withdrawn from service.  
9 And here you have six words.

10 That's why I started thinking we're  
11 not going to get anywhere or very far by  
12 substituting the words from your brief or any of  
13 these briefs for the word "use."

14 Now you don't agree with that, so  
15 explain.

16 MS. SINZDAK: I -- I do not agree with  
17 that. While a locomotive is being put to a  
18 carrier's purposes, then it is in use. I would  
19 say that as -- as we note in our brief, you can  
20 withdraw a locomotive from service and then it's  
21 no longer in use. So, obviously, if the  
22 locomotive has never been put into service in  
23 the first place, then it isn't in use. We do  
24 think that "use" and "service" are synonymous in  
25 this statute.

1                   Now we also think there is a very  
2 clear line here, and it's once a carrier has  
3 placed the locomotive into use, have they done  
4 something to affirmatively withdraw it from  
5 service for storage or repair? And the key  
6 things that they might do are moving it to a  
7 controlled environment like a repair shop, where  
8 you just don't have the same risks of an exposed  
9 railroad yard, where you have trains moving  
10 everywhere, you have people going everywhere.  
11 So you've put it in a controlled environment  
12 where the only people interacting with it are  
13 people who are expecting to be dealing with a  
14 defective locomotive. Or you've done something  
15 to make sure that there is no way that somebody  
16 is going -- an employee is just going to hop on  
17 that train and turn it on or move it.

18                   So, again, you can put it -- you can  
19 and -- and -- and many railroads do put  
20 locomotives in storage by detaching the battery  
21 and draining the fluids. And that way, what you  
22 don't have is the risk that an employee is going  
23 to get on and move this, again, 400 --

24                   JUSTICE BREYER: Now what you're  
25 suggesting is certainly a possible approach.

1 There's a common law approach. If we're Lord  
2 Mansfield or Coke or somebody, we might take  
3 that. And you're suggesting, if that's what  
4 we're trying to do, we ought to look at the  
5 purposes of this statute and decide whether the  
6 kinds of risks that are at issue in the case are  
7 the kinds of risks the statute is trying to  
8 prevent.

9 MS. SINZDAK: That is one approach,  
10 although what I would say is that you could  
11 apply the canon of *in pari materia* and say that  
12 we have interpreted the SAA in exactly this way,  
13 that the Locomotive Inspection Act was enacted  
14 at the same time that Congress --

15 JUSTICE BREYER: Yeah, but they're  
16 going to say, as you know, because you've  
17 written this already, so I do interrupt, that  
18 the first statute is done for all cars, and it's  
19 done for all cars because people wander around  
20 in those cars, particularly employees.

21 But locomotives have special risks,  
22 particularly with fuel and other things, and so  
23 the statute is meant to go beyond that first  
24 statute. But how far beyond? And now we have  
25 the issue in the case.

1 MS. SINZDAK: I'm actually not sure  
2 that we are arguing that the "in use"  
3 definition doesn't go any further.

4 JUSTICE BREYER: You're not, but they  
5 are.

6 MS. SINZDAK: Okay. Well, so, for the  
7 FRA, the -- "use" means the same thing in the  
8 SAA and in the LIA, and it should be interpreted  
9 in that way because -- for basic reasons of  
10 clarity in the law.

11 When you have two statutes enacted at  
12 the -- approximately the same time covering the  
13 same topic, it sort of stretches reality to  
14 think that a regulated party would read those  
15 two laws and think that "use" means one thing as  
16 applied to a locomotive in one law and something  
17 entirely different as applied to a locomotive in  
18 a different law. So that just -- that doesn't  
19 work sort of as a matter of common sense.

20 And it certainly doesn't work if you  
21 do want to look at purpose -- I mean you want to  
22 look at legislative history, and you see that  
23 Congress is expressly borrowing from one statute  
24 and putting it in another.

25 CHIEF JUSTICE ROBERTS: No, "use" --

1 "use" means the same thing. It's just that when  
2 you apply it, the use you put a locomotive to is  
3 to drive and -- and pull cars. The use you put  
4 a railcar to is to have stuff in it and -- and  
5 be attached to a locomotive.

6 It's the same word. It -- it just  
7 looks to, I -- I guess, the primary purpose of  
8 the object that's involved. That doesn't mean  
9 you're using the word differently.

10 MS. SINZDAK: Well, I -- at first, I  
11 have to say that using -- a locomotive may be  
12 used in many different ways.

13 CHIEF JUSTICE ROBERTS: Yeah, I know  
14 it can be a battery too. But most people think  
15 the primary use of a locomotive is to pull  
16 railcars, not to sit around, you know, keeping  
17 the lights on.

18 MS. SINZDAK: Well, I think we know  
19 that "use" is not defined in accordance with --  
20 in its primary purpose from cases -- in the SAA,  
21 from cases such as Johnson, where we had a  
22 dining car sitting there on the side track just  
23 waiting to be picked up for the next -- for the  
24 next journey.

25 Now that dining car was not

1 functioning as its primary purpose. It was not  
2 serving people. It was not -- the Court said it  
3 didn't even matter whether it was full and ready  
4 to serve people, but it still said that that  
5 dining car was in use.

6 And so I think you have to say that  
7 something else is going on. There's a different  
8 definition, and that definition is whether it's  
9 being put to the carrier's purposes.

10 JUSTICE KAVANAUGH: Would there be any  
11 problem, though, with saying that "in use" means  
12 one thing in the SAA and another thing in the  
13 LIA from the perspective of the regulators?

14 MS. SINZDAK: Yes, there would be a  
15 large problem in that --

16 JUSTICE KAVANAUGH: And -- and -- and  
17 what would -- yeah, what would that be?

18 MS. SINZDAK: I mean, it would create  
19 a safety gap.

20 So just to take an obvious example,  
21 there's a -- there's an assertion that if a  
22 train is being operated dead, it isn't in use.

23 One of the key safety concerns that  
24 FRA has is a fuel tank that is too low to the  
25 ground so that if it moves even a little bit,

1 there's going to -- along the ground, it's going  
2 to rub, there's going to be a spark, and there's  
3 going to be an explosion.

4 Now that is a safety risk that occurs  
5 whenever the locomotive is in motion, dead or --  
6 dead or alive, I suppose.

7 (Laughter.)

8 MS. SINZDAK: And so that's the kind  
9 of safety gap that they're very worried about.

10 Another -- they -- I think that this  
11 -- the oil issue and the issue of -- of fluids  
12 in the surfaces, so it's not just slipping.  
13 It's also that, again, we have an electric  
14 generator, we have batteries, we have an engine.

15 What happens is, if water pools in a  
16 locomotive, then -- and -- and that combines  
17 with the electricity, you can actually have,  
18 like, a -- a pool basically of charged water.

19 Wheel defects are another issue. So,  
20 if the wheel defect is even a little broken --  
21 if a wheel is even a little broken and it's  
22 being moved, then it can cause a derailment.

23 So there is basically a regulatory gap  
24 that would -- or that -- that could possibly  
25 open if the Court were to interpret them

1 differently. And that's true even if the Court  
2 was to say, well, at least if it's, you know,  
3 off and motionless.

4 FRA has been very clear with me that  
5 if there is a locomotive in a yard that is  
6 capable of being turned on and moved, then it  
7 will be at some point. The --

8 JUSTICE ALITO: What theory of  
9 statutory interpretation are you applying?

10 I -- I don't understand you to be  
11 arguing that we should ask what "use of a  
12 locomotive" means in ordinary speech. And I  
13 haven't heard an argument about purpose to  
14 distinguish the category of cases you say  
15 justify strict liability versus those that would  
16 be governed only by negligence.

17 So I take it that your argument is  
18 based on inferences about Congress's actual  
19 intent that we can draw from the relationship  
20 between the various statutes, is that correct?

21 MS. SINZDAK: No, I think that  
22 actually there is both a purposive argument.  
23 There is a -- an argument with respect to  
24 ordinary meaning. I mean, again, this Court has  
25 said multiple times --

1 JUSTICE ALITO: What is the purpose --  
2 what is the purposive argument?

3 MS. SINZDAK: So the purposive  
4 argument is that Congress has long wanted to  
5 incentivize preventative maintenance, which is  
6 the railroads taking actions before problems  
7 arise.

