SUPREME COURT
OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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SHAWN MONTGOMERY,   )

        Petitioner,   )

          v.   ) No. 24-1238

CARIBE TRANSPORT II, LLC, ET AL.,)

        Respondents.   )

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Pages: 1 through 116

Place: Washington, D.C.

Date: March 4, 2026

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10   Washington, D.C.

11   Wednesday, March 4, 2026

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13   The above-entitled matter came on for

14   oral argument before the Supreme Court of the

15   United States at 10:12 a.m.

16

17   APPEARANCES:

18   PAUL D. CLEMENT, ESQUIRE, Alexandria, Virginia; on

19   behalf of the Petitioner.

20   THEODORE J. BOUTROUS, JR., ESQUIRE, Los Angeles,

21   California; on behalf of the Respondents.

22   SOPAN JOSHI, Assistant to the Solicitor General,

23   Department of Justice, Washington, D.C.; for the

24   United States, as amicus curiae, supporting the

25   Respondents.

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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 regulatory -- state

25   safety regulatory authority with respect to

1   motor 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 game

13   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 you're

18   thinking about context and common sense, which

19   you mentioned, that seems to be in tension with

20   that. You want to respond to that?

21   MR. CLEMENT: I would love to because

22   I think there is a counter-intuitiveness to the

23   fact that Congress seems to have provided a

24   broader preemption provision for intrastate

25   routes, prices, and services for brokers and

1   freight forwarders and a, you know, smaller

2   preemptive scope for interstate.

3   Now that anomaly is going to exist no

4   matter how you decide this case because (b) is

5   broader not just because it doesn't have a

6   safety exception but also because it doesn't

7   have the phrase "with respect to the

8   transportation of property." So, you know,

9   it -- and -- and so, like, a case like Dan's

10   City, you know, would -- where this Court said

11   that "with respect to the transportation of

12   property" is what meant there was no

13   preemption, there would be preemption for

14   interstate.

15   Now I'm not here to tell you that

16   makes any sense, but what I am here to tell you

17   is that Congress in 1995 made a very deliberate

18   decision to treat brokers and freight

19   forwarders differently for interstate and for

20   intrastate.

21   I mean, it would have been the easiest

22   thing in the world in 1995, because, remember,

23   brokers are added to both a year after --

24   JUSTICE KAVANAUGH: Right. Yeah.

25   MR. CLEMENT: -- the principal

1   statute. It would have been the easiest thing

2   in the world to create, like, a subsection that

3   was about brokers and freight forwarders for

4   interstate and intrastate. But Congress didn't

5   do that. They consciously had a separate sub

6   (b) clause for intrastate, and then they

7   consciously dropped the brokers and the freight

8   forwarders into (c), which already had the

9   safety exception.

10   JUSTICE KAVANAUGH: Just going back to

11   the real world, though, you know, a -- a broker

12   in Los Angeles who arranges a trip to San

13   Francisco, no -- no tort suits available. But,

14   if it's to -- to Reno, a tort suit is available

15   under your theory, right?

16   MR. CLEMENT: Under our theory of the

17   safety exception. Now, you know --

18   JUSTICE KAVANAUGH: Yeah.

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

20   JUSTICE KAVANAUGH: On the safety

21   exception --

22   MR. CLEMENT: Right.

23   JUSTICE KAVANAUGH: -- which is the

24   key. And I guess --

25   MR. CLEMENT: But -- but --

1   JUSTICE KAVANAUGH: -- I'm still

2   trying to figure out how that makes some sense,

3   particularly when -- let's just add to it the

4   other kind of issue that -- that bothers me a

5   little bit here, is the fact that Congress

6   required financial security requirements for

7   the truckers but not for the brokers and --

8   with respect to accidents. And that seems

9   another thing that you can -- you can respond

10   to.

11   MR. CLEMENT: Sure. But let me

12   respond to them in turn.

13   So starting just to -- to reiterate

14   what I said with (b), I mean, look, I'm -- I'm

15   not here to tell you that that's not a little

16   bit anomalous, but it would be more anomalous

17   to take two statutes, one of which has a safety

18   exception and one of which doesn't, and

19   interpret them to mean the same thing.

20   And there's no question that (b) is

21   not the applicable provision here, (c) is the

22   applicable provision. And as I said, no matter

23   what you do with the safety exception, you're

24   going to still have an intrastate provision

25   that is -- has broader preemptive force than

 1   the interstate provision because (b) doesn't

 2   have that with respect to transportation

 3   across --

 4   JUSTICE KAVANAUGH: What about the

 5   financial security requirement?

 6   MR. CLEMENT: So --

 7   JUSTICE KAVANAUGH: If we're trying to

 8   figure out what Congress was doing, which I

 9   think you've talked about here in '94 and '95,

10   they say that the truckers have -- the trucking

11   companies have to have financial security so

12   they can pay judgments with respect to

13   accidents, but they don't do that on brokers.

14   And when you combine the two things we're

15   talking about, that does -- I mean, that's in

16   tension with your position.

17   But what's your best response to that?

18   MR. CLEMENT: Well, I think I have

19   several pretty good responses to that, I mean,

20   one of which is it's even more complicated than

21   that because freight forwarders were also

22   supposed to have some insurance against injury

23   risk. So -- so you can't make some idea that

24   everybody in the sub (b) is different from

25   everybody in the sub (c) if you're following me

1   on that. But more to the point --
2   JUSTICE KAVANAUGH: I am -- I am.
3   But, if Congress envisioned tort suits against
4   brokers, why not require brokers to have the
5   insurance to pay the judgments?
6   MR. CLEMENT: Because I -- I think
7   Congress rationally said we want to make sure
8   that they have a financial security requirement
9   that is responsive to the principal financial
10   risk that they face. And it's different with
11   respect to carriers than with respect to
12   brokers.
13   The principal financial security risk
14   that brokers have is default, but you can't
15   read too much into the insurance requirements
16   because nobody thinks that carriers can't
17   default. In fact, carriers are defaulting all
18   the time --
19   JUSTICE KAVANAUGH: All -- all the
20   time.
21   MR. CLEMENT: -- and going bankrupt --
22   JUSTICE KAVANAUGH: Yeah.
23   MR. CLEMENT: -- all the time. And so
24   you can't draw too strong an inference.
25   And what I would also say is there's

1   also sort of an asymmetry in the -- in the

2   inference that you would draw because, you

3   know, some lower courts, for example, have

4   focused on that insurance requirement by

5   finding that safety torts are not preempted in

6   the Airline Deregulatory Act context.

7   But that sort of makes sense because

8   it would be very weird for Congress to force a

9   carrier to insure against a risk that is

10   actually zero because the risk is preempted.

11   So, when -- when Congress says you

12   must insure against something, it's actually a

13   pretty positive sign that there's not

14   preemption, but I don't think it works the

15   other way around. There's all sorts of

16   contexts where you say things are not preempted

17   and Congress hasn't even thought to make

18   somebody insure against it.

19   So I just don't think, you know --

20   like, you know, I -- I -- like, I don't think

21   there is a presumption against preemption in

22   the express preemption context, but, boy, you

23   need something more than an insurance

24   requirement to ignore the plain text of a

25   clause that is designed to deal with the issue

1   of preemption straight up.

2   JUSTICE KAGAN: Can I take you back,

3   Mr. Clement, to Justice Kavanaugh's first set

4   of questions, the interstate/intrastate, and

5   you said you're -- you're not here to tell us

6   that it makes any sense.

7   Do -- do -- do you have a theory

8   whether or not it makes any sense about how it

9   came to be? I mean, why?

10   MR. CLEMENT: I think that, you know,

11   it was a different -- it was a different

12   Congress, a year later, maybe the interest

13   groups lobbied a little different a year later,

14   maybe the same people weren't paying attention

15   a year later.

16   And, again, though, I -- I think the

17   critical thing, though, is the one thing we

18   can't ignore is that Congress made the

19   deliberate judgment to treat interstate and

20   intrastate differently.

21   Now, if -- if you really think they

22   should be the same, then maybe that's a reason

23   to not read the preemption clause to reach

24   safety-related torts altogether, as -- as lower

25   courts have read the ADA. I mean, if the

1   anomaly's really bothering you, that's the one

2   way you can make the anomaly go away.

3   Or, actually, suppose, you know, like,

4   the text of (b) is a little bit different and

5   it's so focused on intrastate rates, intrastate

6   routes, like, intrastate services that you

7   could say that really, unless you're talking

8   specifically about intrastate services, the

9   preemption clause doesn't apply.

10   But, you know, maybe it's best to

11   leave all of that for a case that actually

12   implicates (b) because this is a (c) case, and

13   Congress clearly said with respect to

14   interstate, at the -- at the moment it's

15   creating this new exception for intrastate,

16   brokers and freight forwarders, at the same

17   moment it says, you know what we're going to

18   do, we're going to not treat brokers and

19   freight forwarders the same way for interstate

20   and intrastate and when it comes to interstate,

21   we're going to drop them into a -- a preemption

22   provision that has a safety exception.

23   I think that's what you have to sort

24   of try to interpret here. And then, if you get

25   to the safety exception, I think the question

1   of whether these negligent hiring torts against

2   a broker are with respect to motor vehicles is

3   quite straightforward.

4   And I think, if you understand the

5   nature of the 411 restatement tort, the whole

6   reason that there is a negligent hiring tort in

7   certain circumstances but not others is because

8   you're hiring somebody to do something that has

9   the possibility of harm, bodily harm, to third

10   people -- third persons, rather.

11   And what creates the threat of bodily

12   harm to third persons in this context? It's

13   the 80,000-pound motor vehicle that you're

14   putting somebody behind the wheel of or you're

15   entrusting the -- the cargo to.

