

IN THE SUPREME COURT OF THE UNITED STATES

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1 P R O C E E D I N G S

2 (10:12 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument this morning in Case 24-1238,
5 Montgomery versus Caribe Transport.

6 Mr. Clement.

7 ORAL ARGUMENT OF PAUL D. CLEMENT

8 ON BEHALF OF THE PETITIONER

9 MR. CLEMENT: Mr. Chief Justice, and
10 may it please the Court:

11 When Congress ended federal economic
12 regulation of the transportation industry, it
13 did not want states to fill the deregulatory
14 gap with economic regulation of their own. It
15 thus enacted a preemption clause modeled on the
16 Airline Deregulation Act that preempts state
17 laws related to prices, routes, or services of
18 motor carriers, of brokers, with respect to the
19 transportation of property.

20 But, while Congress favored economic
21 deregulation, the last thing it wanted was
22 safety deregulation. To that end, it preserved
23 federal safety regulatory authority, and it
24 accepted state fed -- state reg -- safety
25 regulatory authority with respect to motor

1 vehicles.

2 My friends concede that state tort law
3 is a classic exercise of regulatory authority
4 and that a principal aim of tort law is safety.
5 Thus, the question in this case boils down to
6 whether the negligent hiring claim here is with
7 respect to motor vehicles.

8 Of course, it is. The whole point of
9 the tort is to keep dangerous motor vehicles
10 off of the road. Indeed, my friends concede as
11 much when the tort is directed at a carrier.

12 But that essentially gives away the
13 game because it's the same tort whether it's
14 directed at a carrier or a broker, and it is no
15 less with respect to motor vehicles when it's
16 directed against a broker who may well know
17 that the vehicles are poorly maintained or the
18 carrier is underinsured or not registered with
19 the federal government at all.

20 The -- nonetheless, my friends would
21 immunize the brokers in all those situations.
22 That cannot be squared with the plain text or
23 with common sense. Indeed, my friends have to
24 insert words into the statute like "direct
25 link" or "direct connection" that are absent

1 from the statutory text.

2 This Court should interpret the
3 statute as written and not let the brokers off
4 scot-free.

5 I welcome the Court's questions.

6 JUSTICE THOMAS: Mr. Clement, the --
7 what did the landscape look like before
8 deregulation? And by that, I mean who was --
9 was responsible for the safety regulations?
10 Was it the ICC or some other federal agency, or
11 was it the state?

12 MR. CLEMENT: So it was both the
13 federal Transportation Department or subparts
14 of the federal Transportation Department at the
15 federal level and the states at the -- at the
16 state level. So the old ICC regulated rates,
17 prices, and routes, but it did not regulate
18 safety.

19 And that's really the regime, I think,
20 Congress --

21 JUSTICE THOMAS: Well, the -- the --
22 the -- I'm more interested in the safety aspect
23 because I think much of what we're talking
24 about will depend on what it means to regulate
25 the safety of motor vehicles, including the

1 operation.

2 So I'm interested if you would detail
3 the safety regime before the ICC was
4 deregulated.

5 MR. CLEMENT: So, before the ICC was
6 deregulated --

7 JUSTICE THOMAS: Was eliminated. I'm
8 sorry.

9 MR. CLEMENT: Yeah, eliminated.
10 Right. You did have some federal safety
11 regulation from the federal government but --
12 but not through the ICC, through the
13 Transportation Department. But you also had --
14 and there was no preemption of it. You also
15 had state safety regulation. And they could
16 take many forms. They could be positive law,
17 regulations that go to safety, everything from
18 speed limits to other provisions, weight
19 limits, maintenance requirements.

20 But you also had these state negligent
21 hiring torts that were applied under the old
22 regime both against carriers and against
23 brokers. And we cite the L.B. Foster case, for
24 example, from the Ninth Circuit in 1969 in our
25 brief, and that's a state negligent hiring

1 claim that was brought against both brokers and
2 against carriers, and the Ninth Circuit upheld
3 it.

4 And, of course, there would have been
5 no basis before 1995 to even argue that that
6 claim against a broker was preempted and no
7 argument before 1994 that that argument -- that
8 that claim was preempted against a carrier.

9 JUSTICE KAVANAUGH: One oddity I think
10 that you have to deal with is that your theory
11 would mean that claims against brokers would
12 be -- would be preempted for intrastate
13 transportation but not for interstate
14 transportation, which seems a bit backwards in
15 terms of preemption, and that's something, if
16 you think the question here is how broadly to
17 read "with respect to motor vehicles" and
18 you're thinking about context and common sense,
19 which you mentioned, that seems to be in
20 tension with that.

21 You want to respond to that?

22 MR. CLEMENT: I would love to because
23 I think there is a counter-intuitiveness to the
24 fact that Congress seems to have provided a
25 broader preemption provision for intrastate

1 routes, prices, and services for brokers and
2 freight forwarders and a, you know, smaller
3 preemptive scope for interstate.

4 Now that anomaly is going to exist no
5 matter how you decide this case because (b) is
6 broader not just because it doesn't have a
7 safety exception but also because it doesn't
8 have the phrase "with respect to the
9 transportation of property." So, you know,
10 it -- and -- and so, like, a case like Dan's
11 City, you know, would -- where this Court said
12 that "with respect to the transportation of
13 property" is what meant there was no
14 preemption, there would be preemption for
15 interstate.

16 Now I'm not here to tell you that
17 makes any sense, but what I am here to tell you
18 is that Congress in 1995 made a very deliberate
19 decision to treat brokers and freight
20 forwarders differently for interstate and for
21 intrastate.

22 I mean, it would have been the easiest
23 thing in the world in 1995, because, remember,
24 brokers are added to both a year after --

25 JUSTICE KAVANAUGH: Right. Yeah.

1 MR. CLEMENT: -- the principal
2 statute. It would have been the easiest thing
3 in the world to create, like, a subsection that
4 was about brokers and freight forwarders for
5 interstate and intrastate.

6 But Congress didn't do that. They
7 consciously had a separate sub (b) clause for
8 intrastate, and then they consciously dropped
9 the brokers and the freight forwarders into
10 (c), which already had the safety exception.

11 JUSTICE KAVANAUGH: Just going back to
12 the real world, though, you know, a -- a broker
13 in Los Angeles who arranges a trip to San
14 Francisco, no -- no tort suits available. But,
15 if it's to -- to Reno, a tort suit is available
16 under your theory, right?

17 MR. CLEMENT: Under our theory of the
18 safety exception. Now, you know --

19 JUSTICE KAVANAUGH: Yeah.

20 MR. CLEMENT: -- you might be able --

21 JUSTICE KAVANAUGH: On the safety
22 exception --

23 MR. CLEMENT: Right.

24 JUSTICE KAVANAUGH: -- which is the
25 key. And I guess --

1 MR. CLEMENT: But -- but --

2 JUSTICE KAVANAUGH: -- I'm still
3 trying to figure out how that makes some sense,
4 particularly when -- let's just add to it the
5 other kind of issue that -- that bothers me a
6 little bit here, is the fact that Congress
7 required financial security requirements for
8 the truckers but not for the brokers and --
9 with respect to accidents, and that seems
10 another thing that you can -- you can respond
11 to.

12 MR. CLEMENT: Sure. But let me
13 respond to them in turn.

14 So starting just to -- to reiterate
15 what I said with (b), I mean, look, I'm -- I'm
16 not here to tell you that that's not a little
17 bit anomalous, but it would be more anomalous
18 to take two statutes, one of which has a safety
19 exception and one of which doesn't, and
20 interpret them to mean the same thing.

21 And there's no question that (b) is
22 not the applicable provision here, (c) is the
23 applicable provision. And as I said, no matter
24 what you do with the safety exception, you're
25 going to still have an intrastate provision

1 that is -- has broader preemptive force than
2 the interstate provision because (b) doesn't
3 have that with respect to transportation
4 across --

5 JUSTICE KAVANAUGH: What about the
6 financial security requirement?

7 MR. CLEMENT: So --

8 JUSTICE KAVANAUGH: If we're trying to
9 figure out what Congress was doing, which I
10 think you've talked about here in '94 and '95,
11 they say that the truckers have -- the trucking
12 companies have to have financial security so
13 they can pay judgments with respect to
14 accidents, but they don't do that on brokers.
15 And when you combine the two things we're
16 talking about, that does -- I mean, that's in
17 tension with your position.

18 But what's your best response to that?

19 MR. CLEMENT: Well, I think I have
20 several pretty good responses to that, I mean,
21 one of which is it's even more complicated than
22 that because freight forwarders were also
23 supposed to have some insurance against injury
24 risk. So -- so you can't make some idea that
25 everybody in the sub (b) is different from

1 everybody in the sub (c) if you're following me
2 on that. But more to the point --

3 JUSTICE KAVANAUGH: I am -- I am.

4 But, if Congress envisioned tort suits against
5 brokers, why not require brokers to have the
6 insurance to pay the judgments?

7 MR. CLEMENT: Because I -- I think
8 Congress rationally said we want to make sure
9 that they have a financial security requirement
10 that is responsive to the principal financial
11 risk that they face. And it's different with
12 respect to carriers than with respect to
13 brokers.

14 The principal financial security risk
15 that brokers have is default, but you can't
16 read too much into the insurance requirements
17 because nobody thinks that carriers can't
18 default. In fact, carriers are defaulting all
19 the time --

20 JUSTICE KAVANAUGH: All -- all the
21 time.

22 MR. CLEMENT: -- and going bankrupt --

23 JUSTICE KAVANAUGH: Yeah.

24 MR. CLEMENT: -- all the time. And so
25 you can't draw too strong an inference.

1 And what I would also say is there's
2 also sort of an asymmetry in the -- in the
3 inference that you would draw because, you
4 know, some lower courts, for example, have
5 focused on that insurance requirement by
6 finding that safety torts are not preempted in
7 the Airline Deregulatory Act context.

8 But that sort of makes sense because
9 it would be very weird for Congress to force a
10 carrier to insure against a risk that is
11 actually zero because the risk is preempted.

12 So, when -- when Congress says you
13 must insure against something, it's actually a
14 pretty positive sign that there's not
15 preemption. But I don't think it works the
16 other way around. There's all sorts of
17 contexts where you say things are not preempted
18 and Congress hasn't even thought to make
19 somebody insure against it.

20 So I just don't think, you know --
21 like, you know, I -- I -- like, I don't think
22 there is a presumption against preemption in
23 the express preemption context, but, boy, you
24 need something more than an insurance
25 requirement to ignore the plain text of a

1 clause that is designed to deal with the issue
2 of preemption straight up.

3 JUSTICE KAGAN: Can I take you back,
4 Mr. Clement, to Justice Kavanaugh's first set
5 of questions, the interstate/intrastate, and
6 you said you're -- you're not here to tell us
7 that it makes any sense.

8 Do -- do -- do you have a theory
9 whether or not it makes any sense about how it
10 came to be? I mean, why?

11 MR. CLEMENT: I think that, you know,
12 it was a different -- it was a different
13 Congress a year later. Maybe the interest
14 groups lobbied a little different a year later.
15 Maybe the same people weren't paying attention
16 a year later.

17 And, again, though, I -- I think the
18 critical thing, though, is the one thing we
19 can't ignore is that Congress made the
20 deliberate judgment to treat interstate and
21 intrastate differently.

22 Now, if -- if you really think they
23 should be the same, then maybe that's a reason
24 to not read the preemption clause to reach
25 safety-related torts altogether, as -- as lower

1 courts have read the ADA. I mean, if the
2 anomaly's really bothering you, that's the one
3 way you can make the anomaly go away.

4 Or, actually, suppose, you know, like,
5 the text of (b) is a little bit different and
6 it's so focused on intrastate rates, intrastate
7 routes, in -- like, intrastate services that
8 you could say that really, unless you're
9 talking specifically about intrastate services,
10 the preemption clause doesn't apply.

11 But, you know, maybe it's best to
12 leave all of that for a case that actually
13 implicates (b) because this is a (c) case, and
14 Congress clearly said, with respect to
15 interstate, at the -- at the moment it's
16 creating this new exception for intrastate,
17 brokers and freight forwarders, at the same
18 moment, it says, you know what we're going to
19 do, we're going to not treat brokers and
20 freight forwarders the same way for interstate
21 and intrastate and when it comes to interstate,
22 we're going to drop them into a -- a preemption
23 provision that has a safety exception.

24 I think that's what you have to sort
25 of try to interpret here. And then, if you get

1 to the safety exception, I think the question
2 of whether these negligent hiring torts against
3 a broker are with respect to motor vehicles is
4 quite straightforward.

5 And I think, if you understand the
6 nature of the 411 Restatement tort, the whole
7 reason that there is a negligent hiring tort in
8 certain circumstances but not others is because
9 you're hiring somebody to do something that has
10 the possibility of harm, bodily harm, to third
11 people -- third persons, rather.

12 And what creates the threat of bodily
13 harm to third persons in this context? It's
14 the 80,000-pound motor vehicle that you're
15 putting somebody behind the wheel of or you're
16 entrusting the -- the cargo to.

17 And so -- and that's true whether it's
18 a -- a tort against the -- the -- the broker or
19 against the carrier. And so, if I hire
20 somebody to just, like, paint my house and they
21 do a lousy job, like, shame on me, but there's
22 no negligent hiring of a contractor tort in
23 that context because just painting the house
24 isn't going to pose a risk of bodily harm to
25 third parties.

1 So what really triggers this whole
2 tort is a risk of bodily harm to third parties,
3 and the only thing in this mix that poses that
4 risk of bodily harm to third parties is the
5 motor vehicle. So, if you follow what tort
6 we're talking about here, it really does make
7 the connection to motor vehicles quite direct.

8 JUSTICE JACKSON: Mr. Clement, could
9 another way of thinking about this really be
10 focusing on (c), as you've encouraged us to do,
11 and how it operates, what it's doing?

12 It seems to me that one could conceive
13 of this as (c)(1), Congress coming in and
14 making a change to the status quo. This is the
15 deregulation point that you -- that you said.
16 And they say in that section that this
17 deregulation is occurring with respect to the
18 economic aspects of the system.

