

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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BRADLEY LEDURE,)
Petitioner,)
v.) No. 20-807
UNION PACIFIC RAILROAD COMPANY,)
Respondent.)
- - - - -

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Place: Washington, D.C.
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11 Monday, March 28, 2022

13 The above-entitled matter came on for
14 oral argument before the Supreme Court of the
15 United States at 10:00 a.m.
16
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1 P R O C E E D I N G S

2 (10:00 a.m.)

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

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

8 Mr. Frederick.

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

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

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

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

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

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

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

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

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

7 I welcome the Court's questions.

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

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

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

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

1 encompassed within the protections provided by
2 the Safety Appliance Act.

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

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

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

1 later. Its primary purpose is to move some
2 people around and not sit waiting -- even if
3 waiting ready to be used later on.

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

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

11 CHIEF JUSTICE ROBERTS: Well, but I
12 think, even in that case -- and, you know,
13 people might have different natural meanings --
14 even in that situation, I would naturally say
15 the railcars are being used. They're not used
16 for anything other than, you know, hauling goods
17 and they're in the process of that.

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

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

1 the focus has to be on what the railroad's
2 purpose is in using or deploying the particular
3 locomotive at that particular point in time. A
4 locomotive, even dead, has important hydraulic,
5 electrical, braking functions that it performs
6 when moving from one place to another. A
7 locomotive also can be redeployed for the
8 purpose of satisfying the railroad's various
9 logistical needs.

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

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

1 statutes is to impose strict liability.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 Appliance Act, it included locomotives.

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

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

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

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

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

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

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

13 JUSTICE KAGAN: Mr. --

14 JUSTICE SOTOMAYOR: Thank you,
15 counsel.

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

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

23 MR. FREDERICK: Correct.

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

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

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

9 MR. FREDERICK: Your Honor, if I can
10 give you a somewhat more detailed answer than
11 you might like.

12 This regulation was promulgated under
13 both the Locomotive Inspection Act and the
14 Federal Rail Safety Act of 1970.

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

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

1 basis. The Court granted cert on the basis that
2 there was a violation of the LIA based on the
3 use requisite.

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

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

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

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

1 charged with making sure that the locomotive is
2 a safe place in which to work.

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

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

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

1 does the SAA interact with the LIA?

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

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

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

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

1 And so the structure that it enacted
2 was to enact regulation -- or to -- to defer to
3 the ICC, the old Interstate Commerce Commission,
4 the predecessor of the FRSA, or the FRA, to
5 promulgate the necessary rules.

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

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

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

1 MR. FREDERICK: Yes.

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

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

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

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

14 CHIEF JUSTICE ROBERTS: Right.

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

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

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

21 CHIEF JUSTICE ROBERTS: Okay.

22 Justice Thomas, any questions?

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

25 Mr. Frederick, you seem to put a lot

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

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

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

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

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

1 that a braking action is occurring.

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

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

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

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

25 But the point of the rules -- and I

1 think that this is best reflected in Brady --
2 there, it was an inspector, and -- and if you
3 apply that with Lilly, where there was a
4 slippage on a tender, the same kind of scenario
5 has occurred.

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

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

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

21 MR. FREDERICK: Justice Thomas, I
22 think that that constrains the term "use" really
23 to functionally gut the operation of the
24 statute. Of course, locomotives are primarily
25 for hauling, but they serve so many other

1 functions, and the carrier has the discretion in
2 terms of how it is to be used or allowed to be
3 used. And -- and we all recognize that more
4 than half of the injuries that occur to rail
5 workers are when the locomotive is stationary.

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

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

15 MR. FREDERICK: -- I think we would
16 agree --

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

22 MR. FREDERICK: Well, I think that
23 there are ways that -- and we've described them
24 -- for a carrier to take a locomotive out of use
25 by making it in a repair -- by putting it in a

1 repair shop, where it's not to be deployed on
2 the line, where it is in a condition that it
3 can't operate in any meaningful way because it
4 doesn't have the fuel or the fluids, et cetera.

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

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

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

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

24 JUSTICE THOMAS: Okay.

25 MR. FREDERICK: -- to a place of

1 repair.

2 JUSTICE THOMAS: Yes.

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

8 JUSTICE THOMAS: Thank you.

9 MR. FREDERICK: -- same purposes.

10 JUSTICE THOMAS: Thank you.

11 CHIEF JUSTICE ROBERTS: Justice
12 Breyer?

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

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

1 Now you'll have a way of saying we're
2 not covering that. But, I mean, so let's use
3 "use" and not cover it, but -- but, I mean,
4 okay. Now, as soon as I think that -- I'm not
5 sure I think that, but I'm thinking I think
6 that. As soon as I think that, I think, well,
7 what about this case? And here is where I have
8 a problem.

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

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

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

24 JUSTICE BREYER: Right. So what was
25 your view, the test that could apply that would

1 say it's not in use when it's arrived in 10
2 minutes, it's leaving an hour from now, and the
3 motor's running?

4 MR. FREDERICK: Well, I -- I think
5 that question is --

6 JUSTICE BREYER: What test did he
7 apply?

8 MR. FREDERICK: -- better addressed to
9 my friend --

10 JUSTICE BREYER: Yeah, I will.

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

12 JUSTICE BREYER: I want both sides of
13 the --

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

21 Now I proposed a test based on this
22 Court's decisions that say that when the
23 railroad has put the locomotive out on its line
24 -- and that would distinguish the hypothetical
25 that you started with, Justice Breyer, there, it

1 was not on its line when it is in the facility
2 -- that it remains available for use. It
3 remains serving the purposes of the railroad
4 until it's sent to a dedicated place of repair.