16   And so -- and that's true whether it's

17   a -- a tort against the -- the -- the broker or

18   against the carrier. And so, if I hire

19   somebody to just, like, paint my house and they

20   do a lousy job, like, shame on me, but there's

21   no negligent hiring of a contractor tort in

22   that context because just painting the house

23   isn't going to pose a risk of bodily harm to

24   third parties.

25   So what really triggers this whole

 1   tort is a risk of bodily harm to third parties.

 2   And the only thing in this mix that poses that

 3   risk of bodily harm to third parties is the

 4   motor vehicle. So, if you follow what tort

 5   we're talking about here, it really does make

 6   the connection to motor vehicles quite direct.

 7   JUSTICE JACKSON: Mr. Clement, could

 8   another way of thinking about this really be

 9   focusing on (c), as you've encouraged us to do,

10   and how it operates, what it's doing?

11   It seems to me that one could conceive

12   of this as (c)(1), Congress coming in and

13   making a change to the status quo. This is the

14   deregulation point that you -- that you said.

15   And they say in that section that this

16   deregulation is occurring with respect to the

17   economic aspects of the system, and then the

18   safety clause, this part that we're all focused

19   on now, is really just clarifying to some

20   extent that what they have done with respect to

21   preemption is leaving the status quo regarding

22   safety.

23   And so Justice Thomas's point was --

24   was a good one, in other words, what was the

25   status quo? States were regulating with

1   respect to safety. So was the federal

2   government to some extent.

3   And if you think of it from that kind

4   of bird's eye view, I think it seems pretty odd

5   for Respondents to suggest that Congress was

6   really focused on who would be able to bring a

7   claim or how. It's sort of -- that's all up to

8   how the state was regulating. What is their

9   tort? What is their system? Congress was

10   just, it seems to me in this statute, saying

11   we're not touching any of that with respect to

12   the preemption that we are now establishing.

13   MR. CLEMENT: So I wouldn't resist one

14   word of that. I would say that's exactly how

15   the lower courts have approached this in the

16   context of the ADA, where you don't have a

17   safety exception, so your eyes don't

18   immediately go to the safety exception. But

19   still, courts have realized that long before --

20   like in the bad old days of federal economic

21   regulation, you still had state tort suits for

22   personal injury and the rest.

23   And so, when Congress in the ADA says,

24   all right, we want to get rid of the federal

25   economic regulation and we don't want the

1   states replacing it with new economic

2   regulation of their own, but they had no

3   interest whatsoever in getting rid of all those

4   tort actions, and, as I say, as we say in the

5   briefs, but I think it's quite true, actually,

6   from Congress's perspective, if you want

7   economic deregulation, the last thing you want

8   is a huge uptick in accidents and lots of,

9   like, safety mishaps.

10   JUSTICE KAVANAUGH: Well, can I just

11   interrupt there just on the rhetoric. It's not

12   getting rid of safety tort suits. The tort

13   suits against the trucking companies, the

14   carriers, are still preserved. Everyone agrees

15   on that.

16   MR. CLEMENT: Sure. But the problem

17   is, once you agree to that, there's really no

18   coherent reason to stop there. Like, you're

19   looking at the state tort and the state tort is

20   not a --

21   JUSTICE KAVANAUGH: I was just

22   responding to your point about safety

23   regulation being gone. No, safety regulation

24   through tort suits still exist, everyone

25   agrees, against the primary people who are

1   going to be sued, as I think you've

2   acknowledged, which are the -- the truckers,

3   the carriers.

4   MR. CLEMENT: Yeah. And I didn't mean

5   to get carried away with my rhetoric. My -- my

6   point was just like, if -- if you're a rational

7   deregulator, but all -- you know, you care

8   about, you -- you -- Chicago school, you want

9   economic freedom, the last thing you want at

10   that same moment is for there to be new safety

11   problems because that --

12   JUSTICE JACKSON: And -- and my -- my

13   point was -- was why would we think that given

14   the background that you're talking about, that

15   Congress would be focused on preserving only

16   the tort claims with respect to the truckers,

17   as opposed to the brokers, as opposed to

18   anybody else?

19   In other words, why -- Congress's

20   attention, it would seem to me, would not be at

21   the level of who is actually going to

22   ultimately be sued, you know, under tort in

23   these different states or whatnot. The point

24   of its regulation was just to say we are

25   concerned with economic deregulation. Those

1   who are regulating safety, carry on.

2   And under whatever state's law, if

3   they had a particular tort, if they had it

4   before, if it's operating, then Congress wasn't

5   bothering that. If it applied to brokers as

6   well as truckers, Congress wasn't bothering

7   that.

8   It just seems odd to me to think that

9   we would read this statute and all that it's

10   doing to have Congress caring about the

11   particular defendants who are going to be sued

12   at the end of the day.

13   MR. CLEMENT: Again, I couldn't agree

14   more, and I think, if you look at that L.B.

15   Foster case, 1969, Ninth Circuit case, I mean,

16   that's a case where the plaintiff sued the

17   shipper, the broker, and the carrier, and under

18   California law, they were all liable.

19   Now some other state might make a

20   judgment that we want to stop liability at the

21   broker and not have it go to the -- the

22   shipper. Or another state might say we want to

23   stop liability at the -- at the carrier. Maybe

24   a state -- I think it would be crazy, but maybe

25   a state wants to stop it at the driver.

1   All of those are judgments that the

2   states get to make. And I don't think, as you

3   suggested --

4   JUSTICE KAGAN: So, even if a shipper

5   uses a broker who then hires a motor carrier,

6   you think the shipper is included in this?

7   MR. CLEMENT: I -- I -- I do. I

8   think, in a -- in a sense, that's a much more

9   straightforward case. As long as the state

10   tort reaches them, then the shippers aren't

11   covered by the preemption clause.

12   And I actually -- so I -- I don't

13   think the shippers have much of an argument.

14   You know, you got to -- you got to start with

15   the argument that it's preempted and then

16   resist the safety exception. So the shippers

17   can't get off first base -- get to first base

18   because they're not covered by the preemption

19   clause.

20   And one of the anomalies that the

21   other side's position creates, I mean, you

22   know, they -- they like to talk about the

23   brokers as just being middlemen or middle

24   persons. But they're middlemen between

25   shippers and carriers, who both, at least in

1   some states, are liable for this negligent

2   hiring tort.

3   So it's weird to have the middleman

4   between two people that are potentially liable

5   immune, and if you allow that to happen, it

6   creates a huge artificial incentive for

7   shippers to use brokers because that's a way

8   they can try to download or --

9   JUSTICE KAVANAUGH: What --

10   MR. CLEMENT: -- and the other thing

11   they can do is --

12   JUSTICE ALITO: What if --

13   MR. CLEMENT: -- they can actually

14   reinvent themselves as -- as -- as brokers --

15   JUSTICE ALITO: As far as --

16   MR. CLEMENT: -- like --

17   JUSTICE ALITO: I'm sorry.

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

19   JUSTICE ALITO: Yeah. As -- as far as

20   federal law is concerned, how far does "with

21   respect to motor vehicles" extend? I mean,

22   this is a classic question of causation. Does

23   it extend to anything that could contribute to

24   an accident?

25   MR. CLEMENT: So I'm not sure that it,

1   you know, sort of goes, like, to, you know, the

2   butterfly effect and all of that kind of thing.

3   What this Court has said in lots of contexts is

4   it doesn't have to be, like, super-direct.

5   There's no direct link requirement. But, at

6   the same time, things that are attenuated,

7   peripheral, and remote, I think is the phrase

8   this Court has used on a couple of occasions,

9   are not covered.

10   Now, here, I think it's a pretty easy

11   way to say that this is not wildly indirect for

12   purposes of --

13   JUSTICE ALITO: Yeah, no, I -- I see

14   that. But do you think there is some

15   limitation in the phrase "with respect to"?

16   MR. CLEMENT: Yeah. Absolutely. But

17   it's -- but -- but I would say, like, if -- if

18   I were, like, sitting on Congress's shoulder

19   and saying, all right, we want direct

20   connections only, I would say don't use the

21   "with respect to" language.

22   JUSTICE ALITO: And the limitation is

23   proximate cause under state law? Is that the

24   limitation?

25   MR. CLEMENT: Well, that's one

1   practical limitation in this context because

2   you can't bring a tort against a broker under

3   state law unless you satisfy the proximate

4   cause requirement.

5   JUSTICE ALITO: Yeah. Well, I --

6   JUSTICE KAVANAUGH: The --

7   JUSTICE ALITO: -- understand this is

8   pretty direct, but if something has to be --

9   some kind of directness requirement or a -- a

10   minimum link requirement has to be read into

11   (c)(2), then I come back to the question that

12   Justice Kavanaugh led up with, which is the

13   real anomaly, which is very hard to accept,

14   that there's preemption for intrastate activity

15   but not for interstate activity, and I came to

16   the argument hoping you were going to give us

17   some brilliant way of reconciling these two

18   provisions other than just live with it, but I

19   guess there's no -- there is no such theory.

20   MR. CLEMENT: If there is, it has

21   escaped me. But, as I say, I do think it's

22   telling that you're going to have a broader

23   intrastate -- intrastate preemption clause no

24   matter how you decide this case.

25   The other thing is I would say I don't

1   think -- I mean, that would really be letting

2   the tail wag the dog. You know, I've looked

3   through all these cases. I think there are two

4   intrastate cases that I've been able to find.

5   Maybe my friends have found more. But there

6   are, you know, dozens and dozens of interstate

7   cases.

8   And the intrastate cases I've found

9   have actually said there's no preemption on

10   sort of the ADA, that's not what this is all

11   about. So I think it would be a mistake to let

12   the absence of the safety exception in (b) be

13   the tail that wags the dog.