8 Now I think you've asked, though,  
9 well, what about problems in the rail -- in the  
10 repair shop? But the concern there is that  
11 Congress wants to create an incentive to take  
12 defective locomotives off the line, right? So  
13 to take them where they're going to cause --  
14 even if they do cause a potential problem, it's  
15 not going to have the massive consequences that  
16 it would have if it's in a railyard.

17 I mean, you think about, if a fuel  
18 tank explodes in a railyard, there's lots of  
19 other fuel tanks right nearby. There's lots of  
20 other moving trains.

21 So there's this -- what -- what FRA  
22 sees is, if you -- if a carrier has done  
23 something to remove that locomotive to a  
24 controlled environment where that kind of risk  
25 isn't around, then there doesn't need to be the

1 sort of "negligence" per se regime.

2 JUSTICE ALITO: And what -- what is  
3 your evidence of this overriding purpose to  
4 incentivize the removal of locomotives from  
5 service and the placement of them in repair  
6 shops? Where is -- what's the evidence of that  
7 overriding Congressional purpose?

8 MS. SINZDAK: Well, if you look at the  
9 original act, which charged the ICC and -- and  
10 carriers with the responsibility for -- for  
11 implementing rules, and one of the key fixes --  
12 fixations was making sure that -- that  
13 locomotives were inspected and that they were --  
14 any defects were repaired before being returned  
15 to use. So that's where you see this contrast  
16 between repair and use.

17 And I -- I just want to make a point  
18 too about the ordinary meaning because I think,  
19 in Bailey, this Court recognized "use" is a word  
20 who's -- that -- which has many ordinary  
21 meanings. So I think the Court gave the example  
22 of I use a gun to protect my home, but I've  
23 never had to use it.

24 And both of those meanings of "use"  
25 are fully coherent, and it's just a question of

1 looking at the context and determining, well,  
2 what -- what particular meaning is at stake  
3 here? And I think we see with the LIA that it's  
4 the "put to a purpose" broader meaning.

5 JUSTICE ALITO: Well, you think that  
6 if you -- if someone did a survey, asked people  
7 is -- is a stationary locomotive in use, being  
8 used as a locomotive, they would say it is if  
9 it's in the process of being taken to a repair  
10 shop but not if it's actually in the repair  
11 shop?

12 MS. SINZDAK: That we know from the  
13 SAA, that Congress did consider that a use  
14 because it specifically enacted a safe harbor to  
15 say, well, you won't be on the hook for  
16 regulatory fines if you use a car in that way,  
17 but you will be on the hook for liability.

18 JUSTICE ALITO: I mean, seriously, you  
19 think if we asked that of people out on the  
20 street, that's what they would come up with?

21 MS. SINZDAK: Well, I think that the  
22 --

23 JUSTICE ALITO: They would come up  
24 with your -- your highly refined rule?

25 MS. SINZDAK: This Court always --

1 JUSTICE ALITO: That's ordinary usage?

2 MS. SINZDAK: -- looks at the context.

3 No, you have to look at the entire context. And

4 I fully admit, if you just plucked the word

5 "use" out and you kind of ask someone, a man on

6 the street, who knows what they're going to say.

7 And, actually, I have tried this, and

8 you get a kind of range of responses.

9 But, once you give all of the

10 information, once you give the context, once you

11 give the fact that Congress itself made very

12 clear that a rail vehicle continues to be in use

13 when it is being hauled to a repair facility,

14 then I think you're going to get my answer.

15 JUSTICE KAGAN: The safe harbor --

16 CHIEF JUSTICE ROBERTS: Maybe if on --

17 maybe on First Street.

18 MS. SINZDAK: Pardon?

19 CHIEF JUSTICE ROBERTS: Maybe on First

20 Street.

21 (Laughter.)

22 CHIEF JUSTICE ROBERTS: Sorry, Justice

23 Kagan.

24 JUSTICE KAGAN: The -- the safe harbor

25 that you referred to, the parties seem to have a

1       dispute as to whether it would apply under the  
2       LIA. Does the Solicitor General have a view on  
3       that?

4                   MS. SINZDAK: So the FRA has a  
5       regulation, 229.9, and that is what creates sort  
6       of the equivalent of the safe harbor under the  
7       LIA.

8                   The LIA, of course, is different from  
9       the SAA in that it assigned a lot more  
10      responsibility to the agency, originally the ICC  
11      and then the FRA.

12                  And so -- and as I believe Respondents  
13      say on page 3 of their brief, the agency has  
14      always interpreted it -- the -- the LIA to  
15      permit locomotives to be moved safely to a place  
16      of repair. And if you look at 229.9, it says  
17      what you need to do, and, basically, it's --  
18      often you'll need to change the way in which  
19      you're using the locomotive to ensure that  
20      you're continuing to use it safely.

21                  So you might need to drop the miles  
22      per hour. You might -- if it's a lead  
23      locomotive and the defect is in the headlight,  
24      you might need to move the locomotive to  
25      trailing service so it's no longer -- its lights

1 are no longer needed.

2 But it's that sort of -- of  
3 common-sense regime --

4 JUSTICE KAGAN: But there's an  
5 equivalent safe harbor for safely transporting a  
6 locomotive to a repair center?

7 MS. SINZDAK: Correctly, safely using  
8 a locomotive for that particular purpose. And I  
9 think it -- maybe it's just worth referencing,  
10 because I think there was some discussion of the  
11 operating, safe to operate, that the original  
12 statute said safe to operate in the purpose to  
13 which it is put.

14 And we -- and -- and the FRA sees that  
15 as very important because, when it's deciding  
16 whether something is being used unsafely, it  
17 looks at how it's being used.

18 So you're never going to be in trouble  
19 for using a locomotive with a defective  
20 headlight in trailing service where that  
21 headlight isn't even necessary.

22 CHIEF JUSTICE ROBERTS: Justice  
23 Thomas, any questions?

24 JUSTICE THOMAS: Just briefly, Chief  
25 Justice.

1           The -- counsel, can you -- do you --  
2           you seem to suggest that you can change the  
3           meaning of a statutory term, "use," with  
4           regulations. You put a lot -- seem to put a lot  
5           of weight on the fact that there could be a  
6           regulatory gap if "use" is interpreted sort of  
7           less flexibly than you would like.

8           MS. SINZDAK: No, we are not arguing  
9           that you can change the meaning of the word  
10          "use" with regulations. In fact, the FRA has  
11          been taking its clues -- its cues from this  
12          Court and this Court's precedents in cases like  
13          Brady such that it has always seen "use" as  
14          being this broader "put to its purposes." You  
15          know, in Brady, the -- the accident occurred  
16          while the car was being inspected.

17          So it's actually the FRA has been  
18          taking its cues about how "use" should be  
19          interpreted from this Court.

20          JUSTICE THOMAS: Well, some of this  
21          seems a little bit counterintuitive, and I admit  
22          to being somewhat wrapped around the axle about  
23          this. But the -- I asked Mr. Frederick whether  
24          or not when I towed my car -- you heard the  
25          question -- I was using it, and he said that I

1 was. Now I'm sure, if you asked virtually any  
2 motor homer if they're using the car when  
3 they're towing it, they would say no.

4           Could you tell me why that is the  
5 right answer from your perspective as opposed to  
6 just the ordinary meaning of "use"?

7           MS. SINZDAK: Yes. And I -- I think  
8 this goes back to a colloquy I was having a  
9 moment ago. In the SAA, Congress made very  
10 clear that when a rail vehicle such as a  
11 locomotive is being hauled to another -- to a  
12 repair destination, it is still in use. And  
13 they -- in that -- in the provision of the SAA,  
14 they created a safe harbor, a regulatory safe  
15 harbor, but -- but liability continued to apply.

16           So I think you have to look at that  
17 safe harbor provision, which makes clear that  
18 Congress believed that a rail vehicle continues  
19 to be in use even when it is being hauled to a  
20 place of repair.