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

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

18 JUSTICE BREYER: No, I wouldn't say
19 that.

20 MR. FREDERICK: That makes no sense.

21 JUSTICE BREYER: I'd say this -- this
22 case -- we'll worry about the next case, next
23 case -- this is a perfect example of a common
24 law approach. The word is "use" and it's not
25 going to get us any further to say available

1 because available is going to be sometimes you
2 win this case, but you lose some other case.
3 Who knows? Okay.

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

7 MR. FREDERICK: Well, certainly --

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

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

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

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

24 The ones that are actively used may be
25 temporarily halted for a particular short period

1 of time, but they're still fueled up and ready
2 to go. And if an engineer needs to use it for a
3 particular purpose around the railyard, it's
4 there to be used.

5 CHIEF JUSTICE ROBERTS: Justice Alito?

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

11 And I think all the lawyers have a
12 difficult line-drawing problem.

13 So would you explain to me why the
14 instances where a locomotive in your view is in
15 use should be treated differently from those in
16 which you think it is not in use?

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

22 MR. FREDERICK: Justice Alito, I think
23 that the best way to think about it is whether
24 the locomotive could be operated, is operable.
25 If it's been de-fueled, if it's in a repair

1 facility, if it's in storage and it has been
2 denuded of its capability to operate, I don't
3 think it can be used in the way that the
4 railroad intends to serve the various functions
5 that the railroad might have.

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

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

19 JUSTICE ALITO: If you have a -- I see
20 the difference between a locomotive that's
21 moving and one that's stationary, and I see the
22 difference between instances in which a
23 locomotive is used or available for use for
24 something that is distinctive about a locomotive
25 as opposed to a locomotive that's been turned

1 into a museum piece, for example, or a little
2 restaurant.

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

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

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

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

1 latest transit.

2 JUSTICE ALITO: All right. Thank you.

3 CHIEF JUSTICE ROBERTS: Justice
4 Sotomayor?

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

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

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

14 MR. FREDERICK: Yes.

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

25 MR. FREDERICK: I think that the

1 clearest way to think about it is that the
2 dangers are unknown to the transportation crew,
3 whereas, when the locomotive is put in a repair
4 facility, the repair workers have a much greater
5 understanding of the problems with a locomotive
6 that has been turned off, that doesn't have
7 electrics running through it.

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

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

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

23 And there are actually very few cases
24 involving workers injured in storage facilities.
25 I looked, and I couldn't find them. And so,

1 when you look at where the case law has
2 developed, where there are actual injuries and
3 harms, they tend to be in the situations very
4 much like this one, where the locomotive is on
5 the line, it is temporarily stopped, it is about
6 to move on to its journey, and someone gets
7 hurt.

8 JUSTICE SOTOMAYOR: Thank you.

9 CHIEF JUSTICE ROBERTS: Justice Kagan?
10 Justice Gorsuch?

11 Justice Kavanaugh?

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

20 Of course, Congress in 1924 took out
21 moving, so that helps you.

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

25 What helps you is the precedent of the

1 SAA cases, which basically said that's not the
2 way the term is being used in these statutes.
3 And I think what also helps you is the point
4 that most of the injuries on locomotives are
5 when they're stationary, because otherwise we'd
6 be gutting the statute.

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

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

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

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

1 purposes.

2 Now that's -- that's a --

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

7 MR. FREDERICK: Yes.

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

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

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

1 use because it wasn't performing any function
2 when it was traveling to the place where it was
3 going to do a refueling operation.

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

14 JUSTICE KAVANAUGH: Thank you.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel.

17 Ms. Sinzdak.

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

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

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

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

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

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

21 CHIEF JUSTICE ROBERTS: Ms. Sinzdek,
22 if I understand your -- the proposal you just
23 made about what we should do, if you have a
24 locomotive that is used to -- to drive -- to
25 carry trains and passenger -- you know, cars,

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

12 That locomotive would be considered in
13 use under your definition?

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

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

23 MS. SINZDAK: I think there are a
24 number of steps that would have to be taken in
25 order to render that locomotive operable again.

1 And so, no, it's not going to be in use. It's a
2 -- it's a -- it's a -- it's a restaurant. It's
3 in storage.

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

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

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

1 So that's the only reason I'm -- I'm
2 hedging a little bit here. In general, I would
3 say that once it has been withdrawn from active
4 service as a locomotive, it's no longer in use.

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

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

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

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

24 And once it's retired from active
25 service, for example, to become a restaurant or

1 maybe to become a historical artifact, then it's
2 no longer in use within the meaning of the
3 statute.

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

6 MS. SINZDAK: Then it's not in use --

7 JUSTICE BREYER: Oh, not in use.
8 Okay.

9 MS. SINZDAK: -- once one full
10 locomotive is placed for repair.

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

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

21 JUSTICE BREYER: What does that mean,
22 "placed into service"?

23 MS. SINZDAK: Well, usually, it needs,
24 for example --

25 JUSTICE BREYER: It's there, sitting

1 in the yard.

2 MS. SINZDAK: Well, it needs to be
3 filled with fuel. I mean, the 5,000 gallons of
4 fuel is a pretty --

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

9 MS. SINZDAK: That is correct. So the
10 FRA generally focuses --

11 JUSTICE BREYER: Oh, you -- what
12 happened to the thing about you used it until
13 you withdraw it from service. It's not been
14 withdrawn from service.

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

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

25 MS. SINZDAK: Right. So the FRA is

1 basically --

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

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

16 Now you don't agree with that, so
17 explain.

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

1 think that "use" and "service" are synonymous in
2 this statute.

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

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

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

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

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

23 But locomotives have special risks,
24 particularly with fuel and other things, and so
25 the statute is meant to go beyond that first

1 statute. But how far beyond? And now we have
2 the issue in the case.

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

6 JUSTICE BREYER: You're not, but they
7 are.

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

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

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

1 and putting it in another.