14   JUSTICE KAVANAUGH: What do you --

15   what do you do with the fact that the

16   brokers -- I think the amicus brief of the

17   Transportation Intermediaries Association,

18   particularly pages 20 to 24, really go in

19   detail of, if tort liability extends to them,

20   how are they going to assess and evaluate the

21   safety of drivers in a particular trucking

22   company? How are they going to figure out do

23   they have an alcohol/drug issue? How are they

24   going to figure out English proficiency, which,

25   of course, is a critical issue at the current

 1   moment that's being discussed? How are they

 2   going to do this is the real concern that's

 3   raised in that brief and by Respondents that I

 4   think, you know, is something you need to

 5   respond to.

 6   MR. CLEMENT: Sure. I'll try to

 7   respond to it, and I think it may be much more

 8   straightforward than you think in many cases.

 9   I mean, ultimately, like, the legal

10   answer is it's the "know or should have known"

11   standard. But, in --

12   JUSTICE KAVANAUGH: But, usually, when

13   you say that -- sorry to interrupt -- you know,

14   there's some way for the tortfeasor to -- to

15   protect themselves, and -- and what they're

16   saying here is, in the real world of how

17   brokers operate, it's very difficult.

18   MR. CLEMENT: So I think it's going to

19   be pretty easy for them to protect themselves

20   by hiring quality carriers. And --

21   JUSTICE KAVANAUGH: And that's going

22   to favor the -- so this whole thing's going to

23   really favor the large established carriers

24   over the smaller carriers because they're going

25   to default to that to protect themselves, I

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 1      think, which is fine, but I just want the

 2      implications of your position to be understood.

 3               MR. CLEMENT:  Look, you can be a safe

 4      small carrier.  And here's the thing, and this

 5      is where --

 6               JUSTICE KAVANAUGH:  They tend -- they

 7      tend not to be as safe as the larger ones,

 8      correct?

 9               MR. CLEMENT:  Well, some of them tend

10      to be very unsafe, and some of them tend to

11      be --

12               JUSTICE KAVANAUGH:  Right.

13               MR. CLEMENT:  -- these chameleon

14      carriers where they -- their safety record is

15      terrible and then they show back up.  And the

16      situations where there should be liability is

17      when the broker knows, like, or should know

18      that it's a chameleon carrier.  If they've just

19      been dealing with this carrier as, you know,

20      Joe's Trucking run by Joe Smith, and then all

21      of a sudden Joe Smith shows up and this time

22      it's Smith Trucking, like, the carrier is going

23      to know that -- the broker's going to know

24      that.

25               And here's one of the things that sort
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1   of helped me understand all of this, which is

2   you have a number of situations where there is

3   a captive carrier, where that carrier does only

4   loads for C.H. Robinson. And so, in that

5   circumstance, C.H. Robinson is going to know

6   every bit as much as the carrier is going to

7   know in those circumstances.

8   Now there are going to be other

9   situations, like, say, they can protect

10   themselves, but they can also protect

11   themselves by asking some questions and having

12   some screens. I mean, this is a case where

13   C.H. Robinson's own policy says that they don't

14   hire carriers that have conditional safety

15   ratings, but they did it here anyways.

16   So, you know -- so you have cases like

17   that where, yeah, you can worry a little bit

18   about how they're going to protect themselves,

19   but they already take some efforts. And when

20   they blow their own sort of standards or,

21   like --

22   JUSTICE KAVANAUGH: Well, they were

23   relying on the federal government standards

24   because the federal government regulates the

25   trucking companies and -- and kind of certifies

1   them.

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

3   JUSTICE KAVANAUGH: And that's

4   probably not good enough, is what you're

5   saying, which I -- I don't -- I'm not taking

6   issue with that, but -- but that's what they've

7   been relying on in the past, right?

8   MR. CLEMENT: But the federal

9   government regulates in a very minimal way, and

10   the federal statute specifically says it's a

11   minimum, not a maximum, and states are free to

12   go above that. And, I mean, you really can't

13   underestimate, like --

14   JUSTICE KAVANAUGH: Again, for the

15   carriers, that begs the question, but keep

16   going. Yeah.

17   MR. CLEMENT: I mean, you know, the --

18   you know, the statistics that the amicus briefs

19   have shown is that roughly 94 percent of

20   carriers have not had, like, a safety exam by

21   the federal government. And the way this works

22   is, to get on the road in the first instance,

23   you do not have to go through some -- I mean,

24   it's -- it's kind of less rigorous than getting

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

1   CHIEF JUSTICE ROBERTS: Thank you,

2   counsel.

3   Justice Thomas, anything further?

4   JUSTICE THOMAS: Would you take a

5   minute and walk me through why you think or why

6   it's -- it's agreed here that subsection (2)

7   regulates safety in intrastate cases?

8   MR. CLEMENT: So -- oh, the argument

9   would be that, you know, if you -- if -- if

10   this were a (b) case, and I was trying to argue

11   that safety is not -- is -- is not preempted,

12   what I would do is I would make an argument

13   sort of like I would make in the airline

14   deregulation context, which is to say there

15   were these tort claims beforehand, they

16   probably -- like, the last thing anybody would

17   have thought was going to be preempted

18   beforehand was an intrastate tort claim.

19   JUSTICE THOMAS: Mm-hmm.

20   MR. CLEMENT: And all Congress was

21   trying to do with (b) is to make sure when they

22   deregulate interstate that there aren't these

23   sort of confusing intrastate regulations of the

24   same economic things. So that would basically

25   be my argument.

1   I -- you know, I could -- I could warm

2   to it and try to get a little more textual and

3   try to say that, you know, it's written a

4   little bit differently, and it really does

5   focus on intrastate rates, intrastate routes,

6   intrastate services of any freight forwarder or

7   broker. And it's just a little hard to think

8   of these, like, negligent hiring things as

9   being sort of, like, distinctly intrastate, but

10   it's a harder case than (c), I'll -- I'll grant

11   you that.

12   JUSTICE THOMAS: Was there ever any

13   federal involvement during the ICC era with

14   intrastate shipping?

15   MR. CLEMENT: No, that was -- I mean,

16   except in one or two areas where they felt like

17   they had to do it to rationally regulate

18   interstate, but the -- under the old ICC, the

19   basic division of labor was interstate,

20   federal; intrastate, state.

21   JUSTICE THOMAS: So why would this

22   have any application at all just structurally

23   to intrastate shipping? If -- if the

24   deregulatory effort is to deregulate covered

25   areas and this area was not intrastate, why

1   would it have any application at all?

2   MR. CLEMENT: Oh, I -- I -- my -- I'm

3   surmising now, but I think the idea was, okay,

4   like, in a world where everything's regulated

5   at the federal level, it's pretty easy to sort

6   of hand off, like, regulation to the states

7   when it's intrastate, but in a world where you

8   really want the free markets to sort of

9   prevail, having this little island of state

10   economic regulation of intrastate starts to

11   seem like less wholesome and it's sort of

12   interfering with the federal objection --

13   objectives.

14   And in this regard, it's probably

15   worth recognizing, you know, the federal

16   deregulation takes place in 1980. They don't

17   impose the preemption provision generally until

18   '94. And then they don't address brokers and

19   freight forwarders until 1995.

20   So, for 15 years, the federal

21   government was perfectly happy to deregulate at

22   the federal level and let the states kind of do

23   what they want. And then, at a certain point,

24   I'm surmising that they said some of the state

25   regulation is getting in the way of our federal

1 economic deregulatory objectives, but at the

2 same time, you know, the one place -- well, in

3 the two places because they did it for

4 passenger too, they -- they really did try to

5 preserve state regulatory authority with

6 respect to safety in motor vehicles.

7   CHIEF JUSTICE ROBERTS: Justice Alito?

8   Justice Sotomayor?

9   JUSTICE SOTOMAYOR: I -- I paused when

10 I was reading the briefs in this case. Is the

11 intrastate preemption subject to challenge?

12 Because, if it's been decoupled from interstate

13 commerce, under what congressional power could

14 there -- could the government preempt?

15   MR. CLEMENT: I'm -- I'm guessing, I

16 mean, it's probably a pretty good question for

17 the federal government. If I had to make the

18 argument for them, I would say that it's under

19 the Necessary and Proper Clause, and it would

20 be under the theory that they needed to

21 regulate the intrastate in order to rationally

22 deregulate the -- the interstate, but I -- I

23 guess I'll take the question as a friendly

24 amendment as just one more reason to leave the

25 intrastate provision for a case where it's

1   actually at issue because the one thing that's

2   crystal-clear here is they have no (b)

3   argument. This is interstate. And so --

4   JUSTICE SOTOMAYOR: Yes. And I do

5   understand what you're saying to Justice

6   Kavanaugh and Alito, which is the difference

7   between intrastate and interstate is even wider

8   than whether you cover brokers or not because

9   intrastate, they're preempting everything, not

10   just whether it's in transport of property.

11   MR. CLEMENT: Right. And, you know,

12   like, if I were going to warm to the topic of

13   having to have a theory of how all this works,

14   I suppose if what they were really trying to do

15   in 1995 is make sure that the state regulation

16   sort of doesn't interfere, maybe they just

17   address it a little bit differently.

18   JUSTICE SOTOMAYOR: All right. Could

19   I stop you to go back on the shipper question?

20   Because one of my questions in my mind was how

21   far back can you go? Could you go to the

22   shipper? And you're saying in many states you

23   can. Would that be for -- for hiring a

24   negligent carrier or for hiring a negligent

25   driver?

1   MR. CLEMENT: So --

2   JUSTICE SOTOMAYOR: Meaning, is it

3   auto -- is the liability automatic for the

4   shipper?