19 And then the safety clause, this part
20 that we're all focused on now, is really just
21 clarifying to some extent that what they have
22 done with respect to preemption is leaving the
23 status quo regarding safety.

24 And so Justice Thomas's point was --
25 was a good one; in other words, what was the

1 status quo? States were regulating with
2 respect to safety. So was the federal
3 government to some extent.

4 And if you think of it from that kind
5 of bird's eye view, I think it seems pretty odd
6 for Respondents to suggest that Congress was
7 really focused on who would be able to bring a
8 claim or how. It's sort of -- that's all up to
9 how the state was regulating. What is their
10 tort? What is their system? Congress was
11 just, it seems to me in this statute, saying
12 we're not touching any of that with respect to
13 the preemption that we are now establishing.

14 MR. CLEMENT: So I wouldn't resist one
15 word of that. I would say that's exactly how
16 the lower courts have approached this in the
17 context of the ADA, where you don't have a
18 safety exception, so your eyes don't
19 immediately go to the safety exception. But
20 still, courts have realized that long before --
21 like in the bad old days of federal reg --
22 economic regulation, you still had state tort
23 suits for personal injury and the rest.

24 And so, when Congress in the ADA says,
25 all right, we want to get rid of the federal

1 economic regulation and we don't want the
2 states replacing it with new economic
3 regulation of their own, but they had no
4 interest whatsoever in getting rid of all those
5 tort actions, and, as I say, as we say in the
6 briefs, but I think it's quite true, actually,
7 from Congress's perspective, if you want
8 economic deregulation, the last thing you want
9 is a huge uptick in accidents and lots of,
10 like, safety mishaps.

11 JUSTICE KAVANAUGH: Well, can I just
12 interrupt there just on the rhetoric. It's not
13 getting rid of safety tort suits. The tort
14 suits against the trucking companies, the
15 carriers, are still preserved. Everyone agrees
16 on that.

17 MR. CLEMENT: Sure. But the problem
18 is, once you agree to that, there's really no
19 coherent reason to stop there. Like, you're
20 looking at the state tort. And the state tort
21 is not a --

22 JUSTICE KAVANAUGH: I was just
23 responding to your point about safety
24 regulation being gone. No, safety regulation
25 through tort suits still exists, everyone

1 agrees, against the primary people who are
2 going to be sued, as I think you've
3 acknowledged, which are the -- the truckers,
4 the carriers.

5 MR. CLEMENT: Yeah. And I didn't mean
6 to get carried away with my rhetoric. My -- my
7 point was just like, if -- if you're a rational
8 deregulator, but all -- you know, you care
9 about, you -- you -- Chicago school, you want
10 economic freedom, the last thing you want at
11 that same moment is for there to be new safety
12 problems because that --

13 JUSTICE JACKSON: And -- and my -- my
14 point was -- was why would we think that given
15 the background that you're talking about, that
16 Congress would be focused on preserving only
17 the tort claims with respect to the truckers,
18 as opposed to the brokers, as opposed to
19 anybody else?

20 In other words, why -- Congress's
21 attention, it would seem to me, would not be at
22 the level of who is actually going to
23 ultimately be sued, you know, under tort in
24 these different states or whatnot. The point
25 of its regulation was just to say we are

1 concerned with economic deregulation. Those
2 who are regulating safety, carry on.

3 And under whatever state's law, if
4 they have a particular tort, if they had it
5 before, if it's operating, then Congress wasn't
6 bothering that. If it applied to brokers as
7 well as truckers, Congress wasn't bothering
8 that.

9 It just seems odd to me to think that
10 we would read this statute and all that it's
11 doing to have Congress caring about the
12 particular defendants who are going to be sued
13 at the end of the day.

14 MR. CLEMENT: Again, I couldn't agree
15 more, and I think, if you look at that L.B.
16 Foster case, 1969, Ninth Circuit case, I mean,
17 that's a case where the plaintiff sued the
18 shipper, the broker, and the carrier, and under
19 California law, they were all liable.

20 Now some other state might make a
21 judgment that we want to stop liability at the
22 broker and not have it go to the -- the
23 shipper. Or another state might say we want to
24 stop liability at the -- at the carrier. Maybe
25 a state -- I think it would be crazy, but maybe

1 a state wants to stop it at the driver.

2 All of those are judgments that the
3 states get to make. And I don't think, as you
4 suggested --

5 JUSTICE KAGAN: So, even if a shipper
6 uses a broker who then hires a motor carrier,
7 you think the shipper is included in this?

8 MR. CLEMENT: I -- I -- I do. I
9 think, in a -- in a sense, that's a much more
10 straightforward case. As long as the state
11 tort reaches them, then the shippers aren't
12 covered by the preemption clause.

13 And I actually -- so I -- I don't
14 think the shippers have much of an argument.
15 You know, you got to -- you got to start with
16 the argument that it's preempted and then
17 resist the safety exception. So the shippers
18 can't get off first base -- get to first base
19 because they're not covered by the preemption
20 clause.

21 And one of the anomalies that the
22 other side's position creates, I mean, you
23 know, they -- they like to talk about the
24 brokers as just being middlemen or middle
25 persons. But they're middlemen between

1 shippers and carriers, who both, at least in
2 some states, are liable for this negligent
3 hiring tort.

4 So it's weird to have the middleman
5 between two people that are potentially liable
6 immune, and if you allow that to happen, it
7 creates a huge artificial incentive for
8 shippers to use brokers because that's a way
9 they can try to download or --

10 JUSTICE KAVANAUGH: What --

11 MR. CLEMENT: -- and the other thing
12 they can do is --

13 JUSTICE ALITO: What if --

14 MR. CLEMENT: -- they can actually
15 reinvent themselves as -- as -- as brokers --

16 JUSTICE ALITO: As far as --

17 MR. CLEMENT: -- like --

18 JUSTICE ALITO: I'm sorry.

19 MR. CLEMENT: No, I'm sorry.

20 JUSTICE ALITO: Yeah. As -- as far as
21 federal law is concerned, how far does "with
22 respect to motor vehicles" extend? I mean,
23 this is a classic question of causation. Does
24 it extend to anything that could contribute to
25 an accident?

1 MR. CLEMENT: So I'm not sure that it,
2 you know, sort of goes, like, to, you know, the
3 butterfly effect and all of that kind of thing.
4 What this Court has said in lots of contexts is
5 it doesn't have to be, like, super-direct.
6 There's no direct link requirement. But, at
7 the same time, things that are attenuated,
8 peripheral, and remote, I think is the phrase
9 this Court has used on a couple of occasions,
10 are not covered.

11 Now, here, I think it's a pretty easy
12 way to say that this is not wildly indirect for
13 purposes of --

14 JUSTICE ALITO: Yeah, no, I -- I see
15 that. But do you think there is some
16 limitation in the phrase "with respect to"?

17 MR. CLEMENT: Yeah. Absolutely. But
18 it's -- but -- but I would say, like, if -- if
19 I were, like, sitting on Congress's shoulder
20 and saying, all right, we want direct
21 connections only, I would say don't use the
22 "with respect to" language.

23 JUSTICE ALITO: And the limitation is
24 proximate cause under state law? Is that the
25 limitation?

1 MR. CLEMENT: Well, that's one
2 practical limitation in this context because
3 you can't bring a tort against a broker under
4 state law unless you satisfy the proximate
5 cause requirement.

6 JUSTICE ALITO: Yeah. Well, I --

7 JUSTICE KAVANAUGH: The --

8 JUSTICE ALITO: -- understand this is
9 pretty direct, but if something has to be --
10 some kind of directness requirement or a -- a
11 minimum link requirement has to be read into
12 (c)(2), then I come back to the question that
13 Justice Kavanaugh led up with, which is the
14 real anomaly, which is very hard to accept,
15 that there's preemption for intrastate activity
16 but not for interstate activity, and I came to
17 the argument hoping you were going to give us
18 some brilliant way of reconciling these two
19 provisions other than just live with it, but I
20 guess there's no -- there is no such theory.

21 MR. CLEMENT: If there is, it has
22 escaped me. But, as I say, I do think it's
23 telling that you're going to have a broader
24 intrastate -- intrastate preemption clause no
25 matter how you decide this case.

1 The other thing is I would say I don't
2 think -- I mean, that would really be letting
3 the tail wag the dog. You know, I've looked
4 through all these cases. I think there are two
5 intrastate cases that I've been able to find.
6 Maybe my friends have found more. But there
7 are, you know, dozens and dozens of interstate
8 cases.

9 And the intrastate cases I've found
10 have actually said there's no preemption on
11 sort of the ADA, that's not what this is all
12 about. So I think it would be a mistake to let
13 the absence of the safety exception in (b) be
14 the tail that wags the dog.

15 JUSTICE KAVANAUGH: What do you --
16 what do you do with the fact that the
17 brokers -- I think the amicus brief of the
18 Transportation Intermediaries Association,
19 particularly pages 20 to 24 -- really go in
20 detail of, if tort liability extends to them,
21 how are they going to assess and evaluate the
22 safety of drivers in a particular trucking
23 company? How are they going to figure out do
24 they have an alcohol/drug issue? How are they
25 going to figure out English proficiency, which,

1 of course, is a critical issue at the current
2 moment that's being discussed? How are they
3 going to do this is the real concern that's
4 raised in that brief and by Respondents that I
5 think, you know, is something you need to
6 respond to.

7 MR. CLEMENT: Sure. I'll try to
8 respond to it, and I think it may be much more
9 straightforward than you think in many cases.

10 I mean, ultimately, like, the legal
11 answer is it's the "know or should have known"
12 standard. But, in --

13 JUSTICE KAVANAUGH: But, usually, when
14 you say that -- sorry to interrupt -- you know,
15 there's some way for the tortfeasor to -- to
16 protect themselves, and -- and what they're
17 saying here is, in the real world of how
18 brokers operate, it's very difficult.

19 MR. CLEMENT: So I think it's going to
20 be pretty easy for them to protect themselves
21 by hiring quality carriers. And --

22 JUSTICE KAVANAUGH: And that's going
23 to favor the -- so this whole thing's going to
24 really favor the large established carriers
25 over the smaller carriers because they're going

1 to default to that to protect themselves, I
2 think, which is fine, but I just want the
3 implications of your position to be understood.

4 MR. CLEMENT: Look, you can be a safe
5 small carrier. And here's the thing, and this
6 is where --

7 JUSTICE KAVANAUGH: They tend -- they
8 tend not to be as safe as the larger ones,
9 correct?

10 MR. CLEMENT: Well, some of them tend
11 to be very unsafe, and some of them tend to
12 be --

13 JUSTICE KAVANAUGH: Right.

14 MR. CLEMENT: -- these chameleon
15 carriers where they -- their safety record is
16 terrible and then they show back up. And the
17 situations where there should be liability is
18 when the broker knows, like, or should know
19 that it's a chameleon carrier. If they've just
20 been dealing with this carrier as, you know,
21 Joe's Trucking run by Joe Smith, and then all
22 of a sudden Joe Smith shows up and this time
23 it's Smith Trucking, like, the carrier is going
24 to know that -- the broker's going to know
25 that.

1 And here's one of the things that sort
2 of helped me understand all of this, which is
3 you have a number of situations where there is
4 a captive carrier, where that carrier does only
5 loads for C.H. Robinson. And so, in that
6 circumstance, C.H. Robinson is going to know
7 every bit as much as the carrier is going to
8 know in those circumstances.

9 Now there are going to be other
10 situations, like, say, they can protect
11 themselves, but they can also protect
12 themselves by asking some questions and having
13 some screens. I mean, this is a case where
14 C.H. Robinson's own policy says that they don't
15 hire carriers that have conditional safety
16 ratings, but they did it here anyways.

17 So, you know -- so you have cases like
18 that where, yeah, you can worry a little bit
19 about how they're going to protect themselves,
20 but they already take some efforts. And when
21 they blow their own sort of standards or,
22 like --

23 JUSTICE KAVANAUGH: Well, they were
24 relying on the federal government standards
25 because the federal government regulates the

1 trucking companies and -- and kind of certifies
2 them.

3 MR. CLEMENT: In a -- in a very --

4 JUSTICE KAVANAUGH: And that's
5 probably not good enough, is what you're
6 saying, which I -- I don't -- and I'm not
7 taking issue with that, but -- but that's what
8 they've been relying on in the past, right?

9 MR. CLEMENT: But the federal
10 government regulates in a very minimal way, and
11 the federal statute specifically says it's a
12 minimum, not a maximum, and states are free to
13 go above that. And, I mean, you really can't
14 underestimate, like --

15 JUSTICE KAVANAUGH: Again, for the
16 carriers, that begs the question, but keep
17 going. Yeah.

18 MR. CLEMENT: I mean, you know, the --
19 you know, the statistics that the amicus briefs
20 have shown is that roughly 94 percent of
21 carriers have not had, like, a safety exam by
22 the federal government. And the way this works
23 is, to get on the road in the first instance,
24 you do not have to go through some -- I mean,
25 it's -- it's kind of less rigorous than getting

1 your state driver's license for a car. So --

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel.

4 Justice Thomas, anything further?

5 JUSTICE THOMAS: Would you take a
6 minute and walk me through why you think or why
7 it's -- it's agreed here that subsection (2)
8 regulates safety in intrastate cases?

9 MR. CLEMENT: So -- oh, the argument
10 would be that, you know, if you -- if -- if
11 this were a (b) case, and I was trying to argue
12 that safety is not -- is -- is not preempted,
13 what I would do is I would make an argument
14 sort of like I would make in the airline
15 deregulation context, which is to say there
16 were these tort claims beforehand, they
17 probably -- like, the last thing anybody would
18 have thought was going to be preempted
19 beforehand was an intrastate tort claim.

20 JUSTICE THOMAS: Mm-hmm.

21 MR. CLEMENT: And all Congress was
22 trying to do with (b) is to make sure when they
23 deregulate interstate that there aren't these
24 sort of confusing intrastate regulations of the
25 same economic things. So that would basically

1 be my argument.