2 CHIEF JUSTICE ROBERTS: No, "use" --
3 "use" means the same thing. It's just that when
4 you apply it, the use you put a locomotive to is
5 to drive and -- and pull cars. The use you put
6 a railcar to is to have stuff in it and -- and
7 be attached to a locomotive.

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

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

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

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

1 next journey.

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

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

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

16 MS. SINZDAK: Yes, there would be a
17 large problem in that area.

18 JUSTICE KAVANAUGH: And what would --
19 yeah, what would that be?

20 MS. SINZDAK: I mean, it would create
21 a safety gap.

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

25 One of the key safety concerns that

1 FRA has is a fuel tank that is too low to the
2 ground so that if it moves even a little bit,
3 there's going to -- along the ground, it's going
4 to rub, there's going to be a spark, and there's
5 going to be an explosion.

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

9 (Laughter.)

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

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

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

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

1 So there is basically a regulatory gap
2 that would -- or that -- that could possibly
3 open if the Court were to interpret them
4 differently. And that's true even if the Court
5 was to say, well, at least if it's, you know,
6 off and motionless.

7 FRA has been very clear with me that
8 if there is a locomotive in a yard that is
9 capable of being turned on and moved, then it
10 will be at some point to sort of --

11 JUSTICE ALITO: What theory of
12 statutory interpretation are you applying?

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

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

24 MS. SINZDAK: No, I think that
25 actually there is both a purpose of argument.

1 There is a -- an argument with respect to
2 ordinary meaning. I mean, again, this Court has
3 said multiple times --

4 JUSTICE ALITO: What is the purpose --
5 what is the purpose of argument?

6 MS. SINZDAK: So the purpose of
7 argument is that Congress has long wanted to
8 incentivize preventative maintenance, which is
9 the railroads taking actions before problems
10 arise.

11 Now I think you've asked, though,
12 well, what about problems in the rail -- in the
13 repair shop? But the concern there is that
14 Congress wants to create an incentive to take
15 defective locomotives off the line, right?

16 So to take them where they're going to
17 cause -- even if they do cause a potential
18 problem, it's not going to have the massive
19 consequences that it would have if it's in a
20 railyard.

21 I mean, you think about, if a fuel
22 tank explodes in a railyard, there's lots of
23 other fuel tanks right nearby. There's lots of
24 other moving trains.

25 So there's this -- what -- what FRA

1 sees is, if you -- if a carrier has done
2 something to remove that locomotive to a
3 controlled environment where that kind of risk
4 isn't around, then there doesn't need to be
5 concern for a chain reaction.

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

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

21 And I -- I just want to make a point
22 too about the ordinary meaning because I think,
23 in Bailey, this Court recognized "use" is a word
24 who's -- which has many ordinary meanings. So I
25 think the Court gave the example of I use a gun

1 to protect my home, but I've never had to use
2 it.

3 And both of those meanings of "use"
4 are fully coherent, and it's just a question of
5 looking at the context and determining, well,
6 what -- what particular meaning is at stake
7 here? And I think we see with the LIA that it's
8 the put to a purpose broader meaning.

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

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

22 JUSTICE ALITO: Are you serious that
23 you think if we asked that of people out on the
24 street, that's what they would come up with?

25 MS. SINZDAK: Well, I think that the

1 --

2 JUSTICE ALITO: They would come up
3 with your -- your highly refined rule?

4 MS. SINZDAK: This Court always --

5 JUSTICE ALITO: That's ordinary usage?

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

7 No, you have to look at the entire context. And
8 I fully admit, if you just plucked the word
9 "use" out and you kind of ask someone, a man on
10 the street, who knows what they're going to say.

11 And, actually, I have tried this, and
12 you get a kind of range of responses.

13 But, once you give all of the
14 information, once you give the context, once you
15 give the fact that Congress itself made very
16 clear that a rail vehicle continues to be in use
17 when it is being hauled to a repair facility,
18 then I think you're going to get my answer.

19 JUSTICE KAGAN: The safe harbor --

20 CHIEF JUSTICE ROBERTS: Maybe -- maybe
21 on First Street.

22 MS. SINZDAK: Pardon?

23 CHIEF JUSTICE ROBERTS: Maybe on First
24 Street.

25 (Laughter.)

1 CHIEF JUSTICE ROBERTS: Sorry, Justice
2 Kagan.

3 JUSTICE KAGAN: The -- the safe harbor
4 that you referred to, the parties seem to have a
5 dispute as to whether it would apply under the
6 LIA. Does the Solicitor General have a view on
7 that?

8 MS. SINZDAK: So the FRA has a
9 regulation, 229.9, and that is what creates sort
10 of the equivalent of the safe harbor under the
11 LIA.

12 The LIA, of course, is different from
13 the SAA in that it assigned a lot more
14 responsibility to the agency, originally the ICC
15 and then the FRA.

16 And so -- and as I believe Respondents
17 say on page 3 of their brief, the agency has
18 always interpreted the -- the LIA to permit
19 locomotives to be moved safely to a place of
20 repair. And if you look at 229.9, it says what
21 you need to do.

22 And, basically, it's -- often you'll
23 need to change the way in which you're using the
24 locomotive to ensure that you're continuing to
25 use it safely.

1 So you might need to drop the miles
2 per hour. You might -- if it's a lead
3 locomotive and the defect is in the headlight,
4 you might need to move the locomotive to
5 trailing service so it's no longer -- its lights
6 are no longer needed.

7 But it's that sort of common mandatory
8 use --

9 JUSTICE KAGAN: But there's an
10 equivalent safe harbor for safely transporting a
11 locomotive to a repair center?

12 MS. SINZDAK: Correct, safely using a
13 locomotive for that particular purpose. And I
14 think it -- maybe it's just worth referencing,
15 because I think there was some discussion of the
16 operating, safe to operate, that the original
17 statute said safe to operate in the purpose to
18 which it is put.