21           JUSTICE THOMAS: Thank you.

22           CHIEF JUSTICE ROBERTS: Justice  
23 Breyer, anything further?

24           Justice Alito?

25           Justice Sotomayor?

1 JUSTICE SOTOMAYOR: Counsel, I'm -- I  
2 understand that there's a safety gap if we apply  
3 a different meaning to "use" for locomotives and  
4 tender from railroad cars.

5 Is there any other reason? It does  
6 seem, like, illogical that a railroad car  
7 sitting attached to the locomotive on the side  
8 waiting for 15 minutes to get a spot into the  
9 rotation, that that's going to be treated  
10 differently.

11 I think, under your client's theory,  
12 the locomotive, while it's moving on that train  
13 that's going from station to station, wouldn't  
14 be covered.

15 MS. SINZDAK: Not under the FRA's  
16 approach, but I believe that may be Respondent's  
17 position.

18 JUSTICE SOTOMAYOR: That has to be  
19 Respondent's because he basically -- or -- or  
20 what my colleagues are saying, it's not powering  
21 the train, but even if it was moving in the  
22 train, they would say there was coverage for a  
23 worker under FELA but a different coverage under  
24 the railroad car. Is there a problem with that  
25 kind of system?

1 MS. SINZDAK: Yes. It's not the  
2 system that has been in force. And I think  
3 there is a -- a wonderful 1993 publication by  
4 FRA that talks about a hundred years of the  
5 success of these safety laws, and one of the  
6 points it makes is that, before these safety  
7 laws, you used to be able to figure out how long  
8 someone had been in railroading by how many  
9 fingers they had, and they used to put  
10 advertisements for prosthetic devices in  
11 catalogs for rail -- railmen because of the  
12 extreme dangers.

13 And then Congress passed these laws,  
14 and this Court has long interpreted them in  
15 harmony. You look at Lilly, I believe it's the  
16 -- the Court admits that people have been  
17 confusing even calling the LIA the SAA. The  
18 courts have been interpreting them in harmony  
19 for all of this time. To sort of go back on  
20 that, we -- we would risk going back to the bad  
21 old days.

22 Now I do want to put a little caveat  
23 in there because, in 1970, Congress passed the  
24 Federal Railway Safety Act, which does give FRA  
25 supplementary authority to regulate beyond the

1 LIA and the SAA. So I just want to be clear  
2 they do have some of that authority.

3 CHIEF JUSTICE ROBERTS: Justice Kagan?  
4 Justice Gorsuch?  
5 Justice Kavanaugh?

6 JUSTICE KAVANAUGH: The one anomaly  
7 they point out or one of the anomalies they  
8 point out is the inspection every day under your  
9 theory of "in use." Can you answer that?

10 MS. SINZDAK: Sure. So, if, in  
11 fact -- I think they're hypothesizing there will  
12 be locomotives that are not being used for --  
13 for days and days at a time. If that happens,  
14 what locomotive -- what carriers do is put them  
15 into storage. And there are ways you can put a  
16 locomotive in -- in -- in sort of short-term  
17 storage. Again, you unhook the battery, you --  
18 you drain the fluids so you don't have the  
19 concern about fuel.

20 So, if a locomotive has been placed in  
21 storage, then the -- the FRA would not apply the  
22 daily inspection requirement. But, if a  
23 locomotive has not been placed in storage, then  
24 it is still in use.

25 And the FRA's concern is let's say

1 they're using it in what would be called ready  
2 or protective service, which is ready to go  
3 rescue a passenger engine or somebody else.  
4 Then that -- that locomotive needs to be safe so  
5 that if there's an emergency and it starts  
6 moving, there's not going to be an accident  
7 because it's all of a sudden started.

8 JUSTICE KAVANAUGH: So storage,  
9 though, if it's on the side track for a few  
10 days, you would say it's not in storage unless  
11 it's been drained of fuel and the battery's been  
12 disconnected?

13 MS. SINZDAK: It needs to be  
14 effectively rendered inoperable. Again, what  
15 FRA's concern is --

16 JUSTICE KAVANAUGH: And what would you  
17 -- what, just to be clear, and what -- what's  
18 necessary to render it inoperable --

19 MS. SINZDAK: So --

20 JUSTICE KAVANAUGH: -- under your  
21 theory or under the regs?

22 MS. SINZDAK: -- actually, different  
23 railroads have different processes, and, you  
24 know, they do have manuals where they explain  
25 how to put something into storage. Usually, as

1 I say, it's the -- at least you're hook --  
2 unhooking the battery, you're draining the  
3 fuels. You can also -- and I confess --

4 JUSTICE KAVANAUGH: But just to be  
5 clear, sorry, you can be in storage while you're  
6 still on the side track?

7 MS. SINZDAK: You can be in storage  
8 while you're on the side track.

9 JUSTICE KAVANAUGH: Got it.

10 MS. SINZDAK: Now sometimes what  
11 carriers will do is actually sort of -- I think  
12 it's like staking a track to separate out the  
13 track, so just to make sure, absolutely a  
14 hundred percent sure that -- that that -- that  
15 that car is completely separated.

16 But, yes, FRA does not deny that there  
17 are many cars that are in storage. But, again,  
18 they have to be rendered inoperable because  
19 FRA's concern is that when a carrier just says,  
20 oh, we weren't using that car, employees are  
21 treating that car as in use. Employees are  
22 going to be getting into that car. They're  
23 going to turn the ignition switch. They're  
24 going to move those wheels. And so that -- it  
25 has to be more than just the carrier having

1 decided that it's no longer in service.

2 JUSTICE KAVANAUGH: Thank you.

3 CHIEF JUSTICE ROBERTS: Justice Kagan?

4 JUSTICE KAGAN: Could I ask a  
5 follow-up to that? I mean, when you say unhook  
6 the battery, drain the fluid -- you know, in  
7 comparison to all these tests, as Justice Breyer  
8 says, a lot of words, I mean, unhook the battery  
9 and drain the fluid, now that sounds real to me.

10 Is that really what you're saying?  
11 It's like in use or not in use depending on have  
12 you unhooked the battery and drained the fluid?

13 MS. SINZDAK: I mean, yes, although  
14 you could also have just taken the whole -- the  
15 whole locomotive and put it over a pit so,  
16 similarly, it's inoperable. The fear here --  
17 and I -- just to be very clear, FRA's fear is  
18 locomotives are sitting on a side track and the  
19 -- the carrier is saying they're not in use, so  
20 it's fine that they have all of these safety  
21 problems, and employees are getting on those  
22 locomotives, they are having accidents. They  
23 could be moving those locomotives.

24 And, again, imagine the defect is a  
25 fuel tank. That fuel tank scrapes along the

1 ground and there is an explosion. So if -- that  
2 is the fear, but once the carrier has done  
3 something to make sure that that just cannot  
4 happen, then it has been withdrawn from use. It  
5 has been formally withdrawn.

6 JUSTICE KAGAN: And that something is  
7 usually unhook the battery, drain the fluid?

8 MS. SINZDAK: Yes, again, different --  
9 different -- sometimes they wrap these -- the --  
10 these things in big, actually, apparently,  
11 tarps, you know.

12 There's an incentive for -- for  
13 carriers to do this too because FRA has  
14 explained to me, if you leave all the fluids in  
15 a locomotive, you could have freezing problems.  
16 Also, there's something called condensation that  
17 -- from the -- from the fluids that gets into  
18 the different parts and will actually wear away  
19 at it. So there's -- there are good reasons  
20 even beyond the obvious safety rationale that  
21 carriers actually are doing this pretty  
22 regularly anyway.