2 I -- you know, I could -- I could warm
3 to it and try to get a little more textual and
4 try to say that, you know, it's written a
5 little bit differently, and it really does
6 focus on intrastate rates, intrastate routes,
7 intrastate services of any freight forwarder or
8 broker. And it's just a little hard to think
9 of these, like, negligent hiring things as
10 being sort of, like, distinctly intrastate, but
11 it's a harder case than (c), I'll -- I'll grant
12 you that.

13 JUSTICE THOMAS: Was there ever any
14 federal involvement during the ICC era with
15 intrastate shipping?

16 MR. CLEMENT: No, that was -- I mean,
17 except in one or two areas where they felt like
18 they had to do it to rationally regulate
19 interstate, but the -- under the old ICC, the
20 basic division of labor was interstate,
21 federal; intrastate, state.

22 JUSTICE THOMAS: So why would this
23 have any application at all just structurally
24 to intrastate shipping? If -- if the
25 deregulatory effort is to deregulate covered

1 areas and this area was not intrastate, why
2 would it have any application at all?

3 MR. CLEMENT: Oh, I -- I -- my -- I'm
4 surmising now, but I think the idea was, okay,
5 like, in a world where everything's regulated
6 at the federal level, it's pretty easy to sort
7 of hand off, like, regulation to the states
8 when it's intrastate, but in a world where you
9 really want the free markets to sort of
10 prevail, having this little island of state
11 economic regulation of intrastate starts to
12 seem, like, less wholesome and it's sort of
13 interfering with the federal objection --
14 objectives.

15 And in this regard, it's probably
16 worth recognizing, you know, the federal
17 deregulation takes place in 1980. They don't
18 impose the preemption provision generally until
19 '94. And then they don't address brokers and
20 freight forwarders until 1995.

21 So, for 15 years, the federal
22 government was perfectly happy to deregulate at
23 the federal level and let the states kind of do
24 what they want. And then, at a certain point,
25 I'm surmising that they said some of the state

1 regulation is getting in the way of our federal
2 economic deregulatory objectives, but at the
3 same time, you know, the one place -- well, in
4 the two places because they did it for
5 passenger too, they -- they really did try to
6 preserve state regulatory authority with
7 respect to safety in motor vehicles.

8 CHIEF JUSTICE ROBERTS: Justice Alito?
9 Justice Sotomayor?

10 JUSTICE SOTOMAYOR: I -- I paused when
11 I was reading the briefs in this case. Is the
12 intrastate preemption subject to challenge?
13 Because, if it's been decoupled from interstate
14 commerce, under what congressional power could
15 there -- could the government preempt?

16 MR. CLEMENT: I'm -- I'm guessing. I
17 mean, it's probably a pretty good question for
18 the federal government. If I had to make the
19 argument for them, I would say that it's under
20 the Necessary and Proper Clause, and it would
21 be under the theory that they needed to
22 regulate the intrastate in order to rationally
23 deregulate the -- the interstate, but I -- I
24 guess I'll take the question as a friendly
25 amendment as just one more reason to leave the

1 intrastate provision for a case where it's
2 actually at issue because the one thing that's
3 crystal-clear here is they have no (b)
4 argument. This is interstate. And so --

5 JUSTICE SOTOMAYOR: Yes. And I do
6 understand what you're saying to Justice
7 Kavanaugh and Alito, which is the difference
8 between intrastate and interstate is even wider
9 than whether you cover brokers or not because
10 intrastate, they're preempting everything, not
11 just whether it's in transport of property.

12 MR. CLEMENT: Right. And, you know,
13 like, if I were going to warm to the topic of
14 having to have a theory of how all this works,
15 I suppose, if what they were really trying to
16 do in 1995 is make sure that the state
17 regulation sort of doesn't interfere, maybe
18 they just address it a little bit differently.

19 JUSTICE SOTOMAYOR: All right. Could
20 I stop you to go back on the shipper question?
21 Because one of my questions in my mind was how
22 far back can you go. Could you go to the
23 shipper? And you're saying in many states you
24 can. Would that be for -- for hiring a
25 negligent carrier or for hiring a negligent

1 driver?

2 MR. CLEMENT: So --

3 JUSTICE SOTOMAYOR: Meaning, is it
4 auto -- is the liability automatic for the
5 shipper?

6 MR. CLEMENT: So, under certain
7 circumstances, and I think the most
8 circumstances it would be for hiring a
9 negligent carrier, but I think it also could
10 get to the driver level.

11 I mean, I think, you know, in a case
12 like this, like, you know, and this happens
13 more frequently than you think. I mean, I
14 think one of the other statistics in the amicus
15 brief is some 50 percent of all carriers only
16 have one driver. So particularly if you're a
17 broker, you may very well know not just what
18 carrier you're getting but what driver you're
19 getting.

20 JUSTICE SOTOMAYOR: Driver you're
21 getting. But your point is that the shipper
22 would not be preempted under any circumstance.
23 So this lawsuit doesn't have a defense under
24 this Act if you're suing the shipper?

25 MR. CLEMENT: If you're suing the

1 shipper, that's right. Now there is an amicus
2 brief here that's, you know, or two actually, I
3 think, on behalf of shippers that are making
4 what I think is kind of an extravagant argument
5 that they are covered by the preemption
6 provision even though it obviously doesn't
7 address shippers and it only addresses
8 carriers, brokers, and freight forwarders.

9 JUSTICE SOTOMAYOR: Do you happen to
10 know if there are lawsuits against shippers
11 that go on routinely?

12 MR. CLEMENT: My -- my understanding
13 is that there are, and -- but my understanding
14 is that, you know, it's also caused some
15 shippers to start using brokers because --

16 JUSTICE SOTOMAYOR: Because it's a way
17 to try to --

18 MR. CLEMENT: -- at least it gives you
19 a colorable textual preemption argument to use
20 a broker.

21 JUSTICE SOTOMAYOR: Got it. Thank
22 you.

23 CHIEF JUSTICE ROBERTS: Justice Kagan?

24 JUSTICE KAGAN: Mr. Clement, the
25 government has an argument -- I think it's the

1 government, it might be the Respondents too --
2 that your theory makes this "with respect to
3 motor vehicles" phrase superfluous. I was just
4 wondering what you would say about that.

5 MR. CLEMENT: I was hoping you would
6 ask.

7 So I think there's a -- there's a big
8 problem with that argument because I think
9 it -- it sort of fails to appreciate how broad
10 the definition of "transportation" is. And the
11 statutory definition of "transportation" that's
12 relevant for this part of the statute is
13 reproduced at pages 18 and 19 of the petition
14 if you have that.

15 But it's incredibly broad definition.
16 And it's -- it's 23(a). And the first thing in
17 the definition is a motor vehicle, and then it
18 then goes on to list 10 other things: Vessel,
19 warehouse, wharf, pier, dock, yard, property,
20 facility, instrumentality, or equipment of any
21 kind.

22 And then there's a (b) clause that
23 goes on and talks about services related to
24 movement, including receipt, delivery,
25 elevation -- I had to look that one up and

1 figured out they were actually talking about
2 grain elevators -- transfer and transit,
3 refrigeration, icing, ventilation, storage,
4 handling, packaging, unpackaging, and
5 interchange of passengers.

6 So there is an enormous amount of
7 things that come within the broad definition of
8 "transportation" that do not involve motor
9 vehicles. So there's no superfluity problem
10 here at all.

11 And I'd -- I would say that the
12 breadth of that definition of "transportation"
13 is maybe one more reason to think that maybe
14 you should decide this case either just on the
15 safety exception, or maybe you should say the
16 preemption clause doesn't apply here at all to
17 safety torts a la the lower court handling of
18 the ADA cases because, if somebody gets injured
19 on a wharf or a pier or a dock, there's no way
20 that's with respect to a motor vehicle or it
21 could certainly not be.

22 And it would be pretty weird if that
23 were preempted. But, of course, the old ICC
24 had a pretty broad sense of what it got to
25 regulate, including the routes and charges and

1 services for, like, a grain elevator.

2 So -- so I do think there are real
3 reasons for caution here, but I'm glad you
4 asked the question because I do think the more
5 you appreciate the breadth of the statutory
6 definition of "transportation," the less
7 persuaded you would be by that superfluity
8 argument.

9 JUSTICE KAGAN: Thank you.

10 CHIEF JUSTICE ROBERTS: Justice
11 Gorsuch?

12 Justice Kavanaugh?

13 JUSTICE KAVANAUGH: If you prevail
14 here, I just want to pick up on what brokers
15 will need to do. So you prevail here, then
16 you're counsel to a broker, say, and the broker
17 is worried about, you know, the issue The Wall
18 Street Journal focused on yesterday, the
19 English language proficiency of drivers who
20 can't read signs, okay? And so the broker
21 says: I don't want to select a carrier that
22 hires drivers that are not proficient in
23 English language.

24 How do they do that? And do they need
25 to do that? And how do they do that? Because

1 that's a lot of the current discussion, is
2 there are a lot of different issues, but that's
3 one that's currently in the current events.

4 MR. CLEMENT: So a complicated
5 question. I'd probably give them a pretty long
6 memo, and, you know, I'd start by saying I'm
7 not sure these, like, English language
8 requirements are really sort of safety
9 regulations with respect to motor vehicles.

10 Maybe they are, I mean, but, like, I
11 think that's a debatable question sort of at
12 the threshold. And then --

13 JUSTICE KAVANAUGH: Well, why not? If
14 you can't read -- if you're hiring drivers who
15 can't read the signs, that seems like a safety
16 issue.

17 MR. CLEMENT: If -- if -- if you say
18 so. I mean, you know, I -- I -- like --

19 JUSTICE KAVANAUGH: Assume that's
20 true. Keep going then.

21 MR. CLEMENT: Okay. Assume that's
22 true. Then I've got to, like -- you know, I
23 want to address whether, like, I'm violating
24 some other federal law by discriminating on the
25 basis of English language proficiency. And I

1 haven't sort of thought all that through, but
2 it's not obvious to me that you can do that.
3 But assuming you can --

4 JUSTICE KAVANAUGH: Well, the federal
5 government now tests for that for the drivers.

6 MR. CLEMENT: Yeah, I bet that's being
7 challenged somewhere. But -- but -- but let's
8 assume --

9 JUSTICE KAVANAUGH: Yeah.

10 MR. CLEMENT: -- that, you know, we're
11 on to the last part of my memo, we'll assume
12 that that's also legal, then I would say, okay,
13 like, you can use large carriers, but if you
14 do, make sure that they have an adequate
15 testing program, and if you do, you're done.

16 And -- and the carriers will have
17 every incentive to have that themselves because
18 everybody thinks the carriers are liable, so if
19 we don't have problems with the two threshold
20 questions, then the carriers are going to have
21 to do it.

22 So the brokers should be in a pretty
23 good position. They just have to hire carriers
24 that actually have a reasonable policy for
25 dealing with that, and if they want to have

1 smaller carriers, that's great, but they just
2 need to --

3 JUSTICE KAVANAUGH: The same for,
4 let's say, drug use?

5 MR. CLEMENT: Yeah.

6 JUSTICE KAVANAUGH: They're asking the
7 carriers what do you -- they've got to get
8 something from the carriers that say we're
9 checking our drivers for -- for drug use,
10 alcohol background, safety checks, prior
11 accidents, all that?

12 MR. CLEMENT: Right. But what you
13 don't want them to do is not even ask that
14 question --

15 JUSTICE KAVANAUGH: Right.

16 MR. CLEMENT: -- and then hire
17 somebody who's cheaper and then -- because, you
18 know, one of the reasons, I think, that you do
19 want them to have to have some duty of care in
20 these circumstances is this is a margin
21 business.

22 JUSTICE KAVANAUGH: Yeah.

23 MR. CLEMENT: So, if -- you know, if
24 they don't have the -- any sort of incentive to
25 internalize any of the costs of not asking the

1 question, they really have no good reason to
2 ask the question. They want to hire the
3 cheapest carrier.

4 JUSTICE KAVANAUGH: So the real-world
5 effect, again -- and I think this may help your
6 position, so this is not a hostile question --
7 is the -- the brokers are going to be really
8 digging into the carriers' safety background
9 checks of drivers if -- if you prevail in this
10 case, and that, I don't think you should shy
11 away from that. I just want to make sure
12 that's what you think is going to happen.

13 MR. CLEMENT: Yeah, but, you know, I
14 think it's -- it -- I -- I worry a little bit
15 about digging into because -- because, you
16 know, in fairness --

17 JUSTICE KAVANAUGH: Well, they want
18 to -- they don't want to get sued for millions
19 of dollars, so they should dig in, shouldn't
20 they, if you're their counsel?

21 MR. CLEMENT: I'd tell them -- as
22 their counsel, I'd probably say, out of an
23 abundance of caution, dig in, but I would also
24 say I wouldn't -- you know, I wouldn't, like,
25 be alarmist about this because the carriers --

1 everybody agrees the carriers are going to have
2 to do this.

3 JUSTICE KAVANAUGH: Mm-hmm.

4 MR. CLEMENT: And so, as long as
5 you're not hiring fly-by-night carriers who
6 aren't doing it and are -- have the minimum
7 \$750,000 of insurance, like -- and you can hire
8 small, you can hire -- you know, small is
9 beautiful if -- if they do it right.

10 But you do have to sort of ask those
11 questions and make sure that, you know, they're
12 in a position where they are doing everything
13 they can. And then, if you do that, I would
14 think the broker is not going to have a problem
15 if it's asking the hard questions of the
16 carrier.

17 JUSTICE KAVANAUGH: Thank you.

18 CHIEF JUSTICE ROBERTS: Justice
19 Barrett?

20 JUSTICE BARRETT: Mr. Clement, assume
21 that I -- and this is just an assumption --
22 assume that I think (c)(1) doesn't apply and
23 it's not preempted. What would be the
24 advantage of deciding this case based on the
25 safety exception rather than the preemption

1 provision?