19 And we -- and -- and the FRA sees that
20 as very important because, when it's deciding
21 whether something is being used unsafely, it
22 looks at how it's being used.

23 So you're never going to be in trouble
24 for using a locomotive with a defective
25 headlight in trailing service where that

1 headlight isn't even necessary.

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

4 JUSTICE THOMAS: Just briefly, Chief
5 Justice.

6 The -- counsel, can you -- you seem --
7 you seem to suggest that you can change the
8 meaning of a statutory term, "use," with
9 regulations. I know you put a lot -- seem to
10 put a lot of weight on the fact that there could
11 be a regulatory gap if "use" is interpreted sort
12 of less flexibly than you would like.

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

22 So it's actually the FRA has been
23 taking its cues about how "use" should be
24 interpreted from this Court.

25 JUSTICE THOMAS: Well, some of this

1 seems a little bit counterintuitive, and I admit
2 to being somewhat wrapped around the axle about
3 this. But the -- I asked Mr. Frederick whether
4 or not when I towed my car -- you heard the
5 question -- I was using it, and he said that I
6 was. Now I'm sure if you asked virtually any
7 motor homer if they're using the car when
8 they're towing it, they would say no.

9 Could you tell me why that is the
10 right answer from your perspective as opposed to
11 just the ordinary meaning of "use"?

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

21 So I think you have to look at that
22 safe harbor provision, which makes clear that
23 Congress believed that a rail vehicle continues
24 to be in use even when it is being hauled to a
25 place of repair.

1 JUSTICE THOMAS: Thank you.

2 CHIEF JUSTICE ROBERTS: Justice
3 Breyer, anything further?

4 Justice Alito?

5 Justice Sotomayor?

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

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

16 I think, under your client's theory,
17 the locomotive, while it's moving on that train
18 that's going from station to station, wouldn't
19 be covered.

20 MS. SINZDAK: Not under the FRA's
21 approach, but I believe that may be Respondent's
22 --

23 JUSTICE SOTOMAYOR: That has to be
24 Respondent's because he basically -- or what my
25 colleagues are saying, it's not powering the

1 train, but even if it was moving in the train,
2 they would say there was coverage for a worker
3 under FELA but a different coverage under the
4 railroad car.

5 Is there a problem with that kind of
6 system?

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

19 And then Congress passed these laws,
20 and this Court has long interpreted them in
21 harmony. You look at Lilly, I believe it's the
22 -- the Court admits that people have been
23 confusing even calling the LIA the SAA. The
24 courts have been interpreting them in harmony
25 for all of this time. To sort of go back on

1 that, we -- we would risk going back to the bad
2 old days.

3 Now I do want to put a little caveat
4 in there because, in 1970, Congress passed the
5 Federal Railway Safety Act, which does give FRA
6 supplementary authority to regulate beyond the
7 LIA and the SAA. So I just want to be clear
8 they do have some of that authority.

9 CHIEF JUSTICE ROBERTS: Justice Kagan?
10 Justice Gorsuch?
11 Justice Kavanaugh?

12 JUSTICE KAVANAUGH: The one anomaly
13 they point out or one of the anomalies they
14 point out is the inspection every day under your
15 theory of "in use."

16 Can you answer that?

17 MS. SINZDAK: Sure. So if, in fact --
18 I think they're hypothesizing there will be
19 locomotives that are not being used for -- for
20 days and days at a time. If that happens, what
21 locomotive -- what carriers do is put them into
22 storage. And there are ways you can put a
23 locomotive in -- in -- in sort of short-term
24 storage. Again, you unhook the battery, you
25 take -- you drain the fluids so you don't have

1 the concern about fuel.

2 So, if a locomotive has been placed in
3 storage, then the -- the FRA would not apply the
4 daily inspection requirement. But, if a
5 locomotive has not been placed in storage, then
6 it is still in use.

7 And the FRA's concern is let's say
8 they're using it in what would be called ready
9 or protective service, which is ready to go
10 rescue a passenger engine or somebody else.
11 Then that train -- that locomotive needs to be
12 safe so that if there's an emergency and it
13 starts moving, there's not going to be an
14 accident because it's all of a sudden started.

15 JUSTICE KAVANAUGH: So storage,
16 though, if it's on the sidetrack for a few days,
17 you would say it's not in storage unless it's
18 been drained of fuel and the battery's been
19 disconnected?

20 MS. SINZDAK: It needs to be
21 effectively rendered inoperable. Again, what
22 FRA's concern is --

23 JUSTICE KAVANAUGH: And what would --
24 just to be clear, and what -- what's necessary
25 to render it inoperable --

1 MS. SINZDAK: So --

2 JUSTICE KAVANAUGH: -- under your
3 theory or under the regs?

4 MS. SINZDAK: -- actually, different
5 railroads have different processes, and, you
6 know, they do have manuals where they explain
7 how to put something into storage. Usually, as
8 I say, it's the -- at least you're hook --
9 unhooking the battery, you're draining the
10 fuels. You can also -- and I confess --

11 JUSTICE KAVANAUGH: But just to be
12 clear, sorry, you can be in storage while you're
13 still on the sidetrack?

14 MS. SINZDAK: You can be in storage
15 while you're on the sidetrack.

16 JUSTICE KAVANAUGH: Got it.

17 MS. SINZDAK: Now sometimes what
18 carriers will do is actually sort of -- I think
19 it's like staking a track to separate out the
20 track, so just to make sure, absolutely a
21 hundred percent sure that -- that that -- that
22 that car is completely separated.