23 CHIEF JUSTICE ROBERTS: Justice --  
24 okay.

25 Thank you, counsel.

1 MS. SINZDAK: Thank you.

2 CHIEF JUSTICE ROBERTS: Mr. Ballenger.

3 ORAL ARGUMENT OF J. SCOTT BALLENGER

4 ON BEHALF OF THE RESPONDENT

5 MR. BALLENGER: Thank you, Mr. Chief  
6 Justice, and may it please the Court:

7 It seems to me that Petitioner and the  
8 government are just rewriting the statute that  
9 Congress wrote. All of this about draining  
10 fluids and unhooking batteries isn't in the  
11 statute. I don't even think it's in the  
12 regulations. I've never heard it before. It --  
13 it appears to be argument of counsel about what  
14 all of this should mean. Union Pacific has  
15 certainly never enlightened me that taking a --  
16 a locomotive out of use requires that you  
17 disconnect the battery and drain the fluids.

18 Now, as a matter of plain meaning, one  
19 uses a locomotive to move railcars. The  
20 original language of the statute made that  
21 crystal clear by prohibiting the use of  
22 locomotives in moving interstate or foreign  
23 traffic if they were unsafe to operate in active  
24 service. And that active meaning is confirmed  
25 by the statutory language that says that defects

1 discovered during inspections have to be  
2 repaired before the locomotive is used again.

3 That language is literally impossible  
4 to comply with if Petitioner and the government  
5 are right. It's also confirmed by the absence  
6 of any safe harbor for repair movements in the  
7 LIA, like the one that's in the Safety Appliance  
8 Act.

9 Justice Kagan, there is no safe harbor  
10 for the movement of defective locomotives in the  
11 Locomotive Inspection Act. There is a  
12 regulation that governs the safe transport of  
13 defective locomotion -- locomotives. That  
14 regulation is consistent with the statute only  
15 because Congress understood that a locomotive  
16 being hauled dead is not in use within the  
17 coverage of the Locomotive Inspection Act.

18 If it were, then that regulation would  
19 violate the statute. And the Locomotive  
20 Inspection Act would forbid exactly the same  
21 repair movements that the Safety Appliance Act  
22 explicitly authorizes, even if the only safety  
23 defect on the locomotive was a safety appliance  
24 defect. Obviously, Congress didn't intend that.

25 And for those reasons, the LIA will

1 not support Petitioner and the government's  
2 proposed interpretation even if that's -- they  
3 were right under the Safety Appliance Act. But  
4 I actually have come to believe that this Court  
5 needs to reject Petitioner's understanding of  
6 the Safety Appliance Act as well.

7           Petitioner and the government suggest  
8 that a -- a locomotive is in use basically all  
9 of the time that it is outside a dedicated place  
10 of repair. I'd like to offer a new observation  
11 that isn't in the briefs. The -- that view  
12 would actually render the safe harbor in the  
13 Safety Appliance Act meaningless.

14           A safe harbor for moving defective  
15 locomotives is worthless if the trigger for  
16 penalties is not movement and if the locomotive  
17 is subject to the exact same civil penalties  
18 whether it moves the car or not.

19           CHIEF JUSTICE ROBERTS: Well, how, in  
20 -- under your view, the -- the locomotive is  
21 there, you know, they stop -- stop for lunch and  
22 the locomotive is still on, it's still idling,  
23 it's going to pick up again and go in 45  
24 minutes. That locomotive, you would say, is not  
25 in use?

1                   MR. BALLENGER: Well, Your Honor, the  
2 -- the way the lower courts understood the facts  
3 of this case -- and I think they were right --  
4 is that this string of cars came in from  
5 Chicago. It was parked on a -- a back track.  
6 The train crew went home. And -- and there was  
7 going to be a complete turnover of the train  
8 crew and they were going to assemble a whole new  
9 train for the next movement.

10                   And there is an allegation that this  
11 -- this locomotive, which was the third in the  
12 consist, was idling. But that doesn't tell you  
13 anything. Locomotives idle for all sorts of  
14 reasons.

15                   Justice Breyer, they turn themselves  
16 on automatically as well as turning themselves  
17 off automatically. These locomotives have  
18 systems that will turn themselves on if the  
19 battery needs to be charged.

20                   CHIEF JUSTICE ROBERTS: So your answer  
21 to my question is, yes, you would not consider  
22 the locomotive, you know, they're stopping for  
23 lunch at the -- at the station, and they keep  
24 the thing idling, and they're gone 45 minutes,  
25 during that 45 minutes, the locomotive would not

1 be in use?

2 MR. BALLENGER: I -- I think, if they  
3 -- if they have parked it on a -- a back track  
4 off of the main line --

5 CHIEF JUSTICE ROBERTS: Right.

6 MR. BALLENGER: -- and the -- the  
7 train crew has left the -- the locomotive, then  
8 it is temporarily out of -- of use as a  
9 locomotive under the -- the Locomotive  
10 Inspection Act.

11 JUSTICE BREYER: Well, what about the  
12 -- when I was a child, there was a book called  
13 The Little Engine That Could.

14 MR. BALLENGER: There still is.

15 JUSTICE BREYER: And this engine got  
16 to a hill, and it goes up the hill, and suddenly  
17 it stops because it can't go further, but it  
18 thinks I think I can, I think I can, I think I  
19 can, and, eventually, it does. Okay?

20 Now let's take the period "I think I  
21 can."

22 MR. BALLENGER: Justice --

23 JUSTICE BREYER: There it is, not  
24 moving. And, in your view, here it is, you say,  
25 on page 1516, is moving under its own power, in

1 active service. Huh-uh.

2 MR. BALLENGER: Yes.

3 JUSTICE BREYER: Not the Little Engine  
4 That Could. Not during those periods. He was  
5 saying I think I can, I think I can.

6 So do you really mean -- I mean,  
7 that's the same as the lunch question really.  
8 It's just --

9 MR. BALLENGER: No, I think -- I  
10 actually think that it's quite different,  
11 Justice Breyer.

12 JUSTICE BREYER: It is?

13 MR. BALLENGER: The FRA's own  
14 definition of a -- of a -- a active locomotive  
15 movement, not a dead movement, is the  
16 application of tractive power. The Little  
17 Engine That Could is applying tractive power  
18 even if it's having a hard time getting up the  
19 hill.

20 JUSTICE BREYER: Applying tractive  
21 power, you mean its engine's turning?

22 MR. BALLENGER: Yes.

23 JUSTICE BREYER: It has gas?

24 MR. BALLENGER: No, it -- its engine  
25 is turning and it is applying tractive power,

1 which there's a difference.

2 JUSTICE BREYER: What is applying  
3 tractive power? You mean the --

4 MR. BALLENGER: It means --

5 JUSTICE BREYER: -- the thing is  
6 turned on?

7 MR. BALLENGER: -- it -- it's -- it's  
8 applying torque to the wheels, Your Honor.

9 JUSTICE BREYER: It -- applying  
10 torque. I see. So that's the test.

11 MR. BALLENGER: Okay. And -- and --  
12 and just --

13 JUSTICE BREYER: Now -- now you see  
14 where we are and you've heard this argument.  
15 And this argument to me, my real -- my -- that  
16 was just trying to get you to think in the mood  
17 I'm thinking of, there are so many different  
18 things that that's why I was back to Lord Coke,  
19 that if that's the right approach, that we say  
20 let's handle this case as an example, well, he  
21 says, here, you came in 10 minutes after, you  
22 were leaving in an hour, and the engine was  
23 running.

24 You mean it makes a difference whether  
25 the engine is running and it actually applies to

1 the -- the force to the track or it doesn't  
2 apply the force? Now we seem to be in that  
3 thing about turning off the battery, et cetera.

4 MR. BALLENGER: Absolutely, Your  
5 Honor. Under the actual regulations, the actual  
6 regulations say that a dead locomotive movement  
7 is -- is a movement when the locomotive is not  
8 applying tractive power, and they explicitly say  
9 that the locomotive can be idling.

10 And the actual facts of this case --

11 JUSTICE BREYER: Did they say it can  
12 be idle and not in -- in use when it's idle?

13 MR. BALLENGER: 49 CFR 229.5 and page  
14 8-8 of FRA's Mode of Compliance Manual both say  
15 that a dead locomotive can be idling, because  
16 sometimes they need to idle in order to charge  
17 the batteries, they can turn themselves on.

18 And -- and, Your Honor, the -- the key  
19 to these statutes, to both statutes, is that  
20 safe harbor in the -- the Safety Appliance Act.