2 MR. CLEMENT: So the principal
3 advantage of deciding this case on (c)(2), on
4 the -- (c)(2)(B) or whatever it is, like, that
5 might not really move you if you actually don't
6 think it's preempted under the principal
7 preemption provision, but the principal --

8 JUSTICE BARRETT: I said that
9 backwards. I mean say that I think you might
10 win under (c)(1) because I don't think it's
11 preempted.

12 MR. CLEMENT: Right.

13 JUSTICE BARRETT: Why would I decide
14 it, or is there any reason to decide it?

15 MR. CLEMENT: Under those
16 circumstances, there's not much. But I will
17 say this. Like, you know, I think the question
18 about whether the ADA preemption provision
19 applies to safety-related torts is a hard one.

20 JUSTICE BARRETT: Mm-hmm.

21 MR. CLEMENT: And I think anything you
22 say about the principal preemption provision
23 here is, I think, going to have some carryover
24 effects in the ADA context. That's, after all,
25 why the Airlines for America filed an amicus

1 brief urging you to sort of decide it that way.

2 And I think you might want to hold
3 that issue, which is a tricky one, harmless.
4 And the way you hold that issue completely
5 harmless is save it for another day when it
6 actually matters, and you just decide this case
7 on the basis of text that's not in the ADA.

8 JUSTICE BARRETT: Okay. Let me flip
9 it. Let me say that I am very -- I do think
10 it's a hard question. I'm very skeptical about
11 whether the preemption provision applies or
12 not. Is there anything that -- and let's say
13 that I think that you win under the safety
14 exception.

15 Is there anything that an opinion
16 might say about the safety exception that might
17 prejudice that question when we confront it
18 later, the preemption provision?

19 MR. CLEMENT: I don't really see how
20 it could because it's text that's not in the
21 ADA. And I suppose everything I'm saying about
22 the ADA would also be if you ever do get one of
23 these (b) cases and -- you know, with
24 intrastate, that would be another thing that
25 you're not prejudging if you decide this case

1 just based on the text of the safety exception.

2 JUSTICE BARRETT: Same on (c)(1)

3 because the text is the same in the ADA?

4 MR. CLEMENT: Yeah.

5 JUSTICE BARRETT: Yeah.

6 MR. CLEMENT: Yeah. Exactly.

7 Exactly.

8 JUSTICE BARRETT: Okay.

9 CHIEF JUSTICE ROBERTS: Justice
10 Jackson?

11 JUSTICE JACKSON: So I guess I'm still
12 struggling to see how the policy concerns that
13 you explored with Justice Kavanaugh really are
14 being addressed in this statute.

15 I mean, this is not a liability
16 statute as I see it. It's not setting up a
17 cause of action for any kind of trucking
18 accident. It's leaving it to the state.

19 So the concerns about the extent to
20 which the brokers are involved in this or
21 will -- you know, other kinds of defendants or
22 how much liability, don't those come out state
23 by state depending upon what claims are being
24 made as you read this statute?

25 MR. CLEMENT: No, I mean, that's

1 absolutely true. And, you know, you have an
2 amicus brief from 28 states and they pulled off
3 the incredible feat of having California and
4 Texas on the same amicus brief.

5 (Laughter.)

6 MR. CLEMENT: And, you know, that
7 shows there is a lot of variety in the state
8 tort laws. And I think -- you know, there are
9 a couple of states that don't have this tort.
10 But it does go all the way back to the First
11 Restatement, and most states, the overwhelming
12 majority of states, have this tort.

13 But, like --

14 JUSTICE JACKSON: And if -- and the
15 ones that don't, then the brokers in that state
16 wouldn't be held liable for them, or all the
17 arguments about, like, how -- how do we do this
18 seem like they'd be made to the state
19 legislature who's trying to hold them liable.
20 It's not in this statute, I think, because it
21 doesn't suggest to me, looking at this text,
22 that Congress was focused on the result of
23 this, other than to say we are preempting with
24 respect to rates, et cetera, et cetera.

25 Can I just ask you one more thing?

1 The -- the government is focused a lot on the
2 definition of "motor carriers" that is in this
3 statute, and I guess I'm wondering whether that
4 really matters from the standpoint of how we
5 understand your arguments related to (c).

6 Is this turning at all on us focused
7 on the definition? I thought this was about,
8 in your view, with related -- what is it --
9 "with respect to" as opposed to the definition
10 of "motor vehicles."

11 MR. CLEMENT: Right. There's a --
12 there's a couple of things there, I mean --

13 JUSTICE JACKSON: Yeah.

14 MR. CLEMENT: -- which is to say, you
15 know, that there's some focus on motor -- the
16 definition of "motor carrier" or "motor
17 vehicle." But, like, I don't think any of that
18 matters here for the reason that you said, both
19 that we're really thinking about, like, the
20 state judgment, whether it's a state judgment
21 about safety, and then, at the same time, like,
22 nobody doubts there's a motor vehicle here.

23 JUSTICE JACKSON: So it doesn't
24 matter -- we -- we don't have to focus in
25 resolving this case on the definition of "motor

1 vehicle" in your view?

2 MR. CLEMENT: I -- I don't think so.
3 Like, nobody really disputes that there's,
4 like, a motor vehicle at the center of this
5 case that caused, you know, grave injuries to
6 my client. So the only question is, is sort of
7 the state safety regulation sufficiently
8 closely related to that motor vehicle?

9 And as I've tried to explain, it
10 really is quite closely tethered because the
11 whole reason you have a negligent hiring tort
12 is because you're talking about something that
13 poses a danger of harm to third parties, and
14 the thing that poses the danger of harm to
15 third parties in this context isn't some
16 brokerage forum. It's the 80,000-pound truck.

17 JUSTICE JACKSON: Thank you.

18 CHIEF JUSTICE ROBERTS: Thank you,
19 counsel.

20 Mr. Boutrous.

21 ORAL ARGUMENT OF THEODORE J. BOUTROUS, JR.,
22 ON BEHALF OF THE RESPONDENTS

23 MR. BOUTROUS: Mr. Chief Justice, and
24 may it please the Court:

25 Congress assigned freight brokers a

1 defined role to arrange for transportation of
2 property by connecting shippers with motor
3 carriers. Petitioner's tort claims target that
4 core service, so the claims are preempted.

5 The only real question here is whether
6 these claims are saved as the safety regulatory
7 authority of a state with respect to motor
8 vehicles. They are not.

9 Brokers lack sufficient connection to
10 motor vehicles. Brokers don't own, operate, or
11 control motor vehicles. Text, context,
12 history, and precedent confirm this. A few
13 examples. First, the savings clause uses the
14 phrase "with respect to motor vehicles," which,
15 in this Court's words in *Dan's City*, is
16 massively limiting, and it applies specifically
17 only to motor vehicles -- the definitions do
18 matter here -- not transportation of property,
19 which is much broader by statutory definition.

20 Second, subsection (b) expressly
21 preempts state law claims related to intrastate
22 broker services and has no savings clause. It
23 is unthinkable, it's absurd that Congress would
24 have saved states' authority to regulate
25 interstate but not within its own borders.

1 Third, Congress required only carriers
2 to insure against personal injury liability for
3 motor vehicle accidents and only required
4 brokers to have insurance for freight charges.
5 And that mirrored what the ICC said just a few
6 years earlier, that brokers were not
7 responsible for personal injury damages. And
8 it was the expert agency.

9 Finally, this isn't a deeply rooted
10 tort. We challenged Petitioner to find one
11 single negligent selection case involving a
12 federally licensed broker in American history
13 and at common law, and they came up empty. It
14 didn't start until 2004.

15 Petitioner's asking this Court to
16 disrupt the uniform federal regime by
17 green-lighting new state law duties even more
18 onerous than the special checking system that
19 the Court said was preempted in *Rowe v. New*
20 *Hampshire Motor*.

21 I welcome the Court's questions.

22 JUSTICE THOMAS: If brokers are as
23 attenuated in the process as you say, wouldn't
24 they fall out in a tort action from a causation
25 standpoint, proximate cause standpoint?

1 MR. BOUTROUS: Only after a great deal
2 of litigation, Your Honor. What happens in
3 these cases is the brokers are now named
4 automatically. And if you look at the
5 complaint, it's all information and belief.
6 This -- this notion that the company violated
7 its own policies regarding a conditional
8 rating, information and belief. They -- they
9 do this in every case. It's basically strict
10 liability claims against the brokers for having
11 connected the shipper and the carrier.

12 And so, after a lot of litigation, the
13 burdens are tremendous. C.H. Robinson is a big
14 company, has many, many of these cases pending,
15 when it did nothing wrong and when the drivers
16 and the carriers did nothing wrong. So it
17 burdens interstate commerce.

18 And Mr. Clement was arguing for a
19 patchwork, the very patchwork that Congress
20 intended to end, of states imposing their
21 varied standards.

22 JUSTICE THOMAS: But you -- the -- you
23 mentioned that you can't find cases from an
24 earlier time. Isn't that a part that brokers
25 are playing a more pronounced role now than

1 they did in the past?

2 MR. BOUTROUS: Well, my client's been
3 around for over a hundred years. Brokers have
4 been involved all along in the process. The
5 cases -- I love the L.B. Foster case that
6 Mr. Clement banks his whole case on. It was a
7 1969 case involving a shipper -- the broker was
8 not even at issue on appeal -- who had hired an
9 unlicensed broker, so there was a broker
10 involved, and an unlicensed carrier. That's
11 the best they could do. There wasn't a
12 federally licensed broker or federally licensed
13 carrier involved.

14 His Restatement example, Your Honor,
15 he -- he -- he wants to -- us to ignore what
16 the ICC said in 1987, that brokers are not
17 responsible for personal injury liability, and
18 assume Congress knew that in 1934 the
19 Restatement cited a case about a hotel
20 concierge whose omnibus was broken, so he hired
21 someone else to take people to the train depot.
22 That's the history he's relying on.

23 The reason there isn't a history on
24 this, Justice Thomas, is that the -- the ICC
25 and the federal regime was viewed by the states

1 and by the -- by this Court in Castle as being
2 the -- the -- the -- the entity that says
3 whether carriers could traverse in interstate
4 commerce. So there were no -- states could not
5 deem a carrier or a driver unfit. That would
6 thwart the federal licensing regime that
7 existed then and that exists now.

8 JUSTICE THOMAS: What was the
9 treatment by the ICC of intrastate shipping,
10 purely intrastate? And there were certain
11 products that were not covered by the ICC. How
12 were those treated?

13 MR. BOUTROUS: I -- I think what the
14 ICC would have probably -- they would have
15 captured those in its regulation to the extent
16 they were within the chain of interstate
17 commerce. And this goes to some of the
18 questions about Section (b).

19 I -- I do think the quote from
20 Mr. Clement that he has no answer, no idea why
21 Congress would have had preemption intrastate
22 be complete, with no saving clause, but to have
23 saved these claims interstate.

24 But I think that to the extent in the
25 chain of interstate commerce -- and this goes

1 to Justice Sotomayor's question about
2 constitutionality -- I think there is a
3 connection between purely intrastate activities
4 and interstate commerce in some instances.

5 The other point I wanted to -- to make
6 is the -- the briefs and Mr. Clement today
7 really hammer on this notion that Congress was
8 looking at economic deregulation, and safety,
9 of course, it -- it was not touching.

10 It clearly cared about safety. The --
11 the FMCSA, the fed -- the expert agency that
12 now exists, has enormous federal power over
13 safety and wrote 700 pages of regulations, and
14 it's in a partnership with the states who
15 endorse -- I think most, if not all, have
16 endorsed the safety standards of the federal
17 government.

18 JUSTICE JACKSON: Yes, it -- it cared
19 about it in -- in the way that you're talking
20 about, but, really, the -- the relevant focus,
21 I think, needs to be on what it was doing in
22 this statute.

23 And what concerns me about the way
24 you've set this up is you are suggesting, I
25 think, that the preemption part of this was

1 also covering state regulations with respect to
2 brokers as they relate to safety and that then,
3 when Congress came in and put in the -- the --
4 the -- the savings clause as a part of this, it
5 was leaving brokers preempted with respect to
6 what they do that might implicate safety.

7 But that's not the way I think the
8 statute reads. It seems like the preemption is
9 smaller than you're giving it credit for to
10 begin with.

11 MR. BOUTROUS: The -- the preemption
12 is very broad. As, again, Mr. Clement kindly
13 outlined, transportation of property is --
14 that's what's preempted.

15 JUSTICE JACKSON: No, no, no.

16 MR. BOUTROUS: Yes.

17 JUSTICE JACKSON: Laws related to a
18 price, route, or service of any motor carrier.

19 MR. BOUTROUS: Or broker with respect
20 to transportation of property.

21 JUSTICE JACKSON: Transportation of
22 property. But -- but -- but I think what's
23 doing a lot of the work in this, in
24 understanding the scope of preemption, is the
25 states may not enact or enforce a law related

1 to a price, route, or service. And if you read
2 it that way, then the savings clause is focused
3 on what the state can do concerning safety.

4 MR. BOUTROUS: No. Well, it is, Your
5 Honor, but it's safety with respect to motor
6 vehicles. And the -- the preemption clause,
7 everyone -- we're not disputing that a tort
8 claim that -- that targets the services of the
9 broker -- and this goes to the essence, as the
10 Seventh Circuit said, as Aspen said in the
11 Eleventh Circuit, this is the essence.

12 What brokers do is match the carrier.
13 Counsel's depiction of what brokers do is
14 completely divorced from reality. They're not
15 interviewing and investigating. They're
16 matching up federally approved carriers with
17 shippers, and they want them to be safe because
18 they want their shipper clients to keep hiring.

19 JUSTICE JACKSON: There's no duty of
20 the broker to -- to -- to check the safety
21 records when it's doing that match?

22 MR. BOUTROUS: No, Your Honor. In
23 fact, they can rely -- they're supposed to rely
24 on the federal government's licensing. That's
25 what the court said in -- in --

1 JUSTICE JACKSON: As a matter of state
2 law, the state --

3 MR. BOUTROUS: That's --

4 JUSTICE JACKSON: -- could not impose
5 a duty on them to make sure that they pick and
6 match the -- the -- the best in terms of safety
7 record?