23 But, yes, FRA does not deny that there
24 are many cars that are in storage. But, again,
25 they have to be rendered inoperable because

1 FRA's concern is that when a carrier just says,
2 oh, we weren't using that car, employees are
3 treating that car as in use. Employees are
4 going to be getting into that car. They're
5 going to turn the ignition switch. They're
6 going to move those wheels. And so that -- it
7 has to be more than just the carrier having
8 decided that it's no longer in service.

9 JUSTICE KAVANAUGH: Thank you.

10 CHIEF JUSTICE ROBERTS: Justice Kagan?

11 JUSTICE KAGAN: Could I ask a
12 follow-up to that? I mean, when you say unhook
13 the battery, drain the fluid -- you know, in
14 comparison to all these tests, as Justice Breyer
15 says, a lot of words, I mean, unhook the battery
16 and drain the fluid, now that sounds real to me.

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

20 MS. SINZDAK: I mean, yes, although
21 you could also have just taken the whole -- the
22 whole locomotive and put it over a pit so,
23 similarly, it's inoperable. The fear here, and
24 I -- just to be very clear, FRA's fear is
25 locomotives are sitting on a sidetrack and the

1 -- the carrier is saying they're not in use, so
2 it's fine that they have all of these safety
3 problems, and employees are getting on those
4 locomotives, they are having accidents. They
5 could be moving those locomotives.

6 And, again, imagine the defect is a
7 fuel tank. That fuel tank scrapes along the
8 ground and there is an explosion. So if -- that
9 is the fear, but once the carrier has done
10 something to make sure that that just cannot
11 happen, then it has been withdrawn from use. It
12 has been formally withdrawn.

13 JUSTICE KAGAN: And that something is
14 usually unhook the battery, drain the fluid?

15 MS. SINZDAK: Yes, again, different --
16 different -- sometimes they wrap these -- the --
17 these things in big, actually, apparently,
18 tarps, you know.

19 There's an incentive for -- for
20 carriers to do this too because FRA has
21 explained to me, if you leave all the fluids in
22 a locomotive, you could have freezing problems.
23 Also, there's something called condensation that
24 gets -- from the -- from the fluids that gets
25 into the different parts and will actually wear

1 away at it. So there's -- there are good
2 reasons even beyond the obvious safety rationale
3 that carriers actually are doing this pretty
4 regularly anyway.

5 CHIEF JUSTICE ROBERTS: Justice --
6 okay.

7 Thank you, counsel.

8 MS. SINZDAK: Thank you.

9 CHIEF JUSTICE ROBERTS: Mr. Ballenger.

10 ORAL ARGUMENT OF J. SCOTT BALLENGER
11 ON BEHALF OF THE RESPONDENT

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

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

25 Now, as a matter of plain meaning, one

1 uses a locomotive to move railcars. The
2 original language of the statute made that
3 crystal clear by prohibiting the use of
4 locomotives in moving interstate or foreign
5 traffic if they were unsafe to operate in active
6 service. And that active meaning is confirmed
7 by the statutory language that says that defects
8 discovered during inspections have to be
9 repaired before the locomotive is used again.

10 That language is literally impossible
11 to comply with if Petitioner and the government
12 are right. It's also confirmed by the absence
13 of any safe harbor for repair movements in the
14 LIA, like the one that's in the Safety Appliance
15 Act.

16 Justice Kagan, there is no safe harbor
17 for the movement of defective locomotives in the
18 Locomotive Inspection Act. There is a
19 regulation that governs the safe transport of
20 defective locomotion -- locomotives. That
21 regulation is consistent with the statute only
22 because Congress understood that a locomotive
23 being hauled dead is not in use within the
24 coverage of the Locomotive Inspection Act.

25 If it were, then that regulation would

1 violate the statute. And the Locomotive
2 Inspection Act would forbid exactly the same
3 repair movements that the Safety Appliance Act
4 explicitly authorizes, even if the only safety
5 defect on the locomotive was a safety appliance
6 defect. Obviously, Congress didn't intend that.

7 And for those reasons, the LIA will
8 not support Petitioner and the government's
9 proposed interpretation even if that they were
10 right under the Safety Appliance Act. But I
11 actually have come to believe that this Court
12 needs to reject Petitioner's understanding of
13 the Safety Appliance Act as well.

14 Petitioner and the government suggest
15 that a -- a locomotive is in use basically all
16 of the time that it is outside a dedicated place
17 of repair. I'd like to offer a new observation
18 that isn't in the briefs. The -- that view
19 would actually render the safe harbor in the
20 Safety Appliance Act meaningless.

21 A safe harbor for moving defective
22 locomotives is worthless if the trigger for
23 penalties is not movement and if the locomotive
24 is subject to the exact same civil penalties
25 whether it moves the car or not.

1 CHIEF JUSTICE ROBERTS: Well, how, in
2 -- under your view, the -- the locomotive is
3 there, you know, they stop -- stop for lunch and
4 the locomotive is still on, it's still idling,
5 it's going to pick up again and go in 45
6 minutes. That locomotive, you would say, is not
7 in use?

8 MR. BALLENGER: Well, Your Honor, the
9 -- the way the lower courts understood the facts
10 of this case -- and I think they were right --
11 is that this string of cars came in from
12 Chicago. It was parked on a -- a backtrack.
13 The train crew went home. And -- and there was
14 going to be a complete turnover of the train
15 crew and they were going to assemble a whole new
16 train for the next movement.

17 And there is an allegation that this
18 -- this locomotive, which was the third in the
19 consist, was idling, but that doesn't tell you
20 anything. Locomotives idle for all sorts of
21 reasons.

22 Justice Breyer, they turn themselves
23 on automatically as well as turning themselves
24 off automatically. These locomotives have
25 systems that will turn themselves on if the

1 battery needs to be charged.

2 CHIEF JUSTICE ROBERTS: So your answer
3 to my question is, yes, you would not consider
4 the locomotive, you know, they're stopping for
5 lunch at the -- at the station, and they keep
6 the thing idling, and they're gone 45 minutes,
7 during that 45 minutes, the locomotive would not
8 be in use?