21 This Court held in the Rigsby and the  
22 Otos cases that the existence of that safe  
23 harbor makes clear that a movement for repair  
24 purposes would otherwise be covered by the  
25 Safety Appliance Act. And that's right because

1 otherwise the -- the safe harbor would be  
2 unnecessary.

3 But it demonstrates just as powerfully  
4 that a -- a railcar even just sitting passively  
5 in a yard or on a siding is not covered even by  
6 the Safety Appliance Act because otherwise the  
7 safe harbor would be meaningless. It would --

8 JUSTICE SOTOMAYOR: Counsel --

9 JUSTICE KAVANAUGH: Do you think  
10 Brady -- oh, sorry.

11 JUSTICE SOTOMAYOR: I'm sorry.

12 JUSTICE KAVANAUGH: Go ahead.

13 JUSTICE SOTOMAYOR: Counsel,  
14 locomotives by definition are more dangerous  
15 than --

16 MR. BALLENGER: Of course.

17 JUSTICE SOTOMAYOR: -- railroad cars.  
18 They explode. And so I don't take much from the  
19 absence of a safety out in the LIA.

20 But I do go back to the original  
21 question the Chief started with. If this  
22 locomotive, this dead locomotive, or the one  
23 that was being powered off, is being dragged  
24 with the rest of the train and only its brake is  
25 connected, you would say it's not covered even

1     though it's connected to railroad cars that are  
2     covered by the SAA?

3             MR. BALLENGER:  It -- just like every  
4     other vehicle in that train, it is in use as a  
5     vehicle within the meaning of the Safety  
6     Appliance Act.  It is not in use as a vehicle  
7     within the Locomotive Inspection Act.

8             JUSTICE SOTOMAYOR:  Okay.

9             MR. BALLENGER:  And the absence of a  
10    safe harbor --

11            JUSTICE SOTOMAYOR:  Then -- then how  
12    do I deal with the tender and the definition of  
13    use and Lilly?  Because we considered a tender  
14    that was off track to be in use on a side track,  
15    so it's not within your definition.

16            MR. BALLENGER:  I'm -- I'm not sure  
17    about that, Your Honor.  Now several things  
18    about Lilly.  Lilly did not address the in use  
19    question.  It -- it wasn't litigated or decided  
20    in the case.  It appears to have just been  
21    assumed.

22            JUSTICE SOTOMAYOR:  Well, that may be  
23    true of -- you know, one has to take the decades  
24    and decades of jurisprudence when railroads were  
25    the main means of transportation in our country,

1 and nobody's questioning what "in use" means,  
2 that it was understood.

3 I don't take the silence of those  
4 cases as terribly meaningful for me.

5 MR. BALLENGER: Well, but --

6 JUSTICE SOTOMAYOR: So answer my  
7 question. A tender doesn't -- is covered by the  
8 LIA?

9 MR. BALLENGER: Yes.

10 JUSTICE SOTOMAYOR: What -- how does  
11 your definition get us to deal with a tender?

12 MR. BALLENGER: So --

13 JUSTICE SOTOMAYOR: Because it doesn't  
14 go under its own power. It itself doesn't do  
15 the dragging. So give me a definition under the  
16 LIA that could be applicable equally to the  
17 locomotive and the tender and its definition of  
18 use.

19 MR. BALLENGER: So I -- I think, in --  
20 in Lilly, the locomotive and the tender had just  
21 been detached from their train, which was ready  
22 to go, and they just essentially pulled up to a  
23 gas station to be fueled in anticipation of --  
24 of imminent movement.

25 JUSTICE SOTOMAYOR: Well, you --

1 MR. BALLENGER: And I --

2 JUSTICE SOTOMAYOR: -- told me before  
3 that if the train's not revving to go and  
4 revving to go to pull things, it's not in use.  
5 So going off to a fuel tank is not in use  
6 according to your definition.

7 MR. BALLENGER: No, Your Honor. I  
8 think a locomotive, just like an automobile,  
9 doesn't go out of use at stoplights. Just  
10 because it -- it temporarily stops momentarily  
11 doesn't mean that it's out of use.

12 JUSTICE SOTOMAYOR: All right. Thank  
13 you, counsel.

14 MR. BALLENGER: The -- the basic  
15 concept is movement. Once you set it in motion,  
16 it's in use. You take it out of -- of use when  
17 you park it.

18 And -- and there's no safety gap here.  
19 The -- the FRA's regulations governing the safe  
20 transportation of -- of locomotives and the  
21 safety of locomotives sitting there in a  
22 railyard are perfectly supported by its plenary  
23 authority over railroad safety under the FRSA.

24 You don't need to stretch the LIA  
25 beyond all recognition in order to ensure that

1 FRA has the power to ensure that locomotives are  
2 safe --

3 JUSTICE KAVANAUGH: Do you think --

4 MR. BALLENGER: -- in every single  
5 situation.

6 JUSTICE KAVANAUGH: -- do you think  
7 the SAA was stretched beyond all recognition in  
8 Brady?

9 MR. BALLENGER: Well, I think that you  
10 have to read Brady narrowly because, if you read  
11 it as broadly as Petitioner and the government  
12 read it, then you render the safe harbor in the  
13 Safety Appliance Act completely meaningless.

14 Now I -- I think the right way to  
15 understand Brady is that --

16 JUSTICE KAVANAUGH: I don't understand  
17 that. The premise, I think, of the safe harbor  
18 is that it otherwise would be considered in use,  
19 correct?

20 MR. BALLENGER: The -- the safe harbor  
21 protects the railroad from civil penalties for  
22 moving a car in a defective condition. But, if  
23 the railroad is subject to the exact same civil  
24 penalties for possessing the car, sitting there  
25 on a siding or in a yard, then the safe harbor

1 doesn't protect from civil penalties -- doesn't  
2 protect the railroad from any civil penalties.

3 JUSTICE KAVANAUGH: Well, back to --  
4 back to Brady, I take from your initial comments  
5 that you're not just looking to narrow -- have a  
6 narrow interpretation of the LIA but actually to  
7 scale back what Brady and a slew of cases said  
8 about the SAA. Is that accurate or not?

9 MR. BALLENGER: Well, I -- I -- I  
10 think Brady is the outlier. I think that all of  
11 the other cases, "use" was equated with  
12 movement. And we can talk about those. I don't  
13 want to dodge your question about Brady.

14 JUSTICE KAVANAUGH: I mean, there are  
15 a lot of side car, dining car --

16 MR. BALLENGER: So --

17 JUSTICE KAVANAUGH: Okay, but -- we  
18 don't have to get into all of them, but anyway,  
19 Brady -- Brady is --

20 MR. BALLENGER: Well, I would very  
21 much like to, Your Honor, because I think it's  
22 important.

23 So, in -- in the Brady case, I think  
24 you have to understand that case as essentially  
25 an automobile stopped at a stoplight. The --

1 the terminal association was tendering that car  
2 for immediate onward movement to the Wabash.

3 The Wabash was held not to be using  
4 that car during the inspection. The terminal  
5 association was held to still be using it  
6 because they were -- they were tendering it for  
7 immediate onward movement. They hadn't even  
8 parked that car for the night. They were  
9 offering it up to go forward.

10 And in all of the other cases, Johnson  
11 and Delk and Rigsby and Otos and Schendel, every  
12 single one of those cases, the accident happened  
13 in the course of an immediate effort to move the  
14 car.

15 Petitioner and the government like to  
16 emphasize the Johnson case with the dining car  
17 that was dropped off for a while by the  
18 westbound train and then picked up by the  
19 eastbound train.

20 But the actual use that triggered the  
21 SAA in that case was that the -- the crew of a  
22 passing freight train stopped to turn that car  
23 around so that it would be in position for the  
24 eastbound train when the eastbound train arrived  
25 several hours later. And in going between the

1 cars to try and couple up to turn it around, the  
2 employee was hurt. So he was hurt in the course  
3 of an immediate attempt to move the car.