5   MR. CLEMENT: So, under certain

6   circumstances, and I think the most

7   circumstances it would be for hiring a

8   negligent carrier, but I think it also could

9   get to the driver level.

10   I mean, I think, you know, in a case

11   like this, like, you know, and this happens

12   more frequently than you think. I mean, I

13   think one of the other statistics in the amicus

14   brief is some 50 percent of all carriers only

15   have one driver. So particularly if you're a

16   broker, you may very well know not just what

17   carrier you're getting but what driver you're

18   getting.

19   JUSTICE SOTOMAYOR: Driver you're

20   getting. But your point is that the shipper

21   would not be preempted under any circumstance.

22   So this lawsuit doesn't have a defense under

23   this Act if you're suing the shipper?

24   MR. CLEMENT: If you're suing the

25   shipper, that's right. Now there is an amicus

1   brief here that's, you know, or two actually, I

2   think, on behalf of shippers that are making

3   what I think is kind of an extravagant argument

4   that they are covered by the preemption

5   provision even though it obviously doesn't

6   address shippers and it only addresses

7   carriers, brokers, and freight forwarders.

8   JUSTICE SOTOMAYOR: Do you happen to

9   know if there are lawsuits against shippers

10   that go on routinely?

11   MR. CLEMENT: My -- my understanding

12   is that there are, and -- but my understanding

13   is that, you know, it's also caused some

14   shippers to start using brokers because --

15   JUSTICE SOTOMAYOR: Because it's a way

16   to try to --

17   MR. CLEMENT: -- at least it gives you

18   a colorable textual preemption argument to use

19   a broker.

20   JUSTICE SOTOMAYOR: Got it. Thank

21   you.

22   CHIEF JUSTICE ROBERTS: Justice Kagan?

23   JUSTICE KAGAN: Mr. Clement, the

24   government has an argument, I think it's the

25   government, might be the Respondents too, that

 1   your theory makes this "with respect to motor

 2   vehicles" phrase superfluous. I was just

 3   wondering what you would say about that.

 4   MR. CLEMENT: I was hoping you would

 5   ask.

 6   So I think there's a -- there's a big

 7   problem with that argument because I think

 8   it -- it sort of fails to appreciate how broad

 9   the definition of "transportation" is. And the

10   statutory definition of "transportation" that's

11   relevant for this part of the statute is

12   reproduced at pages 18 and 19 of the petition

13   if you have that.

14   But it's incredibly broad definition.

15   And it's -- it's 23(a). And the first thing in

16   the definition is a motor vehicle. And then it

17   then goes on to list 10 other things. Vessel,

18   warehouse, wharf, pier, dock, yard, property,

19   facility, instrumentality, or equipment of any

20   kind.

21   And then there's a (b) clause that

22   goes on and talks about services related to

23   movement, including receipt, delivery,

24   elevation -- I had to look that one up and

25   figured out they were actually talking about

1   grain elevators -- transfer and transit,

2   refrigeration, icing, ventilation, storage,

3   handling, packaging, unpackaging, and

4   interchange of passengers.

5   So there is an enormous amount of

6   things that come within the broad definition of

7   "transportation" that do not involve motor

8   vehicles. So there's no superfluity problem

9   here at all.

10   And I'd -- I would say that the

11   breadth of that definition of "transportation"

12   is maybe one more reason to think that maybe

13   you should decide this case either just on the

14   safety exception, or maybe you should say the

15   preemption clause doesn't apply here at all.

16   The safety torts a la the lower court handling

17   of the ADA cases. Because somebody gets

18   injured on a wharf or a pier or a dock, there's

19   no way that's with respect to a motor vehicle

20   or it could certainly not be.

21   And it would be pretty weird if that

22   were preempted. But, of course, the old ICC

23   had a pretty broad sense of what it got to

24   regulate, including the routes and charges and

25   services for, like, a grain elevator.

1   So -- so I do think there are real

2   reasons for caution here, but I'm glad you

3   asked the question because I do think the more

4   you appreciate the breadth of the statutory

5   definition of "transportation," the less

6   persuaded you would be by that superfluity

7   argument.

8   JUSTICE KAGAN: Thank you.

9   CHIEF JUSTICE ROBERTS: Justice

10   Gorsuch?

11   Justice Kavanaugh?

12   JUSTICE KAVANAUGH: If you prevail

13   here, I just want to pick up on what brokers

14   will need to do. So you prevail here, then

15   you're counsel to a broker say, and the broker

16   is worried about, you know, the issue The Wall

17   Street Journal focused on yesterday, the

18   English language proficiency of drivers who

19   can't read signs, okay?

20   And so the broker says: I don't want

21   to select a carrier that hires drivers that are

22   not proficient in English language.

23   How do they do that? And do they need

24   to do that? And how do they do that? Because

25   that's a lot of the current discussion, is

 1   there are a lot of different issues, but that's

 2   one that's currently in the current events.

 3   MR. CLEMENT: So a complicated

 4   question. I'd probably give them a pretty long

 5   memo, and, you know, I'd start by saying I'm

 6   not sure these, like, English language

 7   requirements are really sort of safety

 8   regulations with respect to motor vehicles.

 9   Maybe they are, I mean, but, like, I

10   think that's a debatable question sort of at

11   the threshold. And then --

12   JUSTICE KAVANAUGH: Well, why not? If

13   you can't read -- if you're hiring drivers who

14   can't read the signs, that seems like a safety

15   issue.

16   MR. CLEMENT: If -- if -- if you say

17   so. I mean, you know, I -- I -- like --

18   JUSTICE KAVANAUGH: Assume that's

19   true. Keep going.

20   MR. CLEMENT: Okay. Assume that's

21   true. Then I've got to, like -- you know, I

22   want to address whether, like, I'm violating

23   some other federal law by discriminating on the

24   basis of English language proficiency. And I

25   haven't sort of thought all that through. But

1   it's not obvious to me that you can do that.

2   But assuming you can --

3   JUSTICE KAVANAUGH: Well, the federal

4   government now tests for that for the drivers.

5   MR. CLEMENT: Yeah, I bet that's being

6   challenged somewhere. But -- but -- but let's

7   assume --

8   JUSTICE KAVANAUGH: Yeah.

9   MR. CLEMENT: -- that, you know, we're

10   on to the last part of my memo, we'll assume

11   that that's also legal, then I would say, okay,

12   like, you can use large carriers, but if you

13   do, make sure that they have an adequate

14   testing program, and if you do, you're done.

15   And -- and the carriers will have

16   every incentive to have that themselves because

17   everybody thinks the carriers are liable, so if

18   we don't have problems with the two threshold

19   questions, then the carriers are going to have

20   to do it.

21   So the brokers should be in a pretty

22   good position. They just have to hire carriers

23   that actually have a reasonable policy for

24   dealing with that, and if they want to have

25   smaller carriers, that's great, but they just

1   need to --

2   JUSTICE KAVANAUGH: The same for,

3   let's say, drug use.

4   MR. CLEMENT: Yeah.

5   JUSTICE KAVANAUGH: They're asking the

6   carriers what do you -- they've got to get

7   something from the carriers that say we're

8   checking our drivers for -- for drug use,

9   alcohol background, safety checks, prior

10   accidents, all that?

11   MR. CLEMENT: Right. But what you

12   don't want them to do is not even ask that

13   question --

14   JUSTICE KAVANAUGH: Right.

15   MR. CLEMENT: -- and then hire

16   somebody who's cheaper. And then -- because,

17   you know, one of the reasons, I think, that you

18   do want them to have to have some duty of care

19   in these circumstances is this is a margin

20   business.

21   JUSTICE KAVANAUGH: Yeah.

22   MR. CLEMENT: So, if -- you know, if

23   they don't have the -- any sort of incentive to

24   internalize any of the cost of not asking the

25   question, they really have no good reason to

1   ask the question. They want to hire the

2   cheapest carrier.

3   JUSTICE KAVANAUGH: So the real-world

4   effect, again -- and I think this may help your

5   position, so this is not a hostile question --

6   is the -- the brokers are going to be really

7   digging into the carriers' safety background

8   checks of drivers if -- if you prevail in this

9   case and that, I don't think you should shy

10   away from that. I just want to make sure

11   that's what you think is going to happen.

12   MR. CLEMENT: Yeah, but, you know, I

13   think it's -- it -- I -- I worry a little bit

14   about digging into because -- because, you

15   know, in fairness --

16   JUSTICE KAVANAUGH: Well, they want

17   to -- they don't want to get sued for millions

18   of dollars, so they should dig in, shouldn't

19   they, if you're their counsel?

20   MR. CLEMENT: I'd tell them -- as

21   their counsel, I'd probably say, out of an

22   abundance of caution, dig in, but I would also

23   say I wouldn't -- you know, I wouldn't, like,

24   be alarmist about this because the carriers --

25   everybody agrees the carriers are going to have

1   to do this.

2   JUSTICE KAVANAUGH: Mm-hmm.

3   MR. CLEMENT: And so, as long as

4   you're not hiring fly-by-night carriers who

5   aren't doing it and are -- have the minimum

6      $750,000 of insurance, like -- and you can hire

7   small, you can hire -- you know, small is

8   beautiful if -- if they do it right.

9   But you do have to sort of ask those

10   questions and make sure that, you know, they're

11   in a position where they are doing everything

12   they can. And then, if you do that, I would

13   think the broker is not going to have a problem

14   if it's asking the hard questions of the

15   carrier.

16   JUSTICE KAVANAUGH: Thank you.

17   CHIEF JUSTICE ROBERTS: Justice

18   Barrett?

19   JUSTICE BARRETT: Mr. Clement, assume

20   that I -- and this is just an assumption --

21   assume that I think (c)(1) doesn't apply and

22   it's not preempted. What would be the

23   advantage of deciding this case based on the

24   safety exception rather than the preemption

25   provision?