9 MR. BALLENGER: I -- I think, if they
10 -- if they have parked it on a -- a backtrack
11 off of the main line --

12 CHIEF JUSTICE ROBERTS: Right.

13 MR. BALLENGER: -- and the -- the
14 train crew has left the -- the locomotive, then
15 it is temporarily out of -- of use as a
16 locomotive under the Locomotive Inspection Act.

17 JUSTICE BREYER: Well, what about the
18 -- when I was a child, there was a book called
19 The Little Engine That Could.

20 MR. BALLENGER: There still is.

21 JUSTICE BREYER: And this engine got
22 to a hill, and it goes up the hill, and suddenly
23 it stops because it can't go further, but it
24 thinks I think I can, I think I can, I think I
25 can, and, eventually, it does. Okay?

1 Now let's take the period "I think I
2 can."

3 MR. BALLENGER: Justice --

4 JUSTICE BREYER: There it is, not
5 moving. And, in your view, here it is, you say,
6 on page 1516, is moving under its own power, in
7 active service.

8 MR. BALLENGER: Yes.

9 JUSTICE BREYER: Not the Little Engine
10 That Could. Not during those periods. He was
11 saying I think I can, I think I can.

12 So do you really mean -- I mean,
13 that's the same as the lunch question really.
14 It's just --

15 MR. BALLENGER: No, I think -- I
16 actually think that it's quite different,
17 Justice Breyer.

18 JUSTICE BREYER: It is?

19 MR. BALLENGER: The FRA's own
20 definition of -- of a -- of a -- a active
21 locomotive movement, not a dead movement, is the
22 application of tractive power. The Little
23 Engine That Could is applying tractive power
24 even if it's having a hard time getting up the
25 hill.

1 JUSTICE BREYER: Applying tractive
2 power, you mean its engine's turning?

3 MR. BALLENGER: Yes.

4 JUSTICE BREYER: It has gas?

5 MR. BALLENGER: No, it -- its engine
6 is turning and it is applying tractive power,
7 which there's a difference.

8 JUSTICE BREYER: What is applying
9 tractive power? You mean the --

10 MR. BALLENGER: It means --

11 JUSTICE BREYER: -- the thing is
12 turned on?

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

15 JUSTICE BREYER: Applying torque. I
16 see. So that's the test.

17 MR. BALLENGER: Okay. And -- and --
18 and, Justice Breyer --

19 JUSTICE BREYER: Now -- now you see
20 where we are and you've heard this argument.
21 And this argument to me, my real -- my -- that
22 was just trying to get you to think in the mood
23 I'm thinking of, there are so many different
24 things that that's why I was back to Lord Coke,
25 that if that's the right approach, that we say

1 let's handle this case as an example, well, he
2 says here, you came in 10 minutes after, you
3 were leaving in an hour, and the engine was
4 running.

5 You mean it makes a difference whether
6 the engine is running and it actually applies to
7 the -- the force to the track or it doesn't
8 apply the force? Now we seem to be in that --

9 MR. BALLENGER: Absolute --

10 JUSTICE BREYER: -- thing about
11 turning off the battery, et cetera.

12 MR. BALLENGER: -- absolutely, Your
13 Honor. Under the actual regulations, the actual
14 regulations say that a dead locomotive movement
15 is -- is a movement when the locomotive is not
16 applying tractive power and they explicitly say
17 that the locomotive can be idling.

18 And the actual facts of this case --

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

21 MR. BALLENGER: 49 CFR 229.5 and page
22 8-8 of FRA's Mode of Compliance Manual both say
23 that a dead locomotive can be idling, because
24 sometimes they need to idle in order to charge
25 the batteries, they can turn themselves on.

1 And -- and, Your Honor, the -- the key
2 to these statutes, to both statutes, is that
3 safe harbor in the -- the Safety Appliance Act.

4 This Court held in the Rigsby and the
5 Otis cases that the existence of that safe
6 harbor makes clear that a movement for repair
7 purposes would otherwise be covered by the
8 Safety Appliance Act. And that's right because
9 otherwise the -- the safe harbor would be
10 unnecessary.

11 But it demonstrates just as powerfully
12 that a -- a railcar even just sitting passively
13 in a yard or on a siding is not covered even by
14 the Safety Appliance Act because otherwise the
15 safe harbor would be meaningless. It would --

16 JUSTICE SOTOMAYOR: Counsel --

17 JUSTICE KAVANAUGH: Do you think
18 Brady -- oh, sorry.

19 JUSTICE SOTOMAYOR: I'm sorry.

20 JUSTICE KAVANAUGH: Go ahead.

21 JUSTICE SOTOMAYOR: Counsel,
22 locomotives by definition are more dangerous
23 than railroad cars.

24 MR. BALLENGER: Of course.

25 JUSTICE SOTOMAYOR: They explode. And

1 so I don't take much from the absence of a
2 safety out in the LIA.

3 But I do go back to the original
4 question the Chief started with. If this
5 locomotive, this dead locomotive, or the one
6 that was being powered off, is being dragged
7 with the rest of the train and only its brake is
8 connected, you would say it's not covered even
9 though it's connected to railroad cars that are
10 covered by the SAA?

11 MR. BALLENGER: It -- just like every
12 other vehicle in that train, it is in use as a
13 vehicle within the meaning of the Safety
14 Appliance Act. It is not in use as a vehicle
15 within the Locomotive Inspection Act.

16 JUSTICE SOTOMAYOR: Okay.

17 MR. BALLENGER: And the absence of a
18 safe harbor --

19 JUSTICE SOTOMAYOR: Then -- then how
20 do I deal with the tender and the definition of
21 use and Lilly? Because we considered a tender
22 that was off track to be in use on a sidetrack,
23 so it's not within your definition.