8 MR. BOUTROUS: That -- that's exactly
9 the question in this case, Your Honor. And --
10 and if you look at the complaint, JA 23
11 through -- 22 through 26, they're asking this
12 Court to -- to green-light the states to impose
13 duty after duty.

14 JUSTICE JACKSON: What was the status
15 quo? Was the state able to hold a broker
16 liable before this action, before the
17 preemption, for things like what is happening
18 in this case?

19 MR. BOUTROUS: No, Your Honor, we
20 don't believe they were. We think this Court's
21 Castle decision talks about how the states
22 could not second-guess the federal
23 authorization of a carrier because it would
24 thwart uniformity, it would thwart commerce.

25 This isn't a traditional area of

1 fed -- of state prerogative. This is about
2 interstate commerce --

3 JUSTICE KAGAN: Well, Mr. --

4 MR. BOUTROUS: -- and the free flow of
5 interstate commerce.

6 JUSTICE KAGAN: Mr. Boutrous, this
7 might be a good idea, this might be a bad idea.
8 I mean, maybe this is just a simple-minded way
9 of looking at this, but I'm just looking at
10 this provision, and it says "shall not restrict
11 the safety regulatory authority of a state with
12 respect to motor vehicles." And you agreed
13 that these tort actions are part of the state's
14 safety regulatory authority.

15 So then the question is whether these
16 suits are with respect to motor vehicles. And,
17 you know, come on, how could they not be?
18 They're all about getting good drivers behind
19 the wheel of a massive truck. That's with
20 respect to motor vehicles.

21 MR. BOUTROUS: That -- that, Your
22 Honor, I think, is actually a good way to look
23 at it because, first, the definitions matter
24 here. It -- the Congress, when it added
25 brokers and added section -- subsection (b),

1 which has no saving clause, it didn't change
2 the -- the saving clause, the safety saving
3 clause, it didn't -- it broadened it to
4 transportation of property. It kept it focused
5 on motor vehicles.

6 Motor vehicles are very narrowly
7 described as the tractor trailer, the truck.

8 JUSTICE KAGAN: Okay. But the motor
9 vehicle is the truck. And these suits are all
10 about the trucks --

11 MR. BOUTROUS: And -- and as this --

12 JUSTICE KAGAN: -- and who's driving
13 the trucks.

14 MR. BOUTROUS: And -- and I go back
15 to -- and, again, Petitioner did not mention
16 this two -- this Court's two leading cases.
17 The Dan's City case, this Court said with
18 respect to transportation of property, which,
19 as Mr. Clement said, is really broad, that that
20 massively limited the scope of preemption.

21 JUSTICE SOTOMAYOR: Could the state
22 say you can't drive a truck unless you're 16?
23 Unless you're over 21?

24 MR. BOUTROUS: I think the states
25 could have.

1 JUSTICE SOTOMAYOR: Oh, so that's not
2 with respect to the motor vehicle. It's with
3 respect to the driver who's going to drive it.
4 Can the state say truck drivers have to wear
5 seatbelts?

6 MR. BOUTROUS: That would be
7 compatible with federal law, Your Honor, and
8 they could do that.

9 JUSTICE SOTOMAYOR: All right. So
10 what's incompatible with federal law with
11 respect to safety to say you shouldn't operate
12 this if you're a careless, negligent driver?

13 MR. BOUTROUS: The states can say
14 that. What they can't say is that a broker can
15 be held liable.

16 JUSTICE SOTOMAYOR: Why not? Because
17 the broker is the one putting the driver in the
18 seat --

19 MR. BOUTROUS: That's not correct,
20 Your Honor.

21 JUSTICE SOTOMAYOR: -- of the motor
22 vehicle that's causing the accident.

23 MR. BOUTROUS: That's not correct,
24 Your Honor. That's another real, I would say,
25 not accurate depiction in the briefing here.

1 The --

2 JUSTICE SOTOMAYOR: Wait a minute.

3 MR. BOUTROUS: Yes.

4 JUSTICE SOTOMAYOR: The broker hires
5 the company who's going to transport, says the
6 company is negligent because it's been -- it's
7 had, I think, two or three accidents in the
8 space of a month, the drivers have, and it only
9 has nine trucks, and it has a driver who just
10 that month had another crash where he was found
11 negligent.

12 I don't see how someone hasn't failed
13 in their duty.

14 MR. BOUTROUS: Yes, Your Honor, that
15 would be the carrier and -- and the driver.
16 The broker doesn't know all that. That --

17 JUSTICE SOTOMAYOR: Well, then that's
18 a defense, counsel.

19 MR. BOUTROUS: Yeah, it is a defense.
20 And it's also why there needs to be --

21 JUSTICE SOTOMAYOR: But it's not --
22 it -- it doesn't answer the substantive
23 question of whether it could be held liable if
24 it had a way to check.

25 MR. BOUTROUS: It -- if it was

1 required to check the special checking system,
2 and I go back to Rowe, where this Court said
3 that the main statute there that would require
4 the carriers to check to see if the packages
5 were going to be directed to a minor shipping
6 tobacco, that that would have imposed this
7 patchwork and would have imposed this extra
8 duty on the services of the carriers.

9 And so --

10 JUSTICE SOTOMAYOR: Safety regulations
11 always create a patchwork. No matter what the
12 safety issue is, there's going to be different
13 state requirements, and so the patchwork exists
14 as -- just because of the exception.

15 MR. BOUTROUS: But can I address that,
16 Your Honor? Because Section 31 -- 31141, which
17 both parties cite, seeks to eliminate that. It
18 gives the Secretary pretty broad power to
19 preempt after decision.

20 So, while the states can enact their
21 own safety regulations, they must be compatible
22 with federal law, consistent with federal law
23 even if they're stricter, and if they burden
24 interstate commerce because they create a
25 patchwork, because -- and we're talking about

1 driving through multiple states. Here, it was
2 Ohio, Texas, and Arkansas, I think. And so you
3 need to have certainty that you can traverse
4 those jurisdictions lawfully.

5 JUSTICE SOTOMAYOR: Thank you.

6 JUSTICE KAVANAUGH: With the -- on the
7 "with respect to motor vehicles" phrase again,
8 going back to that, obviously, motor vehicles
9 are involved. I thought your argument was you
10 have to figure out how broadly to read "with
11 respect to," like, "relating to" --

12 MR. BOUTROUS: Yes.

13 JUSTICE KAVANAUGH: -- it could go
14 forever, or where do you cut it off.

15 And I guess my question is, given the
16 safety implications, why would Congress have
17 wanted to cut it off at carriers and not
18 include brokers when, I think, although they
19 haven't traditionally done it, brokers could do
20 more to ensure that carriers are hiring safe
21 drivers who don't have issues with their
22 history or whether they can read the signs or
23 whatever it might be, and that will reduce the
24 number of fatal trucking accidents, which is a
25 huge problem? Why is that not a reasonable way

1 to read it?

2 MR. BOUTROUS: It -- it's -- I think
3 that Congress -- what Congress did was ensure
4 that brokers could allow for a seamless
5 interstate commerce. If it imposed those
6 obligations, it would -- it would just
7 completely bollix up the broker duty. They
8 would have to investigate whether the driver
9 was fit. This is just right from the
10 complaint. The carrier was -- they'd have to
11 investigate the driver history that -- and ask
12 for that. And so it --

13 JUSTICE KAVANAUGH: Well, how -- how
14 will that happen? Will they demand -- I mean,
15 they'll demand from the carriers, give us
16 information about who you're hiring. I assume
17 that's what will happen if you do not prevail
18 in this case.

19 MR. BOUTROUS: Right. We have to
20 demand that.

21 JUSTICE KAVANAUGH: That can be done,
22 though, right?

23 MR. BOUTROUS: It could be done, but
24 these things happen quickly. This is about
25 matching carriers who are on the road with

1 ship -- shippers' demands to get things there
2 just in time, and -- and it's become a crucial
3 part of interstate commerce.

4 And I do want to go back, Your Honor,
5 if I can, on the interpretation of the
6 language. We do believe that "with respect to
7 motor vehicles" is the crucial question here.
8 And one thing we haven't heard --

9 JUSTICE GORSUCH: Mr. Boutrous?

10 MR. BOUTROUS: Yes.

11 JUSTICE GORSUCH: I'm -- I'm sorry to
12 interrupt you there, but -- so you -- you --
13 you agree, with respect to motor vehicles and
14 safety regulations, it accounts for the safety
15 belt regulation, it accounts for age limits and
16 things like that. You agree that it also
17 permits a hiring tort suit against the carrier.

18 Do you agree that it also permits a
19 tort suit against the shipper?

20 MR. BOUTROUS: We do not agree with
21 that, Your Honor.

22 JUSTICE GORSUCH: Okay. So it stops
23 with -- with the carrier and only the carrier?

24 MR. BOUTROUS: Exactly, Your Honor.
25 And -- and that's not to say there isn't

1 rigorous federal enforcement. There are
2 criminal provisions.

3 JUSTICE GORSUCH: Why not the shipper?

4 MR. BOUTROUS: The shipper, by
5 imposing that duty on the shipper -- and there
6 are lots of claims against shippers. The
7 shipper, by imposing that duty -- this is like
8 Rowe. If you impose that duty on the shipper,
9 then they're going to make different choices
10 with respect to motor carriers. They're not
11 going to allow new entrants. That will have --
12 that will have an impact on the services of the
13 motor carriers. And that's sort of how the
14 Court analyzed it in Rowe.

15 So I think it would burden them
16 tremendously, and it would basically --

17 JUSTICE GORSUCH: It's really a
18 causation argument. You're saying it's just
19 too far removed.

20 MR. BOUTROUS: It's --

21 JUSTICE GORSUCH: It's a proximate
22 causation argument in effect.

23 MR. BOUTROUS: It's -- it's -- it's
24 related to it, but I think it proves our point.
25 We all know proximate --

1 JUSTICE GORSUCH: If it's -- if it's a
2 causation argument, I guess I'm back to where
3 Justice Thomas is. I understand the burden
4 of -- of these lawsuits. I appreciate that.
5 But it -- if your -- to the extent your
6 argument hinges on causation, that is built
7 into the state tort system in these -- in these
8 cases.

9 I suppose, if there weren't a
10 proximate cause element that's required, that
11 might be a matter of some consideration, but
12 there is.

13 MR. BOUTROUS: The problem with that
14 is it is baked into the state system. They
15 want to be, in the words of the Ohio brief,
16 laboratories of democracy. They're going to
17 have varied standards. They're going to create
18 a patchwork, which would cause brokers and
19 shippers and -- and --

20 JUSTICE GORSUCH: Well, right now, we
21 have a proximate cause standard before us,
22 right?

23 MR. BOUTROUS: In -- in this --

24 JUSTICE GORSUCH: In this case?

25 MR. BOUTROUS: Well, that's because

1 Petitioners are asking the Court --
2 Petitioner's asking this Court to assume
3 Congress was thinking about proximate cause.
4 It was thinking about --

5 JUSTICE GORSUCH: Well, I'm asking
6 about the claim in this case. There's a
7 proximate cause?

8 MR. BOUTROUS: Yes, there -- there is.
9 And -- but the problem is it's a nebulous
10 concept. And I go back to the definitions in
11 "with respect to motor vehicles."

12 Motor vehicle safety is defined as the
13 performance of a motor vehicle in a way that
14 protects the public interest against
15 unreasonable risk of accidents occurring
16 because of the design, construction, or
17 performance of a motor vehicle.

18 So, when Congress used "motor vehicle"
19 in "with respect to motor vehicle," it was, in
20 this Court's words, massively limiting the
21 scope of the saving clause.

22 And, here, the brokers are too far
23 removed. They can't -- they don't touch the
24 vehicle. They don't control it. They don't
25 know what vehicle is going to be used. They

1 don't know who -- who the driver is.

2 But they are performing a function
3 relying on the federal authorization and
4 licensing, is -- which is what -- what Congress
5 in -- intended. And so I think it's real
6 important -- and on -- on the federalism point,
7 I think the Nebraska brief points out that
8 under this regime, the state with the most
9 plaintiff-generous tort principles and
10 proximate cause principles, they'll rule the
11 United States. Everyone will have to adhere to
12 those standards or avoid that state entirely.

13 And that's why Congress felt that
14 preemption was important here.

15 JUSTICE ALITO: How difficult is it
16 for a carrier to be authorized under federal
17 law?

18 MR. BOUTROUS: It's not nearly as easy
19 as Petitioner's suggesting. Again, I think the
20 regulations and the statutes speak for
21 themselves. They have to show that they're
22 fit. They have to show that they meet the --
23 the various standards, that they will agree to
24 hold drivers to certain standards. They do
25 audit carriers.

1 A lot of these complaints, we disagree
2 with them about the FMCSA, but if that --
3 that's a complaint, well, then they could do
4 more or go back to Congress.

5 And going back to the insurance point,
6 yes, some carriers don't have significant
7 enough insurance.

8 JUSTICE ALITO: Well, do the -- do the
9 federal authorities insist that someone who's
10 seeking authorization show that they've done
11 background checks on drivers, that drivers can
12 read signs, that drivers don't take drugs,
13 don't have a history of alcohol abuse, any of
14 the things that would contribute to a real
15 safety threat?

16 MR. BOUTROUS: They're -- they're
17 required to do that and -- and -- and -- and --
18 and accomplish those goals to get federal
19 licensure. And if they don't do it, the FMCSA
20 can take -- take away their license. So
21 there's a rigorous system.

22 CHIEF JUSTICE ROBERTS: Thank you,
23 counsel.

24 Justice Thomas?

25 JUSTICE THOMAS: I think I alluded to

1 this before, but has there been an increase in
2 the role of brokers post-deregulation?

3 MR. BOUTROUS: There has been, Your
4 Honor, and it's contributed greatly to our
5 economy and to commerce and the free flow of
6 commerce.

7 JUSTICE THOMAS: How significant?

8 MR. BOUTROUS: Significant, Your
9 Honor. So it was --

10 JUSTICE THOMAS: No, I mean how
11 significant has the increased role been?

12 MR. BOUTROUS: I think back -- back
13 before deregulation, there were more -- you
14 know, less than a hundred brokers, and now
15 there's thousands. Most of them are much
16 smaller than C.H. Robinson, which is another
17 reason not to impose these brand-new duties.