4 And the -- the hard question in the  
5 case wasn't whether that dining car was in use.  
6 It obviously was. It was being moved. The hard  
7 question in the case was whether that use was in  
8 interstate commerce.

9 JUSTICE KAVANAUGH: So -- so the  
10 reading of Brady that says the dividing line's  
11 where it's reached a place of repair, which is  
12 what it says, you reject that?

13 MR. BALLENGER: I think that that  
14 interpretation renders the safe harbor for  
15 repair movements in the Safety Appliance Act  
16 utterly meaningless. It would do absolutely no  
17 work under Petitioner and the government's  
18 interpretation of the statute --

19 JUSTICE KAVANAUGH: Okay. But --

20 MR. BALLENGER: -- be -- because -- I  
21 do reject it because it only -- the only way to  
22 evade "use" in their view is if the car is  
23 already at a place of repair. What good is a  
24 safe harbor for moving it to a place of repair  
25 if the only time that it's out of use is when

1 it's already in the place of repair? It doesn't  
2 make any sense, Your Honor.

3 JUSTICE KAVANAUGH: What about, a  
4 different kind of focus, but their argument is  
5 that most of the accidents with respect to  
6 locomotives occur when they're stationary and  
7 that your position, therefore, leaves the  
8 statute not addressing the primary problem?  
9 What's your response to that?

10 MR. BALLENGER: Well, the -- the  
11 primary problem to which the Safety Appliance  
12 Act is directed is coupler accidents, and that's  
13 the active test --

14 JUSTICE KAVANAUGH: The -- the LIA.

15 MR. BALLENGER: -- to move the car.

16 JUSTICE KAVANAUGH: Yeah.

17 MR. BALLENGER: The -- the Locomotive  
18 Inspection Act was about the safe operation of  
19 locomotives in moving interstate or foreign  
20 traffic. The LIA was never meant to --

21 JUSTICE KAVANAUGH: Well, moving -- I  
22 mean, you said moving a couple times. It was  
23 taken out in 1924. So I don't think "moving"  
24 gets you that far.

25 MR. BALLENGER: Well, but -- but the

1 statute is -- Congress took that language out in  
2 order to make clear that it could be an  
3 intrastate movement because it was really hard  
4 to prove whether the movement was intrastate or  
5 interstate. But I don't think that Congress  
6 meant to decouple the basic concept of use from  
7 what it had always been --

8 JUSTICE KAVANAUGH: Just --

9 MR. BALLENGER: -- which was movement.

10 JUSTICE KAVANAUGH: Sorry to  
11 interrupt, but just on the focus, most of the  
12 accidents, the amicus briefs tell us, that occur  
13 with respect to locomotives are when the  
14 locomotives are stationary. And I just want --

15 MR. BALLENGER: So --

16 JUSTICE KAVANAUGH: -- to get your  
17 response to that.

18 MR. BALLENGER: -- so, under our  
19 interpretation of the statute, the -- the LIA  
20 frequently applies while a locomotive is  
21 stationary because an automobile stopped at a  
22 stoplight is still in use. You have to  
23 affirmatively park it. You don't have to take  
24 it apart or disassemble it, like the government  
25 suggests --

1 JUSTICE KAGAN: You -- you --

2 MR. BALLENGER: -- but you do have to  
3 park it.

4 JUSTICE KAGAN: -- you acknowledge,  
5 don't you, that this statute imposes obligations  
6 on the railroads to do things before the train  
7 starts moving?

8 MR. BALLENGER: Yes.

9 JUSTICE KAGAN: I mean, the whole  
10 notion of the statute, right, I mean, it is a  
11 regulation of the railroad's use, which you say  
12 is its movement. Maybe it is, maybe it's not.

13 But there's -- the entire statute,  
14 it's not like you take all these precautions  
15 once the train is moving. You take all these  
16 precautions before the train is moving so that  
17 --

18 MR. BALLENGER: So --

19 JUSTICE KAGAN: -- when --

20 MR. BALLENGER: -- so that you don't  
21 violate the statute when you move the train.  
22 And -- and -- and FRA --

23 JUSTICE KAGAN: What I'm saying, Mr.  
24 Ballenger, is, like, this statute is a  
25 preventive statute in its very essence. It says

1 do a lot of things while the -- while the train  
2 is parked in order to get it ready for whatever  
3 you -- you might want to do with it afterwards.

4 MR. BALLENGER: I'm going to resist  
5 you a little, Justice Kagan. What the statute  
6 says in 20701 is don't use a -- a locomotive if  
7 it is unsafe to operate.

8 JUSTICE KAGAN: But the only way you  
9 can use a safe locomotive is to make it safe  
10 before you're doing anything with it.

11 MR. BALLENGER: That -- that's --

12 JUSTICE KAGAN: So the entire statute  
13 is all about take precautions, take preventive  
14 measures, do a lot of things before you actually  
15 do anything with it.

16 MR. BALLENGER: And our point --

17 JUSTICE KAGAN: And that suggests to  
18 me that it makes more sense to read the statute  
19 as a kind of could be operated as opposed to  
20 right now, in operation, the wheels are moving,  
21 because the whole point of this is get the car  
22 ready, get the car ready for whatever you might  
23 decide to do with it.

24 MR. BALLENGER: And the Seventh  
25 Circuit's insight that is the foundation of

1 their decisions for 70 years in this area is  
2 that since the point of the statute is to  
3 incentivize the railroad to get it into safe  
4 condition before using it, you have to give the  
5 railroad a chance to get it in safe condition.

6           Petitioner is the person who was  
7 supposed to inspect this railroad for safety  
8 defects. And although it's not in the record  
9 because Petitioner felt free to cite it from an  
10 Internet source, I would direct the Court to  
11 Section 31.1.2 -- or 31.2.1, I'm sorry, of Union  
12 Pacific's operating manual, which says that it  
13 is the duty of the engineer to ensure that the  
14 daily inspection has been performed before using  
15 a locomotive. His position up to and including  
16 the argument that we just had in this case has  
17 always been that this locomotive was overdue for  
18 inspection.

19           So, if the question here is whether  
20 Union Pacific has deemed this locomotive ready  
21 for use, the answer is not without inspecting  
22 it, and it was your job to inspect it.

23           The -- the Seventh Circuit's  
24 recognition, I think, in the Lyle and the  
25 Tisneros cases 70 years ago that preparing a

1 locomotive for use is the opposite of using it  
2 is exactly consonant with the understanding of  
3 the statute, I think, Justice Kagan, that --  
4 that you're putting forward. Yes, the point is  
5 to -- to incentivize the railroad to do a great  
6 job preparing it for use, but you've got to give  
7 them a chance to do that.

8           And I think -- I really want to  
9 emphasize that the -- the safe harbor in the  
10 Safety Appliance Act structurally forbids their  
11 interpretation, I think. It -- it has always  
12 been central to this Court's understanding of  
13 the statute in the Rigsby and -- and the Otos  
14 cases. If Petitioner and the government are  
15 right, the absence of any comparable safe harbor  
16 in the Locomotive Inspection Act means that it  
17 is impossible to transport locomotives for  
18 purposes of repair.

19           And the LIA forbids exactly the same  
20 repair movements that the SAA authorizes. And  
21 it also -- applied under the SAA, their  
22 understanding would mean that that safe harbor  
23 from civil penalties protects the railroad  
24 against literally no civil penalties, and that  
25 can't be the correct understanding of the

1 statute.

2                   And the right -- Justice Breyer, I  
3 think that your instinct that -- that we should  
4 read the statute that Congress wrote is the  
5 right instinct. Everyone understands the desire  
6 for a bright-line rule, but sometimes Congress  
7 writes statutes that require the application of  
8 some common sense. And, here, that's the  
9 section that they wrote.

10                   JUSTICE BREYER: Well, why doesn't  
11 common sense -- look, Brady does seem like  
12 common sense. The car is traveling along. It  
13 comes to the place where it stops. It stops.  
14 It's still on the track. It's just about to go  
15 to the Wabash Railroad, and the inspector whose  
16 job it is to inspect goes and falls, and the  
17 defect is there.