1   MR. CLEMENT: So the principal

2   advantage of deciding this case on (c)(2), on

3   the -- (c)(2)(B) or whatever it is, like, that

4   might not really move you if you actually don't

5   think it's preempted under the principal

6   preemption provision. But the principal --

7   JUSTICE BARRETT: I said that

8   backwards. I mean say that I think you might

9   win under (c)(1) because I don't think it's

10   preempted.

11   MR. CLEMENT: Right.

12   JUSTICE BARRETT: Why would I decide

13   it, or is there any reason to decide it?

14   MR. CLEMENT: Under those

15   circumstances, there's not much. But I will

16   say this. Like, you know, I think the question

17   about whether the ADA preemption provision

18   applies to safety-related torts is a hard one.

19   JUSTICE BARRETT: Mm-hmm.

20   MR. CLEMENT: And I think anything you

21   say about the principal preemption provision

22   here is, I think, going to have some carryover

23   effects in the ADA context. That's, after all,

24   why the Airlines for America filed an amicus

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

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 1              And I think you might want to hold

 2      that issue, which is a tricky one, harmless.

 3      And the way you hold that issue completely

 4      harmless is save it for another day when it

 5      actually matters, and you just decide this case

 6      on the basis of text that's not in the ADA.

 7              JUSTICE BARRETT:  Okay.  Let me flip

 8      it.  Let me say that I am very -- I do think

 9      it's a hard question.  I'm very skeptical about

10      whether the preemption provision applies or

11      not.  Is there anything that -- and let's say

12      that I think that you win under the safety

13      exception.

14              Is there anything that an opinion

15      might say about the safety exception that might

16      prejudice that question when we confront it

17      later, the preemption provision?

18              MR. CLEMENT:  I don't really see how

19      it could because it's text that's not in the

20      ADA.  And I suppose everything I'm saying about

21      the ADA would also be if you ever do get one of

22      these (b) cases and -- you know, with

23      intrastate, that would be another thing that

24      you're not prejudging if you decide this case

25      just based on the text of the safety exception.
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1   JUSTICE BARRETT: Same on (c)(1)

2   because the text is the same in the ADA?

3   MR. CLEMENT: Yeah.

4   JUSTICE BARRETT: Yeah.

5   MR. CLEMENT: Yeah. Exactly.

6   Exactly.

7   JUSTICE BARRETT: Okay.

8   CHIEF JUSTICE ROBERTS: Justice

9   Jackson?

10   JUSTICE JACKSON: So I guess I'm still

11   struggling to see how the policy concerns that

12   you explored with Justice Kavanaugh really are

13   being addressed in this statute.

14   I mean, this is not a liability

15   statute as I see it. It's not setting up a

16   cause of action for any kind of trucking

17   accident. It's leaving it to the state.

18   So the concerns about the extent to

19   which the brokers are involved in this or

20   will -- you know, other kinds of defendants or

21   how much liability, don't those come out state

22   by state depending upon what claims are being

23   made as you read this statute?

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

25   absolutely true. And, you know, you have an

1   amicus brief from 28 states and they pulled off

2   the incredible feat of having California and

3   Texas on the same amicus brief.

4   (Laughter.)

5   MR. CLEMENT: And, you know, that

6   shows there is a lot of variety in the state

7   tort laws. And I think -- you know, there are

8   a couple of states that don't have this tort.

9   But it does go all the way back to the First

10   Restatement, and most states, the overwhelming

11   majority of states, have this tort.

12   But, like --

13   JUSTICE JACKSON: And if -- and the

14   ones that don't, then the brokers in that state

15   wouldn't be held liable for them, or all the

16   arguments about, like, how -- how do we do this

17   seem like they'd be made to the state

18   legislature who's trying to hold them liable.

19   It's not in this statute, I think, because it

20   doesn't suggest to me, looking at this text,

21   that Congress was focused on the result of

22   this, other than to say we are preempting with

23   respect to rates, et cetera, et cetera.

24   Can I just ask you one more thing?

25   The -- the government is focused a lot on the

1   definition of "motor carriers" that is in this

2   statute, and I guess I'm wondering whether that

3   really matters from the standpoint of how we

4   understand your arguments related to (c).

5   Is this turning at all on us focused

6   on the definition? I thought this was about,

7   in your view, with related -- what is it --

8   "with respect to" as opposed to the definition

9   of motor vehicles.

10   MR. CLEMENT: Right. There's a --

11   there's a couple of things there, I mean --

12   JUSTICE JACKSON: Yeah.

13   MR. CLEMENT: -- which is to say, you

14   know, that there's some focus on motor -- the

15   definition of "motor carrier" or "motor

16   vehicle." But, like, I don't think any of that

17   matters here for the reason that you said, both

18   that we're really thinking about, like, the

19   state judgment, whether it's a state judgment

20   about safety, and then, at the same time, like,

21   nobody doubts there's a motor vehicle here.

22   JUSTICE JACKSON: So it doesn't

23   matter -- we -- we don't have to focus in

24   resolving this case on the definition of "motor

25   vehicle" in your view?

1   MR. CLEMENT: I -- I don't think so.

2   Like, nobody really disputes that there's,

3   like, a motor vehicle at the center of this

4   case that caused, you know, grave injuries to

5   my client. So the only question is, is sort of

6   the state safety regulation sufficiently

7   closely related to that motor vehicle?

8   And as I've tried to explain, it

9   really is quite closely tethered because the

10   whole reason you have a negligent hiring tort

11   is because you're talking about something that

12   poses a danger of harm to third parties, and

13   the thing that poses the danger of harm to

14   third parties in this context isn't some

15   brokerage forum. It's the 80,000-pound truck.

16   JUSTICE JACKSON: Thank you.

17   CHIEF JUSTICE ROBERTS: Thank you,

18   counsel.

19   Mr. Boutrous.

20   ORAL ARGUMENT OF THEODORE J. BOUTROUS, JR.,

21   ON BEHALF OF THE RESPONDENTS

22   MR. BOUTROUS: Mr. Chief Justice, and

23   may it please the Court:

24   Congress assigned freight brokers a

25   defined role to arrange for transportation of

 1   property by connecting shippers with motor

 2   carriers. Petitioner's tort claims target that

 3   core service, so the claims are preempted.

 4   The only real question here is whether

 5   these claims are saved as the safety regulatory

 6   authority of a state with respect to motor

 7   vehicles. They are not.

 8   Brokers lack sufficient connection to

 9   motor vehicles. Brokers don't own, operate, or

10   control motor vehicles. Text, context,

11   history, and precedent confirm this. A few

12   examples. First, the savings clause uses the

13   phrase "with respect to motor vehicles," which,

14   in this Court's words in Dan's City, is

15   massively limiting, and it applies specifically

16   only to motor vehicles -- the definitions do

17   matter here -- not transportation of property,

18   which is much broader by statutory definition.

19   Second, subsection (b) expressly

20   preempts state law claims related to intrastate

21   broker services and has no savings clause. It

22   is unthinkable, it's absurd that Congress would

23   have saved states' authority to regulate

24   interstate but not within its own borders.

25   Third, Congress required only carriers

1   to insure against personal injury liability for

2   motor vehicle accidents and only required

3   brokers to have insurance for freight charges.

4   And that mirrored what the ICC said just a few

5   years earlier, that brokers were not

6   responsible for personal injury damages. And

7   it was the expert agency.

8   Finally, this isn't a deeply rooted

9   tort. We challenged Petitioner to find one

10   single negligent selection case involving a

11   federally licensed broker in American history

12   and at common law, and they came up empty. It

13   didn't start until 2004.

14   Petitioner is asking this Court to

15   disrupt the uniform federal regime by

16   green-lighting new state law duties even more

17   onerous than the special checking system that

18   the Court said was preempted in Rowe v. New

19   Hampshire Motor.

20   I welcome the Court's questions.

21   JUSTICE THOMAS: If brokers are as

22   attenuated in the process as you say, wouldn't

23   they fall out in a tort action from a causation

24   standpoint, proximate cause standpoint?

25   MR. BOUTROUS: Only after a great deal

 1   of litigation, Your Honor. What happens in

 2   these cases is the brokers are now named

 3   automatically. And if you look at the

 4   complaint, it's all information and belief.

 5   This -- this notion that the company violated

 6   its own policies regarding conditional rating,

 7   information and belief. They -- they do this

 8   in every case. It's basically strict liability

 9   claims against the brokers for having connected

10   the shipper and the carrier.

11   And so, after a lot of litigation, the

12   burdens are tremendous. C.H. Robinson is a big

13   company, has many, many of these cases pending,

14   when it did nothing wrong and when the drivers

15   and the carriers did nothing wrong. So it

16   burdens interstate commerce.

17   And Mr. Clement was arguing for a

18   patchwork, the very patchwork that Congress

19   intended to end, of states imposing their

20   varied standards.

21   JUSTICE THOMAS: But you -- the -- you

22   mentioned that you can't find cases from an

23   earlier time. Isn't that a part that brokers

24   are playing a more pronounced role now than

25   they did in the past?

1   MR. BOUTROUS: Well, my client's been

2   around for over a hundred years. Brokers have

3   been involved all along in the process. The

4   cases -- I love the L.B. Foster case that

5   Mr. Clement banks his whole case on. It was a

6   1969 case involving a shipper -- the broker was

7   not even at issue on appeal -- who had hired an

8   unlicensed broker, so there was a broker

9   involved, and an unlicensed carrier. That's

10   the best they could do. There wasn't a

11   federally licensed broker or federally licensed

12   carrier involved.