18 CHIEF JUSTICE ROBERTS: Justice Alito,
19 anything further?

20 Justice Gorsuch -- Sotomayor?

21 JUSTICE SOTOMAYOR: There's, amici
22 says, somewhere between 6- to 9,000 motor
23 carriers registered with the FMCSA every month.
24 You're going to tell me that they have the
25 resources to check every one of those new

1 entrants and all the existing ones to see
2 whether they're following the rules?

3 MR. BOUTROUS: They -- they require
4 that the carriers swear they will conform.

5 JUSTICE SOTOMAYOR: They -- I am
6 asking you, do you believe the agency has
7 anywhere near the resources necessary to
8 adequately vet all of those applicants and keep
9 on top of the operation of the people who
10 already are licensed?

11 MR. BOUTROUS: It's a significant
12 task, Your Honor, and -- and probably not.
13 They couldn't do it with respect to every one.

14 JUSTICE SOTOMAYOR: All right.

15 MR. BOUTROUS: But --

16 JUSTICE SOTOMAYOR: So Congress did
17 one thing. It exempted motor vehicle safety.
18 You still haven't given me a reason in this
19 context why, with such a capacious word like
20 "with respect to," that we should read it
21 narrowly instead.

22 MR. BOUTROUS: Your Honor, in the
23 spectrum, "related" is the gold standard for
24 breadth in preemption. "With respect to" is
25 used next to "related" in Section (c)(1). So

1 Congress clearly was thinking of it
2 differently. This Court, in cases like Presley
3 and Lamar, which the Eleventh Circuit cited and
4 the -- the Chamber of Commerce brief cites,
5 this Court said "with respect to" means direct
6 relationship to or impact on.

7 And, here, to hold someone liable for
8 negligence with respect to a motor vehicle,
9 where the -- they had no ability to control it
10 or inspect it, and those duties that Your
11 Honor -- or the -- the big group of carriers,
12 now that would be imposed on these brokers, who
13 aren't safety experts, who would -- they'd have
14 to -- we'd have to hire an army to do what --

15 JUSTICE SOTOMAYOR: Thank you.

16 MR. BOUTROUS: -- they're asking the
17 Court to green-light.

18 CHIEF JUSTICE ROBERTS: Justice Kagan?

19 Justice Gorsuch?

20 Justice Kavanaugh?

21 JUSTICE KAVANAUGH: Two things. You
22 said it started in 2004. Why?

23 MR. BOUTROUS: Because the creative
24 plaintiffs' bar decided to start bringing these
25 cases against brokers and to establish bringing

1 them into the case to have additional targets.
2 That's what's really ironic here. The notion
3 that Congress, when it -- when it preempted
4 claims against brokers --

5 JUSTICE KAVANAUGH: Because some of
6 the carriers couldn't pay or --

7 MR. BOUTROUS: I think they -- some of
8 them couldn't pay or they -- they wanted to
9 have additional potential defendants. And so
10 they're not asking this Court to restore or
11 protect longstanding state law. They're asking
12 this Court to authorize the states to become
13 laboratories of democracy, to creatively adopt
14 a patchwork of new duties that will -- will
15 really hamper interstate commerce and -- and
16 defy Congress's intent.

17 JUSTICE KAVANAUGH: And then you've
18 had, I think, law against you in the Ninth
19 Circuit since 2020, so -- and you've talked
20 about, oh, this would be difficult to
21 impossible.

22 What have brokers been doing in the
23 Ninth Circuit since 2020? Because I assume
24 they have adjusted their behavior in response
25 to that and --

1 MR. BOUTROUS: They've been --

2 JUSTICE KAVANAUGH: -- the Sixth
3 Circuit as well.

4 MR. BOUTROUS: Yes. They've been
5 litigating because they're getting sued still
6 repeatedly. There has --

7 JUSTICE KAVANAUGH: But are they
8 changing their practices at the front end so
9 they're not liable at the back end given the
10 Ninth Circuit and Sixth Circuit law and the
11 possibility that that law will -- will stay the
12 law?

13 MR. BOUTROUS: They -- they have not
14 made the radical change, waiting for a ruling
15 from this Court to clarify that these claims
16 cannot be recognized.

17 But, in California, the effect has
18 been mitigated a bit -- a bit because two state
19 courts of appeal have rejected the Miller
20 decision and gone with Judge -- Judge
21 Fernandez's dissent in that case, which I think
22 really just very in simple terms outlined that
23 this is a step too far, I think the Eleventh
24 Circuit said a bridge too far, to hold someone
25 who -- liable for -- who matched the carrier in

1 the -- the --

2 JUSTICE KAVANAUGH: I'm puzzled that
3 no one's -- I mean, I'm not saying you know
4 everything that's going on out there, but I'm
5 puzzled that brokers haven't started doing more
6 on the theory that they could be held liable.

7 Wouldn't they change their behavior
8 with some bad law?

9 MR. BOUTROUS: Well, the problem is
10 they -- they get you coming and going because,
11 if you do more, then the -- the argument is
12 like, in this case, you're vicariously liable
13 because you had control.

14 So, if you don't do enough --

15 JUSTICE KAVANAUGH: I see.

16 MR. BOUTROUS: -- they say you should
17 have inspected like you were the federal
18 agency. If you do too much or you do anything,
19 they say you're in control, which is just not
20 true. The broker is a broker. They're a
21 middle person matchmaking so commerce can flow.

22 JUSTICE KAVANAUGH: Thank you.

23 CHIEF JUSTICE ROBERTS: Justice
24 Barrett?

25 JUSTICE BARRETT: No.

1 CHIEF JUSTICE ROBERTS: Justice
2 Jackson?

3 Thank you, counsel.

4 MR. BOUTROUS: Thank you, Your Honor.

5 CHIEF JUSTICE ROBERTS: Mr. Joshi.

6 ORAL ARGUMENT OF SOPAN JOSHI

7 FOR THE UNITED STATES, AS AMICUS CURIAE,

8 SUPPORTING THE RESPONDENTS

9 MR. JOSHI: Mr. Chief Justice, and may
10 it please the Court:

11 I think, if you look at the phrase
12 "with respect to motor vehicles" in isolation,
13 Petitioner has a pretty good point about how to
14 interpret just those words in isolation. But I
15 don't think it works in this statute. And I
16 really focus on the contrast between paragraphs
17 1 and 2.

18 Paragraph 1 uses the phrase "with
19 respect to the transportation of property,"
20 paragraph 2 "with respect to motor vehicles."
21 That seems like a conscious choice that
22 Congress made to parallel the language but
23 change the noun to a much narrower noun. As
24 Mr. Clement observed, "transportation" has,
25 like, 24 or 25 different nouns I think I

1 counted, one of which is motor vehicles.

2 So that suggests that "with respect to
3 motor vehicles" must not include things that
4 are with respect to the other stuff in the
5 definition of "transportation," one of which is
6 arranging for the movement of property, which
7 is what a broker does.

8 Put it this way. Suppose there were a
9 rule that applied with respect to coffee,
10 cream, and sugar and then an exception that
11 applied only with respect to coffee. You would
12 naturally think that the exception does not
13 apply with respect to cream and sugar, even
14 though that phrase in isolation might cause you
15 to adopt the opposite view.

16 I think that's kind of what's going on
17 here, and that's why I think Respondents'
18 reading of the statute is the better one.

19 I welcome the Court's questions.

20 JUSTICE THOMAS: Is there any daylight
21 between your argument and that of the
22 Respondent?

23 MR. JOSHI: I don't think so. I -- I
24 think we're aligned on the interpretation of
25 the safety exception.

1 JUSTICE THOMAS: With respect to the
2 use or the role of brokers, how significantly
3 has that increased?

4 MR. JOSHI: I agree with what
5 Mr. Boutrous said. It has increased markedly.
6 Before the deregulation, there were only
7 several hundred brokers, is my understanding.
8 Today, there are approximately 25,000
9 registered -- federally registered brokers
10 operating, from small sizes to as large as C.H.
11 Robinson.

12 JUSTICE THOMAS: What role did the ICC
13 play in regulating transportation in intrastate
14 before deregulation?

15 MR. JOSHI: I -- I don't know exactly
16 the extent of the role. My understanding is
17 that they generally would have thought that --
18 that intrastate regulation has a substantial
19 effect on interstate commerce, and so, to the
20 extent there would be inconsistent rules, as --
21 as both Mr. Clement and Mr. Boutrous mentioned,
22 the Castle case is, you know, from the 1960s, I
23 think, and -- and that really exemplifies these
24 things.

25 Illinois there, you know, had certain

1 regulations for trucks, but this Court said
2 that Illinois cannot use a violation of those
3 in order to revoke the operating authority even
4 for the intrastate trucks.

5 CHIEF JUSTICE ROBERTS: Counsel, both
6 the counsel for Respondent and for Petitioner
7 were asked a fair number of questions about
8 (b)(1). And I don't want to evaluate it, but I
9 think they were basically each saying they
10 don't quite know why it's there. And I wonder
11 if the federal government has an answer.

12 MR. JOSHI: I think my answer is that
13 Congress did not view the safety exception as
14 reaching these kinds of claims against brokers
15 and freight forwarders. And so I don't think
16 there is an anomaly. And there certainly isn't
17 if you adopt Respondents' view of the -- of the
18 safety exception.

19 Now what Mr. Clement said, first, he
20 said he has no idea, but that's just how it is.
21 He said, regardless of this case, I think he
22 said there's going to be this difference
23 between intrastate and interstate anyway. But
24 I don't think that's correct.

25 The first thing he pointed to was that

1 (b) does not include the limiting phrase "with
2 respect to the transportation of property" the
3 way (c)(1) does. But you don't need that
4 phrase in (b) because the only entities covered
5 in (b) are freight forwarders and brokers, and
6 the only thing those guys do is act as
7 middlemen for the transportation of property.
8 That's what they're statutorily defined as
9 being.

10 So you don't need that limitation in
11 (b). You do need it in (c) because it applies
12 to motor carriers, which can have their cars on
13 the road not engaged in interstate
14 transportation of property. So I don't think
15 that works.

16 So I -- I really do think there's a
17 huge anomaly here that Congress in '95, where,
18 you know, we all acknowledge broker -- claims
19 against brokers were not preempted before 1995,
20 and then Congress decides in '95 we need to add
21 brokers.

22 And the way they do it is they, as
23 Mr. Clement said, insert them in (c) and add
24 this provision (b). And it just makes no sense
25 whatsoever that a Congress interested in

1 preempting claims against brokers would leave
2 greater state authority over interstate broker
3 services than intrastate. That is so weird. I
4 am unaware of any preemption regime -- express,
5 implied, field, conflict, obstacle, whatever --
6 in which that's how it works.

7 JUSTICE JACKSON: Mr. --

8 MR. JOSHI: It is so bizarre that I
9 think you really should look at the safety
10 exception the way Respondents do because that's
11 the only way to avoid --

12 JUSTICE JACKSON: But let me ask you a
13 question, Mr. Joshi, because I think we could
14 also believe that Congress was really
15 interested in making sure that safety was top
16 of mind, priority.

17 And the problem, I think, with the
18 argument in the way that you've set it up is
19 that you are assuming away any responsibility
20 that a broker might have for safety. Your
21 argument depends in a way on us accepting what
22 you've said, what Mr. Boutrous said, that
23 brokers are just operating as middlemen, they
24 really don't have anything to do with safety.

25 And I guess I don't understand why we

1 have to believe that Congress shared that view
2 as opposed to Congress thinking: Well, to the
3 extent that brokers are involved in safety,
4 that's going to come out in the tort suit as a
5 causation issue. And so we don't really have
6 to take a position on which individual
7 defendants are actually responsible for safety.

8 What we want to do is make sure that
9 safety regulations are preserved, that safety
10 is top of mind for everyone, and if brokers
11 really are the kinds of middlemen that
12 Mr. Boutrous and you say, they're ultimately
13 not going to be held liable because either the
14 state's not going to allow this kind of tort
15 suit on the front end or they're not going to
16 be held liable because they're really not a big
17 player in this from the standpoint of tort law.

18 Why -- why can't -- that to me is
19 perfectly consistent with the view that
20 Petitioners have and make your view seem a
21 little odd.

22 MR. JOSHI: So two responses to that.
23 Well, first, I agree, what you just said is
24 consistent with what Mr. Clement says, but,
25 obviously, I disagree with it.

1 So the -- the two stat -- a couple of
2 statutory points that I think show that
3 Congress, in fact, was thinking that brokers
4 wouldn't be responsible for safety, so they did
5 share the view that Mr. Boutrous and I are
6 advancing today.

7 Number one, on the safety exception,
8 it would have been the easiest thing in the
9 world for Congress to just repeat "with respect
10 to transportation," just like it had half a
11 sentence earlier, or just leave it out
12 entirely.

13 JUSTICE JACKSON: But wouldn't --
14 wouldn't the easier thing to be to -- and say
15 something about brokers in the safety
16 exception? I mean, if you're right and they
17 shared this view that there were certain
18 individuals in the chain who were just not
19 going to fit, then I would think we would see
20 that language in the -- in the safety
21 exception, right?

22 MR. JOSHI: Sure. Congress could
23 always be more clear, but what I'm saying is
24 that Congress's choice there suggests that they
25 did not necessarily view it this way. But

1 there's more. There's much more.

2 Congress has an entire chapter,
3 several chapters, of the U.S. Code in Title 49
4 that deal with safety addressing carriers,
5 safety of motor vehicles, driver
6 qualifications, and they're all addressed at
7 carriers. Not a single one is addressed at
8 brokers.

9 And I'm going to now invoke, you know,
10 they say the exception sometimes proves the
11 rule. In 2012, Congress passed a statute and
12 they added a provision and that provision makes
13 transportation intermediaries, which I think we
14 all agree includes brokers and freight
15 forwarders, liable, and it says, you know, you
16 should not coerce a driver or a carrier to
17 violate all these numerous safety rules that
18 apply only to carriers and drivers.