18                   Okay. This was a car that came along.  
19 It was coming from Salem, I guess, or going to  
20 Salem, Chicago. It was -- they're in the middle  
21 of the decision about whether to keep it as a  
22 car, use it as a railroad. The engine is still  
23 running, although I agree there's -- I don't  
24 know about traction. Whatever that is, it may  
25 not be there. And they have the accident.

1           Okay. It's pretty close to the Wabash  
2 thing. And I grant you that it's a different  
3 statute, but "use" is a function of total  
4 circumstances say. Why not?

5           MR. BALLENGER: So can I clarify the  
6 --

7           JUSTICE BREYER: Yeah.

8           MR. BALLENGER: -- the total  
9 circumstances here? The total circumstances  
10 are, on the record, that this string of -- of  
11 cars and three locomotives came from Chicago  
12 more than an hour before, not 10 minutes before,  
13 and it left Salem for Dexter, Missouri, not an  
14 hour later but at least four hours later. The  
15 -- the accident happened at 3 in the morning.  
16 And it took them three train movements and more  
17 than four hours to put together a different  
18 train for the run to Dexter.

19           And the court of appeals and the  
20 district court looked at all of these facts,  
21 that it was parked on -- on a back track, that  
22 no one was even planning to use this locomotive  
23 as a locomotive for the forward movement, the  
24 train crew had been sent home, and they still  
25 needed to put the train together for its next --

1 next movement, and said, no, they're parked.

2 Right?

3 And -- and that sort of common-sense  
4 factual insight, I -- I think, is the sort of  
5 judgment that Congress intended for courts to  
6 make under this statute.

7 And Petitioner accuses us of adding  
8 words to the statute by suggesting that we want  
9 to draw a distinction between use as a  
10 locomotive and use as a vehicle.

11 Again, I think that the safe harbor  
12 difference between the two statutes absolutely  
13 demands that you recognize that locomotives are  
14 sometimes in use as vehicles and sometimes in  
15 use as -- as locomotives.

16 But, also, this Court's SAA precedents  
17 already recognize that vehicles can be in use in  
18 different capacities. The holding of the Erie  
19 case is that during yard-switching movements to  
20 put a train together, those cars and those  
21 locomotives are in use as vehicles and maybe as  
22 locomotives, respectively.

23 But they're not in use as a train for  
24 purposes of the SAA's distinct requirements that  
25 apply only to trains. It's not a train until

1 the train is fully put together and it's ready  
2 to move out on to the mainline.

3 And so the lesson is that, when you  
4 are using a locomotive under its own power to  
5 move cars around a yard, that locomotive is in  
6 use as a locomotive, absolutely. It is applying  
7 tractive power. It and the cars are in use as  
8 vehicles. None of them are a train yet.

9 Well, similarly, we're just asking the  
10 Court to recognize that when a locomotive is  
11 being hauled dead or -- or let alone being  
12 prepared to be hauled dead, it -- it will be in  
13 use as a vehicle within the coverage of the SAA,  
14 which will supply all of the safety requirements  
15 that Congress and the FRA have ever required for  
16 vehicles that are going to be passively moved.  
17 Right?

18 I mean, whatever you need for a boxcar  
19 or -- or a hopper car to passively move it to be  
20 safe for everyone involved is within the  
21 coverage of the SAA. And if you're moving a  
22 locomotive dead, all of those same requirements  
23 apply. All of the holdings of this Court's SAA  
24 cases apply.

25 The only question is, is that

1 locomotive also being operated as a locomotive?

2 And I think that the context --

3 JUSTICE SOTOMAYOR: I -- I'm sorry.

4 Is there better coverage under the LIA than the  
5 SAA? Because you seem to be saying this was  
6 covered by the SAA but not the LIA.

7 MR. BALLENGER: It -- it certainly was  
8 once it started moving covered by the SAA  
9 because it's a vehicle.

10 JUSTICE SOTOMAYOR: Oh, okay.

11 MR. BALLENGER: The definition of  
12 vehicles --

13 JUSTICE SOTOMAYOR: So the fact that  
14 it was going to be moving with the -- as a dead  
15 locomotive, that's not enough for you because  
16 the -- the actual locomotive that was picked and  
17 wasn't powered down hadn't started to move  
18 anything yet? Is that what your position is?

19 MR. BALLENGER: Our -- our position is  
20 that while it's sitting there on the track it  
21 might or might not have been -- been idling.  
22 That tells you literally nothing about whether  
23 anybody had ever used this locomotive or was  
24 planning to use this locomotive.

25 It's -- it's sitting there --

1 JUSTICE SOTOMAYOR: Well, I don't  
2 think it's ever -- you don't get that from it  
3 sitting there. You get it from what the intent  
4 of the railroad, and we always have to look at  
5 that, don't we?

6 MR. BALLENGER: Well, I -- I think, if  
7 you're looking at the intent of the railroad,  
8 nobody intended to use this locomotive as a  
9 locomotive, even for its next movement. And it  
10 was not. And Petitioner was -- was injured in  
11 the --

12 JUSTICE SOTOMAYOR: So he should have  
13 sued under the SAA, is what you're saying to me,  
14 maybe?

15 MR. BALLENGER: There certainly would  
16 have been a much better argument. So the FRA's  
17 own definition of "in use" for purposes of the  
18 Safety Appliance Act is in its Mode of Power  
19 Compliance Manual and in 49 CFR 232.9, and their  
20 definition is that a -- a railcar, including a  
21 locomotive, which is a car under the -- the SAA,  
22 comes into use when it's -- it's moving or  
23 shortly before movement if all inspections have  
24 been completed and it's deemed ready for  
25 imminent movement.

1                   And I --

2                   JUSTICE SOTOMAYOR: Thank you,  
3                   counsel.

4                   MR. BALLENGER: Thank you.

5                   Are we done?

6                   JUSTICE KAVANAUGH: Your -- your test  
7                   would be imminent, right, would encompass  
8                   imminent movement?

9                   MR. BALLENGER: It -- it would. The  
10                  -- the case law and FRA have always recognized  
11                  that a -- a railcar can come into -- to use  
12                  shortly before imminent movement, just as if you  
13                  get in your car and you turn the key and you put  
14                  your foot on the brake and put it in gear.

15                  JUSTICE KAVANAUGH: Should we flesh  
16                  out what "imminent" means any more than that if  
17                  you were to prevail?

18                  MR. BALLENGER: I -- I think it's a  
19                  common-sense concept, and -- and it is tied in  
20                  FRA's compliance manual, in the case law, and in  
21                  232.9 to whether the inspections have been  
22                  completed.

23                  And it is Petitioner's position  
24                  throughout this case and at this argument that  
25                  this locomotive still needed its inspection if

1 it was going to be used at the time. It was not  
2 ready for use.

3 CHIEF JUSTICE ROBERTS: Justice  
4 Thomas, any questions?

5 JUSTICE THOMAS: Yes. Thank you, Mr.  
6 Chief Justice.

7 Mr. Ballenger, was there any  
8 indication that this locomotive had been cleared  
9 for use? It -- it seems as though I'm confused  
10 as to whether or not anyone ever suggested that  
11 it's okay to use this particular locomotive.

12 MR. BALLENGER: Union Pacific's  
13 operating manual forbids the use of locomotives  
14 that are overdue for inspection.

15 Petitioner's position throughout this  
16 litigation, including today, has been that this  
17 locomotive is overdue for inspection.  
18 Therefore, Union Pacific did not deem this  
19 locomotive ready for use until it was inspected.

20 JUSTICE THOMAS: The other thing, the  
21 -- I asked Petitioner and the government  
22 about -- and I know it's a little bit off  
23 topic -- towing my car, which, in the motor home  
24 world, is referred to as a dinghy, to -- to  
25 various places.

1                   And they suggested that the mere fact  
2                   that I was towing and the lights worked and I  
3                   had a braking system, which, by the way, is  
4                   independent from the car's vehicle -- I mean the  
5                   -- the tow vehicle's braking system, that I was  
6                   using that vehicle.