13   His Restatement example, Your Honor,

14   he -- he -- he wants to -- us to ignore what

15   the ICC said in 1987, that brokers are not

16   responsible for personal injury liability. And

17   assume Congress knew that in 1934, the

18   Restatement cited a case about a hotel

19   concierge whose omnibus was broken, so he hired

20   someone else to take people to the train depot.

21   That's the history he's relying on.

22   The reason there isn't a history on

23   this, Justice Thomas, is that the -- the ICC

24   and the federal regime was viewed by the states

25   and by the -- by this Court in Castle as being

1   the -- the -- the -- the entity that says

2   whether carriers could traverse in interstate

3   commerce. So there were no -- states could not

4   deem a carrier or a driver unfit. That would

5   thwart the federal licensing regime that

6   existed then and that exists now.

7   JUSTICE THOMAS: What was the

8   treatment by the ICC of intrastate shipping,

9   purely intrastate? And there were certain

10   products that were not covered by the ICC. How

11   were those treated?

12   MR. BOUTROUS: I -- I think what the

13   ICC would have probably -- they would have

14   captured those in its regulation to the extent

15   they were within the chain of interstate

16   commerce. And this goes to some of the

17   questions about Section (b).

18   I -- I do think the quote from

19   Mr. Clement that he has no answer, no idea why

20   Congress would have had preemption intrastate

21   be complete, with no saving clause, but to have

22   saved these claims interstate.

23   But I think that to the extent in the

24   chain of interstate commerce, and this goes to

25   Justice Sotomayor's question about

1   constitutionality, I think there is a

2   connection between purely intrastate activities

3   and interstate commerce in some instances.

4   The other point I wanted to -- to make

5   is the -- the briefs and Mr. Clement today

6   really hammer on this notion that Congress was

7   looking at economic deregulation, and safety,

8   of course, it -- it was not touching.

9   It clearly cared about safety. The --

10   the FMCSA, the fed -- the expert agency that

11   now exists, has enormous federal power over

12   safety and wrote 700 pages of regulations, and

13   it's in a partnership with the states who

14   endorse, I think most, if not all, have

15   endorsed the safety standards of the federal

16   government.

17   JUSTICE JACKSON: Yes, and it cared

18   about it in -- in the way that you're talking

19   about, but, really, the -- the relevant focus,

20   I think, needs to be on what it was doing in

21   this statute.

22   And what concerns me about the way

23   you've set this up is you are suggesting, I

24   think, that the preemption part of this was

25   also covering state regulations with respect to

1   brokers as they relate to safety and that then,

2   when Congress came in and put in the -- the --

3   the -- the savings clause as a part of this, it

4   was leaving brokers preempted with respect to

5   what they do that might implicate safety.

6   But that's not the way I think the

7   statute reads. It seems like the preemption is

8   smaller than you're giving it credit for to

9   begin with.

10   MR. BOUTROUS: The -- the preemption

11   is very broad. As, again, Mr. Clement kindly

12   outlined, transportation of property is --

13   that's what's preempted.

14   JUSTICE JACKSON: No, no, no.

15   MR. BOUTROUS: Yes.

16   JUSTICE JACKSON: Laws related to a

17   price, route, or service of any motor carrier.

18   MR. BOUTROUS: Or broker with respect

19   to transportation of property.

20   JUSTICE JACKSON: Transportation of

21   property. But -- but -- but I think what's

22   doing a lot of the work in this, in

23   understanding the scope of preemption, is the

24   states may not enact or enforce a law related

25   to a price, route, or service.

 1   And if you read it that way, then the

 2   savings clause is focused on what the state can

 3   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.

3   And so you need to have certainty that

4   you can traverse 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? And I

15   guess my question is, given the safety

16   implications, why would Congress have wanted to

17   cut it off at carriers and not include brokers

18   when, I think, although they haven't

19   traditionally done it, brokers could do more to

20   ensure that carriers are hiring safe drivers

21   who don't have issues with their history or

22   whether they can read the signs or whatever it

23   might be, and that will reduce the number of

24   fatal trucking accidents, which is a huge

25   problem? Why is that not a reasonable way to

1   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   but we all know proximate --

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 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
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 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

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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
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         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

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 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 --
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 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.  They're just --
 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 this.
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
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 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.

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 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
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 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 saving exception.

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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
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 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   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

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 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 what
10    were they doing when they said here we are
11    preserving states' ability --
12              MR. JOSHI:  Right.  No.  No.  I -- I
13    -- 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 makes --
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1   that makes perfect sense if, in fact, there is

2   -- the -- the federal authorization does

3   require some -- does involve some inquiry into

4   the safety of carriers. And do you want to say

5   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 a -- 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

3   not just that the driver was negligent on this

4   particular occasion, and it wouldn't just say

5   that CH 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 CH 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 these sorts of torts fall within (c)(1).

20   JUSTICE ALITO: Thank you.

21   CHIEF JUSTICE ROBERTS: Justice

22 Sotomayor?

23   JUSTICE SOTOMAYOR: I think you told

24 Justice Thomas that you agree with everything

25 that Mr. Montgomery is arguing. Is that

1   correct?

2   MR. JOSHI: No, we're on the opposite

3   side from Mr. Montgomery.

4   JUSTICE SOTOMAYOR: I'm sorry. Not

5   Mr. Montgomery. What Mr. Caribe's counsel

6   would say.

7   MR. JOSHI: Yeah, we're -- we're --

8   we're supporting Respondent.

9   JUSTICE SOTOMAYOR: You're agreeing

10   that the safety -- they -- they've argued, but

11   I didn't see it in your brief, that the safety

12   exception preserves only states' authority at

13   the time of the Act's enactment?

14   MR. JOSHI: No, no. That's one where

15   we say --

16   JUSTICE SOTOMAYOR: All right. And so

17   I also didn't think that you were agreeing with

18   his implied preemption argument, or are you?

19   MR. JOSHI: We're -- we're -- we don't

20   take a position --

21   JUSTICE SOTOMAYOR: So it's not

22   everything?

23   MR. JOSHI: I agree with everything

24   Mr. Boutrous said at the lectern today --

25   JUSTICE SOTOMAYOR: All right. So

1   right now, you would have it that the federal

2   government is not imposing any safety

3   obligations on brokers, and you're saying,

4   despite the exemption for safety with -- with

5   respect to motor vehicles, neither can states,

6   so nobody is checking what they're doing?

7   MR. JOSHI: Brokers are required to

8   pick from among the pool of federally

9   registered carriers. That's what does the work

10   here. And --

11   JUSTICE SOTOMAYOR: And so even if

12   someone has had a thousand accidents and it's

13   well known, no -- no broker is ever liable?

14   MR. JOSHI: The -- the carriers would

15   be liable for that, but, correct.

16   JUSTICE SOTOMAYOR: All right. Thank

17   you.

18   MR. JOSHI: The broker -- as long as

19   they still are --

20   JUSTICE SOTOMAYOR: I just want to

21   know --

22   MR. JOSHI: Yeah.

23   JUSTICE SOTOMAYOR: -- the end result

24   of your argument. No one is checking?

25   MR. JOSHI: That is --

1   JUSTICE SOTOMAYOR: No one is going to

2   be liable?

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

4   well, carriers are liable. But that is what we

5   think the federal system is -- how it's

6   supposed to work. Carriers are responsible for

7   safety. It should be --

8   JUSTICE SOTOMAYOR: How about

9   shippers? Are you agreeing with your

10   adversary --

11   MR. JOSHI: We --

12   JUSTICE SOTOMAYOR: -- on shippers?

13   MR. JOSHI: We have not taken a

14   position on shippers. I don't think -- I mean,

15   just standing here at the lectern, it doesn't

16   seem like this statute covers claims against

17   shippers except --

18   JUSTICE SOTOMAYOR: Yeah, it's hard to

19   do.

20   MR. JOSHI: -- except insofar as

21   through the Rowe against New Hampshire Motor

22   Transport Association. There, that was a rule

23   that actually regulated shippers, but it was

24   nonetheless preempted because it affected

25   carrier services. So, under that way, perhaps

1　　　it could, you know, preempt certain types of

2　　　rules against shippers, but it's sort of hard

3　　　to see. There may be other --

4　　　　　　　JUSTICE SOTOMAYOR: Hard to see that a

5　　　safety one would?

6　　　　　　　MR. JOSHI: I don't know the answer to

7　　　that --

8　　　　　　　JUSTICE SOTOMAYOR: All right. Thank

9　　　you.

10　　　　　　　MR. JOSHI: -- frankly.

11　　　　　　　CHIEF JUSTICE ROBERTS: Justice Kagan?

12　　　　　　　JUSTICE KAGAN: I take it when you

13　　　stood up, you said, okay, if you look at "with

14　　　respect to motor vehicles," that seems pretty

15　　　bad for you. But we're going to look further.

16　　　And the place where you pointed was the

17　　　definition of "transportation." Is that right?

18　　　　　　　And I'm doing this on the fly, so

19　　　forgive me, you can just tell me if I'm wrong,

20　　　but you said the key thing about the definition

21　　　of "transportation" was that it specifically

22　　　says that transportation includes services

23　　　related to arranging for, blah, blah, blah, you

24　　　know, the transport of property. Is that --

25　　　and you said that's what a broker does. So we

1   should think about that as in the other "with

2   respect to" clause, not in the "with respect to

3   motor vehicles" clause. Do I have that right?

4   MR. JOSHI: That's right.

5   JUSTICE KAGAN: Okay. So -- but that

6   provision also, you know, in addition to saying

7   services related to arranging for transport, it

8   says services related to receipt, delivery,

9   transfer in transit. You know, it has all

10   these other verbs in it too, which it seems to

11   me would apply to the motor carriers

12   themselves.