19 JUSTICE JACKSON: As a matter of
20 federal law?

21 MR. JOSHI: As a matter of federal
22 law.

23 JUSTICE JACKSON: Right. Isn't
24 that --

25 MR. JOSHI: And so it's a little bit

1 odd --

2 JUSTICE JACKSON: No, but -- but --
3 but what I'm saying is this statute expressly
4 preserves the scope of state safety
5 regulations. So it's no answer, I think, to
6 point out that Congress, under federal law,
7 would not have held these brokers liable.

8 MR. JOSHI: Well -- well --

9 JUSTICE JACKSON: The question is,
10 what were they doing when they said here we are
11 preserving states' ability --

12 MR. JOSHI: Right. No. No. I --
13 I -- I took your original question to be why do
14 we think Congress shared the view that brokers
15 would not be responsible for safety. And what
16 I'm saying is the entire federal scheme is set
17 up so that carriers and drivers who, to use
18 tort law terms, are the lowest-cost-avoider in
19 terms of safety are responsible for safety and
20 they have to pledge that they're responsible
21 for safety and obey all the safety rules as a
22 condition of federal registration. And then
23 brokers select from the pool of registered
24 carriers. And --

25 JUSTICE ALITO: Well, that -- that

1 makes -- that makes perfect sense if, in fact,
2 there is -- the -- the federal authorization
3 does require some -- does involve some inquiry
4 into the safety of carriers. And do you want
5 to say something about that, how it works as a
6 practical matter?

7 MR. JOSHI: As a practical matter,
8 you're -- you're right. And Justice Sotomayor
9 was right earlier. You know, FMCA is -- is
10 understaffed, overworked, can't possibly review
11 the 700,000 federally registered carriers. But
12 every year -- or I should say this. Of the
13 700,000 federally registered carriers, the
14 agency has been able to do at least one
15 roadside inspection for -- for two-thirds of
16 those carriers in the last five years.

17 So there is some oversight, not nearly
18 enough. I will -- I will take -- I will grant
19 the point. But carriers who violate their
20 requirements under the statute or the
21 regulations, not only can the agency revoke
22 their operating authority and go after them,
23 there is a federal private cause of action
24 against a carrier who violates the federal
25 requirements that an injured party can bring

1 against a carrier for violating it. In fact,
2 there's one against brokers too.

3 Now, of course, I'm -- I'm not going
4 to tell you it's frequently invoked because,
5 obviously, the federal requirements for brokers
6 don't involve safety, so I don't think there's
7 a lot of federal cause -- you know, federal
8 lawsuits based on it. But Congress did provide
9 these as a means to ensure that carriers and
10 brokers obey federal law.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel.

13 Justice Thomas?

14 Justice Alito?

15 JUSTICE ALITO: (c)(2) wouldn't come
16 into play unless (c)(1) applies. Would --
17 could you just say something briefly about why
18 (c)(1) applies?

19 MR. JOSHI: Yes. Because a broker is
20 defined as someone who -- you know, I'm looking
21 at 13102(2), the back end of the definition,
22 arranges -- arranging for transportation by a
23 motor carrier. That is literally the service
24 of a broker.

25 And Petitioner's tort claim, if

1 successful, would allow enforcement of a common
2 law rule, and the common law rule would say not
3 just that the driver was negligent on this
4 particular occasion, and it wouldn't just say
5 that C.H. Robinson erred in selecting Caribe on
6 that occasion to transport those particular
7 flower pots in December of 2017.

8 Instead, it would say, Caribe, you
9 should not -- you should not have hired -- or,
10 C.H. Robinson, you should not have hired Caribe
11 at all, and, in fact, no broker should ever
12 have hired Caribe to do anything.

13 So it's directly attacking a broker's
14 selection of a carrier, which is the core
15 service, which means it's related to the
16 service of a broker. And that is why every
17 court of appeals, even ones that agree with
18 Petitioner, have rejected this claim and have
19 agreed that these sorts of torts fall within
20 (c)(1).

21 JUSTICE ALITO: Thank you.

22 CHIEF JUSTICE ROBERTS: Justice
23 Sotomayor?

24 JUSTICE SOTOMAYOR: I think you told
25 Justice Thomas that you agree with everything

1 that Mr. Montgomery is arguing. Is that
2 correct?

3 MR. JOSHI: No, we're on the opposite
4 side from Mr. Montgomery.

5 JUSTICE SOTOMAYOR: I'm sorry, not
6 Mr. Montgomery. What Mr. Caribe's counsel
7 would say.

8 MR. JOSHI: Yeah, we're -- we're --
9 we're supporting Respondents' view.

10 JUSTICE SOTOMAYOR: You're agreeing
11 that the safety -- they -- they've argued, but
12 I didn't see it in your brief, that the safety
13 exception preserves only states' authority at
14 the time of the Act's enactment?

15 MR. JOSHI: No, no. That's one where
16 we say --

17 JUSTICE SOTOMAYOR: All right. And so
18 I also didn't think that you were agreeing with
19 his implied preemption argument, or are you?

20 MR. JOSHI: We're -- we're -- we don't
21 take a position. We're saying you don't need
22 to.

23 JUSTICE SOTOMAYOR: So it's not
24 everything?

25 MR. JOSHI: I agree with everything

1 Mr. Boutrous said at the lectern today --

2 JUSTICE SOTOMAYOR: All right. So,
3 right now, you would have it that the federal
4 government is not imposing any safety
5 obligations on brokers, and you're saying,
6 despite the exemption for safety with -- with
7 respect to motor vehicles, neither can states,
8 so nobody's checking what they're doing?

9 MR. JOSHI: Brokers are required to
10 pick from among the pool of federally
11 registered carriers. That's what does the work
12 here. And --

13 JUSTICE SOTOMAYOR: So, even if
14 someone has had a thousand accidents and it's
15 well known, no -- no broker's ever liable?

16 MR. JOSHI: The -- the carriers would
17 be liable for that, but, correct.

18 JUSTICE SOTOMAYOR: All right. Thank
19 you.

20 MR. JOSHI: The broker -- as long as
21 they still are --

22 JUSTICE SOTOMAYOR: I just want to
23 know the --

24 MR. JOSHI: Yeah.

25 JUSTICE SOTOMAYOR: -- the end result

1 of your argument. No one's checking?

2 MR. JOSHI: That -- that is --

3 JUSTICE SOTOMAYOR: And no one's going
4 to be liable?

5 MR. JOSHI: That is -- that is --
6 well, carriers are liable. But that is what we
7 think the federal system is -- how it's
8 supposed to work. Carriers are responsible for
9 safety. It should be registered --

10 JUSTICE SOTOMAYOR: How about
11 shippers? Are you agreeing with your
12 adversary --

13 MR. JOSHI: We --

14 JUSTICE SOTOMAYOR: -- on shippers?

15 MR. JOSHI: We have not taken a
16 position on shippers. I don't think -- I mean,
17 just standing here at the lectern, it doesn't
18 seem like this statute covers claims against
19 shippers except in so --

20 JUSTICE SOTOMAYOR: Yeah, it's hard to
21 do.

22 MR. JOSHI: -- except insofar as
23 through the Rowe against New Hampshire Motor
24 Transport Association. There, that was a rule
25 that actually regulated shippers, but it was

1 nonetheless preempted because it affected
2 carrier services. So, under that way, perhaps
3 it could, you know, preempt certain types of
4 rules against shippers, but it's sort of hard
5 to see. There may be other --

6 JUSTICE SOTOMAYOR: Hard to see that a
7 safety one would?

8 MR. JOSHI: I don't know the answer to
9 that --

10 JUSTICE SOTOMAYOR: All right. Thank
11 you.

12 MR. JOSHI: -- frankly.

13 CHIEF JUSTICE ROBERTS: Justice Kagan?

14 JUSTICE KAGAN: I take it when you
15 stood up, you said, okay, if you look at "with
16 respect to motor vehicles," that seems pretty
17 bad for you. But we're going to look further.
18 And the place where you pointed was the
19 definition of "transportation." Is that right?

20 And I'm doing this on the fly, so
21 forgive me, you can just tell me if I'm wrong,
22 but you said the key thing about the definition
23 of "transportation" was that it specifically
24 says that transportation includes services
25 related to arranging for, blah, blah, blah, you

1 know, the transport of property. Is that --
2 and you said that's what a broker does. So we
3 should think about that as in the other "with
4 respect to" clause, not in the "with respect to
5 motor vehicles" clause. Do I have that right?

6 MR. JOSHI: That's right.

7 JUSTICE KAGAN: Okay. So -- but that
8 provision also, you know, in addition to saying
9 services related to arranging for transport, it
10 says services related to receipt, delivery,
11 transfer in transit. You know, it has all
12 these other verbs in it too which it seems to
13 me would apply to the motor carriers
14 themselves.

15 So, if we want to apply that same
16 theory of the case, we would have to take out
17 the motor carriers from the "with respect to
18 motor vehicles" phrase.

19 MR. JOSHI: Maybe, maybe not. I mean,
20 motor carriers are the ones who own and operate
21 the vehicles. And so, to the extent what
22 you're challenging is they're performing those
23 services, I -- I think maybe not.

24 But more to the point, I think most of
25 these claims against drivers are for

1 negligence, and those are obviously permitted.
2 They're not preempted. And federal law, you
3 know, by operation of federal law and the
4 definition of "employee," drivers of commercial
5 motor vehicles are deemed to be employees of
6 motor carriers even if they're independent
7 contractors. That's express in -- in the
8 definition.

9 And everyone understands the reason
10 for that is so that motor carriers will always
11 be vicariously liable for the torts of their
12 drivers during the -- the scope of employment.
13 That's why you don't see in this complaint,
14 which is in the Joint Appendix, you don't see a
15 claim against the motor carrier here for
16 negligently selecting the driver. That would
17 be silly. No -- no sane plaintiff would bring
18 that claim because you can just say the driver
19 was negligent on this occasion, and therefore,
20 you are vicariously liable. And that's
21 typically why these claims against motor
22 carriers aren't going to be preempted.

23 JUSTICE KAGAN: I mean, I take that
24 point. All I'm suggesting is that you pointed
25 us to a phrase as being --

1 MR. JOSHI: Yeah.

2 JUSTICE KAGAN: -- like, very relevant
3 to you when that phrase includes just about
4 everybody. It's not like a phrase about
5 brokers where you say, oh, look, you know, they
6 meant brokers to be in this provision because
7 this is a phrase about brokers. This is a
8 definition that includes everybody under the
9 sun.

10 MR. JOSHI: That is true, and --

11 JUSTICE KAGAN: So I guess I'm -- I'm
12 seeing --

13 MR. JOSHI: Yeah.

14 JUSTICE KAGAN: -- I'm not seeing how
15 relevant it is --

16 MR. JOSHI: So --

17 JUSTICE KAGAN: -- to the question of
18 whether "with respect to motor vehicles"
19 somehow excludes brokers.

20 MR. JOSHI: So I want to be clear.
21 I -- I -- I think this particular point I'm
22 making, as well as the three other main
23 contextual clues that we've made in the brief,
24 one of which is the intrastate, the other is
25 the superfluity, potential superfluity, and the

1 third being the financial services
2 requirements, which Justice Kavanaugh was
3 discussing earlier, I'm not making a claim that
4 any of those four itself is dispositive and
5 just answers the question.

6 I do think this is a hard case, but I
7 think all four of them tilt in Respondents'
8 direction, and they suggest that "with respect
9 to motor vehicles" has a narrower effect than
10 it might seem. Dan's City supports that
11 reading of "with respect to" as well.

12 And given that every contextual clue,
13 every oddity, every anomaly, Respondents'
14 reading doesn't produce it, whereas
15 Petitioner's does, I think, in the end, when
16 you look at all of it, Respondents' is the
17 better reading. That --

18 JUSTICE KAGAN: Thank you.

19 MR. JOSHI: -- that's our point.

20 CHIEF JUSTICE ROBERTS: Justice
21 Gorsuch?

22 JUSTICE GORSUCH: I just want to
23 follow up on that a little bit.

24 I -- I take your point that "with
25 respect to transportation" is a lot broader

1 than "with respect to motor vehicles." It's a
2 good point.

3 But, once you say that "with respect
4 to motor vehicles" doesn't just mean with
5 respect to the mechanics of that vehicle but
6 can include hiring, negligent hiring, by the
7 carrier or some negligence by the carrier, then
8 I -- I -- I wonder why that doesn't also hold
9 for brokers.

10 MR. JOSHI: Yeah. So -- so, to be
11 clear, the definition of "motor vehicle" is not
12 just tractor trailer, et cetera.

13 JUSTICE GORSUCH: Yeah.

14 MR. JOSHI: But it also says it has to
15 be "and used on a highway in transportation."

16 JUSTICE GORSUCH: Sure.

17 MR. JOSHI: So claims about the use
18 count --

19 JUSTICE GORSUCH: Okay.

20 MR. JOSHI: -- under the safety
21 exception.

22 JUSTICE GORSUCH: So -- and that's my
23 point, is once that camel's nose is under the
24 tent and you can have a claim for negligent
25 hiring against the carrier, why not against the

1 broker?

2 MR. JOSHI: No, that -- that's my
3 point. As far as I'm aware, there's no such
4 thing as a negligent hiring claim against the
5 carrier because the carrier is vicariously
6 liable for the driver, so it would be -- so
7 to -- a negligent hiring --

8 JUSTICE GORSUCH: Or negligence by the
9 driver. Once -- once -- once you've gotten to
10 the driver --

11 MR. JOSHI: Yeah.

12 JUSTICE GORSUCH: -- okay, and not
13 just the motor vehicle itself, and a negligence
14 in operation or use of the motor vehicle
15 counts, then --

16 MR. JOSHI: Well, "use" counts because
17 it's in the definition.

18 JUSTICE GORSUCH: I understand that.
19 I -- I -- I -- I'm not arguing with you about
20 that.

21 MR. JOSHI: Yeah.

22 JUSTICE GORSUCH: Once you concede
23 that the use counts and that somebody can be
24 held liable for negligence in the use, then it
25 just seems to me we're talking about causation

1 at that point.