24 MR. BALLENGER: I'm -- I'm not sure
25 about that, Your Honor. Now several things

1 about Lilly.

2 Lilly did not address the in use
3 question. It -- it wasn't litigated or decided
4 in the case. It appears to have just been
5 assumed.

6 JUSTICE SOTOMAYOR: Well, that may be
7 true -- you know, one has to take the decades
8 and decades of jurisprudence when railroads were
9 the main means of transportation in our country,
10 and nobody's questioning what "in use" means,
11 that it was understood.

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

14 MR. BALLENGER: Well, but --

15 JUSTICE SOTOMAYOR: So answer my
16 question. A tender doesn't -- is covered by the
17 LIA?

18 MR. BALLENGER: Yes.

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

21 MR. BALLENGER: So --

22 JUSTICE SOTOMAYOR: Because it doesn't
23 go under its own power. It itself doesn't do
24 the dragging. So give me a definition under the
25 LIA that could be applicable equally to the

1 locomotive and the tender and its definition of
2 use?

3 MR. BALLENGER: So I -- I think, in --
4 in Lilly, the locomotive and the tender had just
5 been detached from their train, which was ready
6 to go, and they just essentially pulled up to a
7 gas station to be fueled in anticipation of --
8 of imminent movement.

9 JUSTICE SOTOMAYOR: Well, you --

10 MR. BALLENGER: And I --

11 JUSTICE SOTOMAYOR: -- told me before
12 that if the train's not revving to go and
13 revving to go to pull things, it's not in use.
14 So going off to a fuel tank is not in use
15 according to your definition.

16 MR. BALLENGER: No, Your Honor. I
17 think a locomotive, just like an automobile,
18 doesn't go out of use at stoplights. Just
19 because it -- it temporarily stops momentarily
20 doesn't mean that it's out of use.

21 JUSTICE SOTOMAYOR: All right. Thank
22 you, counsel.

23 MR. BALLENGER: The -- the basic
24 concept is movement. Once you set it in motion,
25 it's in use. You take it out of -- of use when

1 you park it.

2 And -- and there's no safety gap here.
3 The -- the FRA's regulations governing the safe
4 transportation of -- of locomotives and the
5 safety of locomotives sitting there in a
6 railyard are perfectly supported by its plenary
7 authority over railroad safety under the FRSA.

8 You don't need to stretch the LIA
9 beyond all recognition in order to ensure that
10 FRA has the power to ensure that locomotives are
11 safe --

12 JUSTICE KAVANAUGH: Do you think --

13 MR. BALLENGER: -- in every single
14 situation.

15 JUSTICE KAVANAUGH: -- do you think
16 the SAA was stretched beyond all recognition in
17 Brady?

18 MR. BALLENGER: Well, I think that you
19 have to read Brady narrowly because, if you read
20 it as broadly as Petitioner and the government
21 read it, then you render the safe harbor in the
22 Safety Appliance Act completely meaningless.

23 Now I -- I think the right way to
24 understand Brady is that --

25 JUSTICE KAVANAUGH: I don't understand

1 that. The premise, I think, of the safe harbor
2 is that it otherwise would be considered in use,
3 correct?

4 MR. BALLENGER: The -- the safe harbor
5 protects the railroad from civil penalties for
6 moving a car in a defective condition. But, if
7 the railroad is subject to the exact same civil
8 penalties for possessing the car, sitting there
9 on a siding or in a yard, then the safe harbor
10 doesn't protect from civil penalties -- doesn't
11 protect the railroad from any civil penalties.

12 JUSTICE KAVANAUGH: Well, back to --
13 back to Brady, I take from your initial comments
14 that you're not just looking narrow -- have a
15 narrow interpretation of the LIA but actually to
16 scale back what Brady and a slew of cases said
17 about the SAA. Is that accurate or not?

18 MR. BALLENGER: Well, I -- I -- I
19 think Brady is the outlier. I think that all of
20 the other cases, "use" was equated with
21 movement. And we can talk about those. I don't
22 want to dive into a question about Brady.

23 JUSTICE KAVANAUGH: I mean, there are
24 a lot of side car, dining car --

25 MR. BALLENGER: So --

1 JUSTICE KAVANAUGH: Okay, but -- we
2 don't have to get into all of them, but anyway,
3 Brady -- Brady is --

4 MR. BALLENGER: Well, I would very
5 much like to, Your Honor, because I think it's
6 important.

7 So, in -- in the Brady case, I think
8 you have to understand that case as essentially
9 an automobile stopped at a stoplight. The --
10 the terminal association was tendering that car
11 for immediate onward movement to the Wabash.
12 The Wabash was held not to be using that car
13 during the inspection. The terminal association
14 was held to still be using it because they were
15 -- they were tendering it for immediate onward
16 movement. They hadn't even parked that car for
17 the night. They were offering it up to go
18 forward.

19 And in all of the other cases, Johnson
20 and Delk and Rigsby and Otis and Schendel, every
21 single one of those cases, the accident happened
22 in the course of an immediate effort to move the
23 car.

24 Petitioner and the government like to
25 emphasize the Johnson case with the dining car

1 that was dropped off for a while by the
2 westbound train and then picked up by the
3 eastbound train.

4 But the actual use that triggered the
5 SAA in that case was that the -- the crew of a
6 passing freight train stopped to turn that car
7 around so that it would be in position for the
8 eastbound train when the eastbound train arrived
9 several hours later. And in going between the
10 cars to try and couple up to turn it around, the
11 employee was hurt. So he was hurt in the course
12 of an immediate attempt to move the car.

13 And the -- the hard question in the
14 case wasn't whether that dining car was in use.
15 It obviously was. It was being moved. The hard
16 question in the case was whether that use was in
17 interstate commerce.