13   So, if we want to apply that same

14   theory of the case, we would have to take out

15   the motor carriers from the "with respect to

16   motor vehicles" phrase.

17   MR. JOSHI: Maybe, maybe not. I mean,

18   motor carriers are the ones who own and operate

19   the vehicles. And so, to the extent what

20   you're challenging is they're performing those

21   services, I -- I think maybe not.

22   But more to the point, I think most of

23   these claims against drivers are for

24   negligence, and those are obviously permitted.

25   They're not preempted. And federal law, you

      1   know, by operation of federal law and the

      2   definition of "employee," drivers of commercial

      3   motor vehicles are deemed to be employees of

      4   motor carriers even if they're independent

      5   contractors. That's express in -- in the

      6   definition.

      7   And everyone understands the reason

      8   for that is so that motor carriers will always

      9   be vicariously liable for the torts of their

     10   drivers during the -- the scope of employment.

     11   That's why you don't see in this complaint,

     12   which is in the Joint Appendix, you don't see a

     13   claim against the motor carrier here for

     14   negligently selecting the driver. That would

     15   be silly. No -- no sane plaintiff would bring

     16   that claim because you can just say the driver

     17   was negligent on this occasion, and therefore,

     18   you are vicariously liable. And that's

     19   typically why these claims against motor

     20   carriers aren't going to be preempted.

     21   JUSTICE KAGAN: I mean, I take that

     22   point. All I'm suggesting is that you pointed

     23   us to a phrase as being --

     24   MR. JOSHI: Yeah.

     25   JUSTICE KAGAN: -- like, very relevant

1   to you when that phrase includes just about

2   everybody. It's not like a phrase about

3   brokers where you say, oh, look, you know, they

4   meant brokers to be in this provision because

5   this is a phrase about brokers. This is a

6   definition that includes everybody under the

7   sun.

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

9   JUSTICE KAGAN: So I guess I'm -- I'm

10   seeing --

11   MR. JOSHI: Yeah.

12   JUSTICE KAGAN: -- I'm not seeing how

13   relevant it is --

14   MR. JOSHI: So --

15   JUSTICE KAGAN: -- to the question of

16   whether "with respect to motor vehicles"

17   somehow excludes brokers.

18   MR. JOSHI: So I want to be clear.

19   I -- I -- I think this particular point I'm

20   making, as well as the three other main

21   contextual clues that we've made in the brief,

22   one of which is the intrastate, the other is

23   the superfluity, potential superfluity, and the

24   third being the financial services

25   requirements, which Justice Kavanaugh was

1   discussing earlier, I'm not making a claim that

2   any of those four itself is dispositive and

3   just answers the question.

4   I do think this is a hard case, but I

5   think all four of them tilt in Respondents'

6   direction, and they suggest that "with respect

7   to motor vehicles" has a narrower effect than

8   it might seem. Dan's City supports that

9   reading of "with respect to" as well.

10   Given that every contextual clue,

11   every oddity, every anomaly, Respondents'

12   reading doesn't produce it; whereas

13   Petitioner's does, I think in the end when you

14   look at all of it, Respondents is the better

15   reading. I think that's our point.

16   JUSTICE KAGAN: Thank you.

17   CHIEF JUSTICE ROBERTS: Justice

18   Gorsuch?

19   JUSTICE GORSUCH: I just want to

20   follow up on that a little bit.

21   I -- I take your point that "with

22   respect to transportation" is a lot broader

23   than "with respect to motor vehicles." It's a

24   good point.

25   But once you say that "with respect to

1   motor vehicles" doesn't just mean with respect

2   to the mechanics of that vehicle but can

3   include hiring, negligent hiring by the carrier

4   or some negligence by the carrier, then I -- I

5   -- I wonder why that doesn't also hold for

6   brokers.

7   MR. JOSHI: Yeah. So -- so to be

8   clear, the definition of motor vehicle is not

9   just tractor-trailer, et cetera --

10   JUSTICE GORSUCH: Yeah.

11   MR. JOSHI: But it also says it has to

12   be "and used on a highway in transportation."

13   JUSTICE GORSUCH: Sure.

14   MR. JOSHI: So claims about the use

15   count --

16   JUSTICE GORSUCH: Okay.

17   MR. JOSHI: -- under the safety

18   exception.

19   JUSTICE GORSUCH: So -- and that's my

20   point. Once that camel's nose is under the

21   tent, and you can have a claim for negligent

22   hiring against the carrier, why not against the

23   broker?

24   MR. JOSHI: No, that's my point. As

25   far as I'm aware, there's no such thing as a

1   negligent hiring claim against the carrier

2   because the carrier is vicariously liable for

3   the driver, so it would be -- so to -- a

4   negligent driver --

5   JUSTICE GORSUCH: Negligence by the

6   driver. Once -- once -- once you've gotten to

7   the driver --

8   MR. JOSHI: Yeah.

9   JUSTICE GORSUCH: -- okay, and not

10   just the motor vehicle itself, and the

11   negligence and operation or use of the motor

12   vehicle counts, then --

13   MR. JOSHI: Well, "use" counts because

14   it's in the definition.

15   JUSTICE GORSUCH: I understand that.

16   I -- I -- I -- I'm not arguing with you about

17   that.

18   MR. JOSHI: Yeah.

19   JUSTICE GORSUCH: But once you concede

20   that the use counts and that somebody can be

21   held liable for negligence in the use, then it

22   just seems to me we're talking about causation

23   at that point.

24   MR. JOSHI: I take the point. And

25   obviously that is Mr. Clement's point here

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 1    today, but my -- my point is that --
 2              JUSTICE GORSUCH:  And -- and I
 3    understand as well -- I'm sorry to interrupt --
 4    but, you know, I'll let you answer.  I
 5    understand as well, if there were strict
 6    liability regime or something like that, but so
 7    long as we have a proximate cause regime, and
 8    that's all that is before us, all right, now go
 9    ahead and answer.
10              MR. JOSHI:  Yeah.  I guess -- I guess
11    the way I look at it is transportation is
12    really broad.  And, yes, it says motor vehicle
13    is one of them.  And it has got other stuff
14    that may be closer to motor vehicles, may be
15    farther away.
16              I think you know, 20 -- you know --
17    13102(23)(A) says motor vehicle, vessel,
18    warehouse, et cetera, and then in (B) it's
19    services related to the movement, including
20    arranging for.  And I know how you could see
21    that "arranging for the transport of property"
22    is kind of related to motor vehicles, but given
23    Congress's choice to use "with respect to
24    transportation" in paragraph 1, in paragraph 1,
25    and "with respect to motor vehicles" in 2, that
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1   suggests it wants a subset.

2   And the question is what is in that

3   subset and what is out of the subset?

4   JUSTICE GORSUCH: I agree with that.

5   MR. JOSHI: And I think arranging for

6   transportation is --

7   JUSTICE GORSUCH: But once you've

8   gotten to use of the motor vehicle --

9   MR. JOSHI: Yeah, but --

10   JUSTICE GORSUH: -- is into, right,

11   you say that's --

12   MR. JOSHI: Right, yeah.

13   JUSTICE GORSUCH: You spot them that.

14   I'm not arguing with you about that. I -- you

15   -- you -- you've given that up, fine.

16   But now the use of the motor vehicle,

17   not just the motor vehicle itself, but the use

18   of the motor vehicle can be regulated by the

19   state.

20   MR. JOSHI: Yes, but -- but brokers

21   don't use vehicles, right? Brokers don't

22   control the vehicle. The broker doesn't know

23   how -- when the brakes --

24   JUSTICE GORSUCH: But --

25   MR. JOSHI: -- were last inspected,

1   how thick the tire tread is. Brokers don't

2   even know the safety record of the driver.

3   That's confidential.

4   JUSTICE GORSUCH: But even vicarious,

5   liability --

6   MR. JOSHI: No.

7   JUSTICE GORSUCH: -- you spot that.

8   MR. JOSHI: No, for carriers, not for

9   brokers.

10   JUSTICE GORSUCH: No, I understand.

11   But you spot vicarious liability for carriers.

12   I'm not arguing with you.

13   MR. JOSHI: Under federal law, it's

14   express.

15   JUSTICE GORSUCH: I understand that.

16   MR. JOSHI: Okay.

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

18   MR. JOSHI: I -- I mean, I take the

19   point that this could be, you know, what you

20   described could be a sensible system, but I

21   think given the federal statutes and

22   regulations, I don't think it's what we have

23   today.

24   CHIEF JUSTICE ROBERTS: Thank you,

25   counsel.

1   Justice Kavanaugh?

2   JUSTICE KAVANAUGH: A couple things.

3 You at the beginning said "related to" and

4 "with respect to" are different in your view.

5   MR. JOSHI: Probably.

6   JUSTICE KAVANAUGH: And that's not

7 very convincing to me.

8   MR. JOSHI: Yeah, agreed.

9   JUSTICE KAVANAUGH: So I just want

10 that get that out there.

11   I mean, I think with either term you

12 have to look at the context and common sense to

13 see, as Judge Fernandez said in his dissent in

14 the Ninth Circuit, where to draw the line,

15 Palsgraf, et cetera.

16   MR. JOSHI: Yeah, I actually agree

17 completely. I mean, I think --

18   JUSTICE KAVANAUGH: Okay.

19   MR. JOSHI: -- this court in -- in

20 Lamar and Archer made the point --

21   JUSTICE KAVANAUGH: That -- that --

22 I'm going to move on to my next question, if

23 you agree completely.

24   (Laughter.)

25   JUSTICE KAVANAUGH: So you say the

 1   carriers are liable, so don't worry about it,

 2   but one of the problems, I think, that's led to

 3   this is the carriers sometimes can't pay.