2 MR. JOSHI: I take the point. And,
3 obviously, that is Mr. Clement's point here
4 today, but my -- my point is that --

5 JUSTICE GORSUCH: And I under -- and I
6 understand as well -- I'm sorry to interrupt --
7 but, you know, I'll let you answer. I
8 understand as well, if there were a strict
9 liability regime or something like that, but so
10 long as we have a proximate cause regime, and
11 that's all that's before us, all right, now go
12 ahead and answer.

13 MR. JOSHI: Yeah. I mean, I guess --
14 I guess the way I look at it is transportation
15 is really broad. And, yes, it says motor
16 vehicle is one of them. And it's got other
17 stuff that may be closer to motor vehicles, may
18 be farther away.

19 I think, you know, 20 -- 13102(23)(a)
20 says motor vehicle, vessel, warehouse, et
21 cetera, and then, in (b), it's services related
22 to the movement, including arranging for. And
23 I know how you could see that "arranging for
24 the transport of property" is kind of related
25 to motor vehicles, but given Congress's choice

1 to use "with respect to transportation" in 1,
2 in paragraph 1, and "with respect to motor
3 vehicles" in 2, that suggests it wants a
4 subset, and the question is, what is in that
5 subset and what is out of the subset?

6 JUSTICE GORSUCH: I agree with that.

7 MR. JOSHI: And I think arranging for
8 transportation is --

9 JUSTICE GORSUCH: But, once you've
10 gotten to use of the motor vehicle --

11 MR. JOSHI: Yeah, but --

12 JUSTICE GORSUCH: -- is into, right,
13 you say that's --

14 MR. JOSHI: Right, yeah.

15 JUSTICE GORSUCH: You -- you -- you --
16 you -- you spot them that. I'm not arguing
17 with you about that. I -- you -- you -- you've
18 given that up, fine.

19 But now the use of the motor vehicle,
20 not just the motor vehicle itself but the use
21 of the motor vehicle can be regulated by the
22 state.

23 MR. JOSHI: Yes, but -- but brokers
24 don't use vehicles, right? Brokers don't
25 control the vehicles. The broker doesn't know

1 how -- when the brakes --

2 JUSTICE GORSUCH: Yeah, but if
3 somebody was --

4 MR. JOSHI: -- were last inspected,
5 how thick the tire tread is. Brokers don't
6 even know the safety record of the driver.
7 That's confidential.

8 JUSTICE GORSUCH: Right. But you can
9 have vicarious liability.

10 MR. JOSHI: No.

11 JUSTICE GORSUCH: You -- you spot
12 that.

13 MR. JOSHI: No, for carriers, not for
14 brokers.

15 JUSTICE GORSUCH: No, I understand.
16 But you spot vicarious liability for carriers.
17 I'm not arguing with you.

18 MR. JOSHI: Under federal law, it's
19 express.

20 JUSTICE GORSUCH: I understand that.

21 MR. JOSHI: Okay.

22 JUSTICE GORSUCH: I -- I -- I'll stop.

23 MR. JOSHI: I -- I mean, I take the
24 point that this could be a -- you know, what
25 you described could be a sensible system, but I

1 think, given the federal statutes and
2 regulations, I don't think it's what we have
3 today.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 counsel.

6 Justice Kavanaugh?

7 JUSTICE KAVANAUGH: A couple things.
8 You at the beginning said "related to" and
9 "with respect to" are different in your view.

10 MR. JOSHI: Probably.

11 JUSTICE KAVANAUGH: And that's not
12 very convincing to me.

13 MR. JOSHI: Yeah, agreed.

14 JUSTICE KAVANAUGH: So I just --

15 MR. JOSHI: Yeah. Look --

16 JUSTICE KAVANAUGH: -- want that get
17 that out there. I mean, I think, with either
18 term, you have to look at the context and
19 common sense to see, as Judge Fernandez said in
20 his dissent in the Ninth Circuit, where to draw
21 the line, Palsgraf, et cetera.

22 MR. JOSHI: I -- yeah, I -- I actually
23 agree completely. I mean, I think --

24 JUSTICE KAVANAUGH: Okay.

25 MR. JOSHI: -- this Court in -- in

1 Lamar and Archer made the point that --

2 JUSTICE KAVANAUGH: That -- that --

3 I'm going to move on to my next question --

4 MR. JOSHI: Okay.

5 JUSTICE KAVANAUGH: -- if you agree
6 completely.

7 (Laughter.)

8 JUSTICE KAVANAUGH: So you say the
9 carriers are liable, so don't worry about it,
10 but one of the problems, I think, that's led to
11 this is the carriers sometimes can't pay.

12 MR. JOSHI: Yeah.

13 JUSTICE KAVANAUGH: So, when we're
14 thinking about context and common sense in
15 figuring out how broadly to read "with respect
16 to," isn't that part of the context and common
17 sense?

18 MR. JOSHI: Well, it's the statutory
19 context.

20 JUSTICE KAVANAUGH: Okay.

21 MR. JOSHI: So we have to look at it
22 from Congress's perspective. And from
23 Congress's perspective, carriers could pay
24 because they were -- they are required to have
25 the financial security requirements of 750,000,

1 and, yes, that was enacted in 1980.

2 I take the point. Maybe it's woefully
3 inadequate.

4 JUSTICE KAVANAUGH: Okay.

5 MR. JOSHI: But -- but --

6 JUSTICE KAVANAUGH: Two more quick
7 ones. You just said brokers don't know the
8 safety records of the drivers.

9 MR. JOSHI: Yeah.

10 JUSTICE KAVANAUGH: Aren't they going
11 to have to, if the other side prevails in this
12 case, figure out how to -- how to get into
13 that?

14 MR. JOSHI: I -- I mean, those are
15 confidential. The carriers --

16 JUSTICE KAVANAUGH: By -- by virtue of
17 what?

18 MR. JOSHI: By privacy laws and
19 federal law when -- when FMCSA reviews it.
20 So -- so, right now, I don't think brokers have
21 a practical way to get it. And what that means
22 is that brokers will, as some of the amicus
23 briefs point out and as I think Mr. Clement
24 just candidly admitted, acknowledged, that
25 brokers are going to follow the, you know, no

1 one ever got fired for buying IBM principal and
2 they're just going to go to the largest
3 carriers. It's going to be FedEx, UPS, J.B.
4 Hunt, Penske, you know, et cetera, and --

5 JUSTICE KAVANAUGH: That leads to my
6 last question, which is, again, context and
7 common sense, and their position's going to
8 mean fewer truck accidents.

9 MR. JOSHI: There are going to be
10 fewer trucks. There are going to be fewer
11 carriers in the market.

12 JUSTICE KAVANAUGH: Fewer truck
13 accidents where people get killed. And they
14 say because brokers are going to dig in and not
15 hire or arrange with shaky truck drivers.

16 MR. JOSHI: That -- that could well be
17 true, but that would be a result of there being
18 fewer trucks on the road, which means worse
19 interstate commercial motor delivery services.
20 I mean, if Petitioner's tort claim is
21 successful, it's going to take the pool of
22 registered carriers that federal law says
23 brokers can pick between, and it's going to
24 shrink the pool. That is contrary to
25 Congress's deregulatory purposes.

1 JUSTICE KAVANAUGH: Thank you.

2 CHIEF JUSTICE ROBERTS: Justice
3 Barrett?

4 Justice Jackson?

5 JUSTICE JACKSON: I just want to give
6 you a chance to explain as quickly as you can
7 what your surplusage argument is because the
8 way you've defined this, you have motor
9 vehicles as a subset, not as the whole thing,
10 in terms of the preemption. So why there would
11 be surplusage here?

12 MR. JOSHI: There would be a
13 surplusage on Petitioner's reading of the
14 statute. Petitioner seems to suggest that
15 "with respect to" just means concern, and it
16 can be a pretty lengthy chain, pretty indirect.

17 I mean, I think he -- Mr. Clement
18 today at the lectern said indirect. He wants
19 it to be interpreted the same as "related to"
20 in Morales and, you know, the ADA cases, which
21 includes indirect connections.

22 If that's true, then every single
23 thing, as I think Justice Kagan was pointing
24 out, in the definition of "transportation"
25 arguably is indirectly related to a motor

1 vehicle, which means that the safety
2 exception --

3 JUSTICE JACKSON: Although he says --

4 MR. JOSHI: -- you could blue
5 pencil --

6 JUSTICE JACKSON: I'm sorry, he says
7 -- he says -- he says with transportation a
8 property is like grain elevators, it has
9 nothing to do with the car or with the motor
10 vehicle. He's got transportation of property
11 much broader.

12 MR. JOSHI: I don't know how you get
13 the grain into the elevator or out of the
14 elevator without a motor vehicle. So I would
15 think that on Petitioner's logic, that --
16 claims about that would also be in.

17 So I think, if you take Petitioner's
18 interpretation seriously, then the -- the
19 safety exception basically reads the same if
20 you blue pencil the phrase "with respect to
21 motor vehicles" out of the statute.

22 JUSTICE JACKSON: Thank you.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel.

25 Rebuttal, Mr. Clement?

1 REBUTTAL ARGUMENT OF PAUL D. CLEMENT
2 ON BEHALF OF THE PETITIONER

3 MR. CLEMENT: Thank you, Mr. Chief
4 Justice. Just a few points in rebuttal.

5 First, a couple of times my friends on
6 the other side have crept into this alternative
7 theory that really this should be -- "motor
8 vehicles" should be limited to owners and
9 operators. Obviously, those words aren't in
10 the relevant statutory provisions.

11 And as we point out in the reply
12 brief, as a practical matter, something like
13 45 percent of carriers don't actually own
14 the -- the vehicles. They lease them or they
15 belong to the driver.

16 If we're going to talk practicalities,
17 I think one really important number that's
18 practical is that 94 percent of the registered
19 carriers out there on the roads haven't had any
20 meaningful federal safety inspection, the kind
21 of annual inspection you have. You get the
22 registration, and then, hopefully, within about
23 a year or so, you get the fuller inspection.

24 But 94 percent of the carriers out
25 there haven't gotten this federal inspection.

1 So it would be really nice if state tort law
2 provided a backstop to a federal system that's
3 not really doing a lot.

4 On the (b) point, my -- my friend from
5 the Solicitor General's office said, you know,
6 the freight forwarders are just -- are -- are
7 just middlemen. That's not actually true. And
8 that's why there is this requirement that they
9 have some personal injury liability insurance.

10 They do do more than the brokers, but
11 the point is brokers aren't just middlemen at
12 least in many of these cases.

13 I talked about the cases where the
14 carrier is actually captive. All they do is
15 take C.H. Robinson loads. That's all they do.
16 They don't serve any other broker or they don't
17 serve shippers directly. In that situation,
18 C.H. Robinson knows or should know every bit as
19 much as a carrier.

20 The issue of the -- oh, and one other
21 point on this, just the practicalities of this.
22 There are services out there right now that
23 tell brokers more safety information that's
24 available based on the federal records.

25 C.H. Robinson doesn't want to use

1 those, but other brokers do. Maybe that's why
2 C.H. Robinson is a defendant in more of these
3 cases than some of the other brokers. There's
4 more that brokers can do.

5 There was some discussion of a
6 patchwork. That really doesn't work here
7 because they're -- they concede there's going
8 to be a patchwork with respect to the carriers.
9 And this whole regime on safety allows for a
10 patchwork. It's a -- the -- the federal safety
11 regulations are expressly designed as a
12 minimum, and states are allowed to go above and
13 beyond the minimum.

14 All right. There was some discussion
15 of this L.B. Foster case, and my friend said,
16 well, that's not such a great case for
17 Mr. Clement because that was an unregistered
18 broker and unregistered carrier. But the
19 problem is their theory sweeps so broadly that
20 you can't hold a broker liable for negligently
21 hiring a completely unregistered carrier.
22 There are some cases like that. And that just
23 doesn't make any sense whatsoever. That's
24 complete negligence, and there's no reason
25 there would be immunity there.

1 There was some brief discussion of the
2 Castle case. That old chestnut, if you take a
3 look at it, it basically says Illinois can fine
4 drivers for violating their state law. They
5 just can't literally bar them from the state.
6 But, you know, this is a situation much more
7 analogous to the fines, that there would be
8 liability. It's going to mean, if it's a
9 single company driver, like, it might put the
10 carrier out of business, this particular
11 carrier here has dissolved itself as an Indiana
12 corporation, but I think that's probably a good
13 thing, not a bad thing.

14 Some discussion just about how to
15 resolve this case. I would say, if you are
16 convinced that we win on (c)(2), then I would
17 urge you not to say anything really definitive
18 about (c)(1). My friend is correct that all
19 the courts that have looked at this particular
20 issue, with the safety exception staring them
21 in the face, have all said that (c)(1) provides
22 preemption.

23 But the hard case is going to be in
24 the ADA context. The hard case is going to be,
25 if there ever is a (b) case -- there probably

1 won't because they're so few that are purely
2 intrastate -- but the hard case is going to be
3 when you're staring at that preemption clause
4 and there is no safety exception to sort of
5 back it up. So I would urge you, if you think
6 (c)(2) applies here, just leave (c)(1) for
7 another day.

8 And then I'm sure I missed some of the
9 subtlety of the Solicitor General's officer
10 point about the coffee and the cream and the
11 sugar and all of that. But the thing is, if
12 you have one of these, like, McDonald's torts
13 where the problem is the piping-hot coffee
14 spilled in your lap, I would say that's a tort
15 with respect to coffee. And for the same
16 reasons, this is a tort with respect to motor
17 vehicles.

18 This case doesn't have to be that
19 hard. The thing that triggers state tort
20 liability is an 80,000-pound motor vehicle.
21 That's what devastatingly injured my client.
22 This is a case with respect to motor vehicles.

23 We urge you to reverse.

24 CHIEF JUSTICE ROBERTS: Thank you,
25 counsel.

1 The case is submitted.

2 (Whereupon, at 11:52 a.m., the case

3 was submitted.)

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