7                   Could you react to that just briefly?

8                   MR. BALLENGER: So I think it's  
9                   debatable as to the motor coach. I think it's  
10                  not debatable as to the tow vehicle.

11                  The -- the hypo that -- that I would  
12                  propose is you tow your motor coach to a  
13                  campground with the tow vehicle?

14                  JUSTICE THOMAS: No, I'm towing -- I'm  
15                  towing the car, not the -- the motor coach is  
16                  the --

17                  MR. BALLENGER: Oh.

18                  JUSTICE THOMAS: -- yeah, it's towing  
19                  the vehicle.

20                  MR. BALLENGER: You're towing --  
21                  you're towing a car behind the motor coach?

22                  JUSTICE THOMAS: Exactly.

23                  MR. BALLENGER: I -- I think that --  
24                  that that car is not in use while you -- as a  
25                  car while you are passively towing it. I had in

1 mind the -- the more -- you know, a tow-behind  
2 RV and you tow it to a campground and you park  
3 and you go out to dinner.

4           Clearly, the tow vehicle that you used  
5 to pull your -- your RV is no longer in use when  
6 it's parked at the campground and you go out to  
7 dinner.

8           JUSTICE THOMAS: Yeah, you're thinking  
9 more of a trailer or a -- or -- or a  
10 fifth-wheeler, but let's go to another thing.

11           You -- you -- there was some talk  
12 about stationary locomotives. The -- is there  
13 any instance in which a stationary locomotive is  
14 in use, not being hauled around the yard for  
15 repairs, you suggest -- you did discuss that,  
16 but just sitting on the track?

17           MR. BALLENGER: I -- if it is -- is  
18 sitting there as part of a train and the train  
19 is stopped at -- at a red light, you know,  
20 waiting for a switch, then I think it hasn't  
21 been taken out of use yet.

22           I think, if it is parked on a back  
23 track and the train crew goes home, it is out of  
24 use. And I think the Raudenbush case from the  
25 Third Circuit in 1947 explains those

1 distinctions fairly well.

2 JUSTICE THOMAS: Okay. Final  
3 question. You seem to suggest that our test  
4 should be a totality of circumstances.

5 Could you give us an indication of  
6 what circumstances or what considerations are  
7 required in order to make the determination as  
8 to whether or not a vehicle is in use?

9 MR. BALLENGER: I -- I -- I actually  
10 am not sure it's totality of the circumstances.  
11 I -- I think, in this context, use, the basic  
12 concept is movement. FRA and the case law have  
13 recognized that imminent movement can be enough  
14 if all inspections are completed.

15 And then, on the back end, it goes out  
16 of use when it's genuinely parked, not just  
17 stopped at a switch but genuinely parked for the  
18 night.

19 JUSTICE THOMAS: Thank you.

20 CHIEF JUSTICE ROBERTS: Justice  
21 Breyer?

22 Justice Alito?

23 Justice Sotomayor?

24 Justice Kagan?

25 Justice Kavanaugh?

1 JUSTICE KAVANAUGH: In the SAA, if  
2 there weren't the safe harbor, would that  
3 otherwise be considered in use when it's being  
4 moved to -- for repairs?

5 MR. BALLENGER: This Court's insight  
6 in the Otos and Rigsby cases was that the -- the  
7 -- the safe harbor definitely tells you that it  
8 would be in use because otherwise the safe  
9 harbor would be unnecessary. Right?

10 JUSTICE KAVANAUGH: Right.

11 MR. BALLENGER: And -- and I -- I  
12 think that a -- a car being transported for --  
13 only for purposes of repair, if that safe harbor  
14 weren't there, I think that might be debatable,  
15 but it's not debatable any more after the safe  
16 harbor, as this Court recognized in Otos and  
17 Rigsby.

18 But, in those cases, like Delk, I urge  
19 Your Honor to read the Delk opinion. It clearly  
20 equates use with movement. What the railroad  
21 was blamed for in that case was moving the --  
22 the railcar around the yard.

23 This -- this Court said that once the  
24 defect was discovered it should have been  
25 withdrawn from use. It was not. The railroad

1 continued moving it about in connection with  
2 other cars. And that's why the SAA applied, not  
3 because it was just sitting there, because they  
4 moved it.

5 JUSTICE KAVANAUGH: Brady was just  
6 sitting there? Yeah, you don't like --

7 MR. BELLENGER: It was -- it was --

8 JUSTICE KAVANAUGH: -- you don't like  
9 Brady, though?

10 MR. BALLENGER: -- it was tendered for  
11 -- for immediate onward movement. And if -- and  
12 if you -- you interpret the case as holding that  
13 parked railcars are always in use, then you  
14 render the safe harbor meaningless, and I think  
15 you can't do that.

16 JUSTICE KAVANAUGH: Thank you.

17 CHIEF JUSTICE ROBERTS: Thank you,  
18 counsel.

19 Rebuttal, Mr. Frederick?

20 REBUTTAL ARGUMENT OF DAVID C. FREDERICK  
21 ON BEHALF OF THE PETITIONER

22 MR. FREDERICK: So, in addition to the  
23 brief, Respondents offered a new test, that it's  
24 got to be torque to the wheels constitutes use,  
25 while later in his argument he said and conceded

1 that imminent movement was going to be enough.

2           The problem with Respondent's test,  
3 this torque to the wheels concept, is it -- that  
4 adds words to the statute when what we're  
5 looking at is whether the carrier may use a  
6 locomotive and whether it is safe to operate.  
7 That's what the statute says.

8           The locomotive here can go on or off,  
9 which means that we're going to defer the  
10 application of the statute, according to the  
11 railroad, by the particular technical equipment  
12 on the locomotive. That makes no sense.

13           Locomotives perform the use of backup  
14 power, braking services, connections. He never  
15 addresses that at all in their brief or in their  
16 argument. So, if the locomotive is towed, it  
17 still can perform the railroad's use of being at  
18 a place where it can perform other logistics  
19 necessary.

20           The railroad's theory now, and blaming  
21 my client for being the one who got on the  
22 locomotive, now turns the statute completely on  
23 its head because it's not the carrier who  
24 determines whether the locomotive is used; it's  
25 the worker.

1                   Well, that makes no sense because the  
2 worker is the one who got hurt, and he's the one  
3 who is deciding whether or not to keep the  
4 locomotive powered on or off for its continuing  
5 journey from Salem on to Dexter.

6                   Mr. Chief Justice, the restaurant  
7 example is not in use on the railroad's line,  
8 and so it would be outside of the statute. For  
9 that reason, you wouldn't have to get into the  
10 peculiarities of use.

11                   The -- under the SAA, the car applies  
12 and it is in use even if it is empty, so it  
13 makes no sense to apply "use" in a different way  
14 under the LIA, whether the locomotive is on or  
15 off. And as we say, empty cars are clearly in  
16 use under the SAA, and workers can be hurt when  
17 they are done in that particular function.

18                   We urge a broader reading of "in use"  
19 because that -- the whole purpose and the words  
20 of the statute were to protect workers, and by  
21 having a narrow constriction of the statute, as  
22 proposed here by the railroad, would completely  
23 gut the rules.

24                   The slipping hazard here that is the  
25 regulation is for an exterior walkway that no

1 worker uses when the locomotive is in -- is in  
2 motion. The locomotive is being inspected and  
3 being serviced or being put on or off by the  
4 worker getting on the passageway that has to be  
5 safe under the rules. So, under their example,  
6 it would be completely gutting the regulations.

7 Now I dare say I run some risks by  
8 going back to Justice Thomas's towing example,  
9 but, because he mentioned it, I want to try to  
10 urge the Court to think about "use" in the sense  
11 of the entire trip that he was making. For his  
12 entire trip, he is using the car for vacation or  
13 for whatever purposes he has for the -- for  
14 that. And I would urge the Court to consider  
15 "use" in that broader application sense.

16 Thank you.

17 CHIEF JUSTICE ROBERTS: Thank you,  
18 counsel. The case is submitted.

19 (Whereupon, at 11:41 a.m., the case  
20 was submitted.)

21

22

23

24

25

## Official

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