 4   MR. JOSHI: Yeah.

 5   JUSTICE KAVANAUGH: So when we're

 6   thinking about context and common sense and

 7   figuring out how broadly to read "with respect

 8   to," isn't that part of the context and common

 9   sense?

10   MR. JOSHI: Well, it's the statutory

11   context.

12   JUSTICE KAVANAUGH: Okay.

13   MR. JOSHI: So we have to look at it

14   from Congress's perspective. And from

15   Congress's perspective, carriers could pay

16   because they were -- they are required to have

17   the financial security requirements of 750,000

18   and, yes, that was enacted in 1980.

19   I take the point, maybe it's woefully

20   inadequate.

21   JUSTICE KAVANAUGH: Okay.

22   MR. JOSHI: But -- but --

23   JUSTICE KAVANAUGH: Two more quick

24   ones. You just said brokers don't know the

25   safety records of the drivers.

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 1              MR. JOSHI:  Yeah.
 2              JUSTICE KAVANAUGH:  Aren't they going
 3      to have to, if the other side prevails in this
 4      case, figure out how to -- how to get into
 5      that?
 6              MR. JOSHI:  I mean, those are
 7      confidential.  The carriers --
 8              JUSTICE KAVANAUGH:  By -- by virtue of
 9      what?
10              MR. JOSHI:  By privacy laws and
11      federal law, when -- when FMCSA reviews it.  So
12      right now I don't think brokers have a
13      practical way to get it.  And what that means
14      is that brokers will, as some of the amicus
15      briefs point out, and as I think Mr. Clement
16      just candidly admitted, acknowledged, that
17      brokers are going to follow the, you know, no
18      one ever got fired for buying IBM principle and
19      they're just going to go to the largest
20      carriers.  It's going to be Fed Ex, UPS, J.B.
21      Hunt, Penske, you know, et cetera.
22              JUSTICE KAVANAUGH:  That leads to my
23      last question, which is, again, context and
24      common sense.  And their position's going to
25      mean fewer truck accidents.
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 1              MR. JOSHI:  There are going to be

 2     fewer trucks.  There are going to be fewer

 3     carriers in the market.

 4              JUSTICE KAVANAUGH:  Fewer truck

 5     accidents where people get killed.  And they

 6     say because brokers are going to dig in and not

 7     hire or arrange with shaky truck drivers.

 8              MR. JOSHI:  That -- that could well be

 9     true, but that would be a result of there being

10     fewer trucks on the road, which means worse

11     interstate commercial motor delivery services.

12     I mean, if Petitioner's tort claim is

13     successful, it's going to take the pool of

14     registered carriers that federal law says

15     brokers can pick between, and it's going to

16     shrink the pool.  That is contrary to

17     Congress's deregulatory purposes.

18              JUSTICE KAVANAUGH:  Thank you.

19              CHIEF JUSTICE ROBERTS:  Justice

20     Barrett?

21              Justice Jackson?

22              JUSTICE JACKSON:  I just want to give

23     you a chance to explain as quickly as you can

24     what your surplusage argument is because the

25     way you've defined this, you have motor
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1    vehicles as a subset, not as the whole thing,

2    in terms of the preemption.  So why there would

3    be surplusage here?

4              MR. JOSHI:  There would be a

5    surplusage on Petitioner's reading of the

6    statute.  Petitioner seems to suggest that

7    "with respect to" just means concern.  And it

8    can be a pretty lengthy chain, pretty indirect.

9              I mean, I think he -- Mr. Clement

10   today at the lectern said indirect.  He wants

11   it to be interpreted the same as "related to"

12   in Morales and the ADA cases, which includes

13   indirect connections.

14             If that's true, then every single

15   thing, as I think Justice Kagan was pointing

16   out, in the definition of transportation

17   arguably is indirectly related to a motor

18   vehicle, which means that the safety

19   exception --

20             JUSTICE JACKSON:  Although he says --

21             MR. JOSHI:  -- you could blue pencil

22   --

23             JUSTICE JACKSON:  Sorry, he says -- he

24   says with transportation a property is like

25   grain elevators, it has nothing to do with the
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 1   car or with the motor vehicle. He's got

 2   transportation of property much broader.

 3   MR. JOSHI: I don't know how you get

 4   the grain into the elevator or out of the

 5   elevator without a motor vehicle. So I would

 6   think that on Petitioner's logic, that --

 7   claims about that would also be in.

 8   So I think if you take Petitioner's

 9   interpretation seriously, then the safety

10   exception basically reads the same if you blue

11   pencil the phrase "with respect to motor

12   vehicles" out of this statute.

13   JUSTICE JACKSON: Thank you.

14   CHIEF JUSTICE ROBERTS: Thank you,

15   counsel.

16   Rebuttal, Mr. Clement?

17   REBUTTAL ARGUMENT OF PAUL D. CLEMENT

18   ON BEHALF OF THE PETITIONER

19   MR. CLEMENT: Thank you, Mr. Chief

20   Justice. Just a few points in rebuttal.

21   First, a couple of times my friends on

22   the other side have crept into this alternative

23   theory that really this should be -- motor

24   vehicle should be limited to owners and

25   operators. Obviously those words aren't in the

 1   relevant statutory provisions.

 2   And as we point out in the reply

 3   brief, as a practical matter, something like

 4   45 percent of carriers don't actually own the

 5   vehicles. They lease them or they belong to

 6   the driver.

 7   If we're going to talk practicalities,

 8   I think one really important number that's

 9   practical is that 94 percent of the registered

10   carriers out there on the roads haven't had any

11   meaningful federal safety inspection, the kind

12   of annual inspection you have. You get the

13   registration, and then hopefully within about a

14   year or so you get the fuller inspection.

15   But 94 percent of the carriers out

16   there haven't gotten this federal inspection.

17   So it would be really nice if state tort law

18   provided a backstop to a federal system that's

19   not really doing a lot.

20   On the B point, my -- my friend from

21   the Solicitor General's Office said, you know,

22   the freight forwarders are just -- are -- are

23   just middlemen. That's not actually true. And

24   that's why there is this requirement that they

25   have some personal injury liability insurance.

 1   They do do more than the brokers, but

 2 the point is, brokers aren't just middlemen, at

 3 least in many of these cases.

 4   I talked about the cases where the

 5 carrier is actually captive. All they do is

 6 take C.H. Robinson loads. That's all they do.

 7 They don't serve any other broker or they don't

 8 serve shippers directly.

 9   In that situation, C.H. Robinson knows

10 or should know every bit as much as a carrier.

11 The issue of the -- oh, and one other point on

12 this, the practicalities of this, there are

13 services out there right now that tell brokers

14 more safety information that's available based

15 on the federal records.

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

17 those, but other brokers do. Maybe that's why

18 C.H. Robinson is a defendant in more of these

19 cases than some of the other brokers. There's

20 that more brokers can do.

21   There was some discussion of a

22 patchwork. That really doesn't work here

23 because they're -- they concede there's going

24 to be a patchwork with respect to the carriers.

25 And this whole regime on safety allows for a

 1   patchwork. It's a -- the -- the federal safety

 2   regulations are expressly designed as a

 3   minimum, and states are allowed to go above and

 4   beyond the minimum.

 5   All right. There was some discussion

 6   of this L.B. Foster case, and my friend said,

 7   well, that's not such a great case for

 8   Mr. Clement because that was an unregistered

 9   broker and unregistered carrier. But the

10   problem is their theory sweeps so broadly that

11   you can't hold a broker liable for negligently

12   hiring a completely unregistered carrier. And

13   there are some cases like that. And that just

14   doesn't make any sense whatsoever. That's

15   complete negligence, and there's no reason

16   there would be immunity there.

17   There was some brief discussion of the

18   Castle case. That old chestnut, if you take a

19   look at it, it basically says Illinois can fine

20   drivers for violating their state law. They

21   just can't literally bar them from the state.

22   But, you know, this is a situation much more

23   analogous to the fines, that there would be

24   liability. It's going to mean, if it's a

25   single company driver, like, it might put the

 1   carrier out of business, this particular

 2   carrier here has dissolved itself as an Indiana

 3   corporation, but I think that's probably a good

 4   thing, not a bad thing.

 5   Some discussion just about how to

 6   resolve this case. I would say, if you are

 7   convinced that we win on (c)(2), then I would

 8   urge you not to say anything really definitive

 9   about (c)(1). My friend is correct that all

10   the courts that have looked at this particular

11   issue, with the safety exception staring them

12   in the face, have all said that (c)(1) provides

13   preemption.

14   But the hard case is going to be in

15   the ADA context. The hard case is going to be,

16   if there ever is a (b) case -- there probably

17   won't because they're so few that are purely

18   intrastate -- but the hard case is going to be

19   when you're staring at that preemption clause

20   and there is no safety exception to sort of

21   back it up. So I would urge you, if you think

22   (c)(2) applies here, just leave (c)(1) for

23   another day.

24   And then I'm sure I missed some of the

25   subtlety of the Solicitor General's officer

1   point about the coffee and the cream and the

2   sugar and all of that. But the thing is, if

3   you have one of these, like, McDonald's torts

4   where the problem is the piping-hot coffee

5   spilled in your lap, I would say that's a tort

6   with respect to coffee. And for the same

7   reasons, this is a tort with respect to motor

8   vehicles.

9   This case doesn't have to be that

10   hard. The thing that triggers state tort

11   liability is an 80,000-pound motor vehicle.

12   That's what devastatingly injured my client.

13   This is a case with respect to motor vehicles.

14   We urge to reverse.

15   CHIEF JUSTICE ROBERTS: Thank you,

16   counsel.

17   The case is submitted.

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

19   was submitted.)

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