18 JUSTICE KAVANAUGH: So -- so the
19 reading of Brady that says the dividing line's
20 where it's reached a place of repair, which is
21 what it says, you reject that?

22 MR. BALLENGER: I think that that
23 interpretation renders the safe harbor for
24 repair movements in the Safety Appliance Act
25 utterly meaningless. It would do absolutely no

1 work under Petitioner and the government's
2 interpretation of the statute --

3 JUSTICE KAVANAUGH: Okay. But --

4 MR. BALLENGER: -- be -- because -- I
5 do reject it because it only -- the only way to
6 evade "use" in their view is if the car is
7 already at a place of repair. What good is a
8 safe harbor for moving it to a place of repair
9 if the only time that it's out of use is when
10 it's already in the place of repair? It doesn't
11 make any sense, Your Honor.

12 JUSTICE KAVANAUGH: What about, a
13 different kind of focus, but their argument is
14 that most of the accidents with respect to
15 locomotives occur when they're stationary and
16 that your position, therefore, leaves the
17 statute not addressing the primary problem?
18 What's your response to that?

19 MR. BALLENGER: Well, the -- the
20 primary problem to which the Safety Appliance
21 Act is directed is coupler accidents, and that's
22 the active test --

23 JUSTICE KAVANAUGH: The -- the LIA?

24 MR. BALLENGER: -- to move the car.
25 The -- the Locomotive Inspection Act was about

1 the safe operation of locomotives in moving
2 interstate or foreign traffic. The LIA was
3 never meant to --

4 JUSTICE KAVANAUGH: Well, moving -- I
5 mean, you said moving a couple times. It was
6 taken out in 1924. So I don't think "moving"
7 gets you that far.

8 MR. BALLENGER: Well, but -- but the
9 statute is -- Congress took that language out in
10 order to make clear that it could be an
11 intrastate movement because it was really hard
12 to prove whether the movement was intrastate or
13 interstate. But I don't think that Congress
14 meant to decouple the basic concept of use from
15 what it had always been --

16 JUSTICE KAVANAUGH: Just --

17 MR. BALLENGER: -- movement.

18 JUSTICE KAVANAUGH: Sorry to
19 interrupt, but just on the focus, most of the
20 accidents, the amicus briefs tell us, that occur
21 with respect to locomotives are when the
22 locomotives are stationary. And I just want --

23 MR. BALLENGER: So --

24 JUSTICE KAVANAUGH: -- to get your
25 response to that.

1 MR. BALLENGER: -- so, under our
2 interpretation of the statute, the -- the LIA
3 frequently applies while a locomotive is
4 stationary because an automobile stopped at a
5 stoplight is still in use. You have to
6 affirmatively park it. You don't have to take
7 it apart or disassemble it, like the government
8 suggests --

9 JUSTICE KAGAN: You -- you --

10 MR. BALLENGER: -- but you do have to
11 park it.

12 JUSTICE KAGAN: -- you acknowledge,
13 don't you, that this statute imposes obligations
14 on the railroads to do things before the train
15 starts moving?

16 MR. BALLENGER: Yes.

17 JUSTICE KAGAN: I mean, the whole
18 notion of the statute, right, I mean, it is a
19 regulation of the railroad's use, which you say
20 is its movement. Maybe it is, maybe it's not.

21 But there's -- the entire statute,
22 it's not like you take all these precautions
23 once the train is moving. You take all these
24 precautions before the train is moving so that
25 --

1 MR. BALLENGER: So --

2 JUSTICE KAGAN: -- when --

3 MR. BALLENGER: -- so that you don't
4 violate the statute when you move the train.
5 And -- and -- and FRA --

6 JUSTICE KAGAN: What I'm saying, Mr.
7 Ballenger, is, like, this statute is a
8 preventive statute in its very essence. It says
9 do a lot of things while the -- while the train
10 is parked in order to get it ready for whatever
11 you -- you might want to do with it afterwards.

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

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

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

20 JUSTICE KAGAN: So the entire statute
21 is all about take precautions, take preventive
22 measures, do a lot of things before you actually
23 do anything with it.

24 MR. BALLENGER: And our point --

25 JUSTICE KAGAN: And that suggests to

1 me that it makes more sense to read the statute
2 as a kind of could be operated as opposed to
3 right now, in operation, the wheels are moving,
4 because the whole point of this is get the car
5 ready, get the car ready for whatever you might
6 decide to do with it.

7 MR. BALLENGER: And the Seventh
8 Circuit's insight that is the foundation of
9 their decisions for 70 years in this area is
10 that since the point of the statute is to
11 incentivize the railroad to get it into safe
12 condition before using it, you have to give the
13 railroad a chance to get it in safe condition.

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

1 inspection.

2 So, if the question here is whether
3 Union Pacific has deemed this locomotive ready
4 for use, the answer is not without inspecting
5 it, and it was your job to inspect it.

6 The -- the Seventh Circuit's
7 recognition, I think, in the Lyle and the
8 Tisneros cases 70 years ago, that preparing a
9 locomotive for use is the opposite of using it,
10 is exactly consonant with the understanding of
11 the statute, I think, Justice Kagan, that --
12 that you're putting forward. Yes, the point is
13 to -- to incentivize the railroad to do a great
14 job preparing it for use, but you've got to give
15 them a chance to do that.

16 And I think -- I really want to
17 emphasize that the -- the safe harbor in the
18 Safety Appliance Act structurally forbids their
19 interpretation, I think. It -- it has always
20 been central to this Court's understanding of
21 the statute in the Rigsby and -- and the Otos
22 cases. If Petitioner and the government are
23 right, the absence of any comparable safe harbor
24 in the Locomotive Inspection Act means that it
25 is impossible to transport locomotives for

1 purposes of repair.

2 And the LIA forbids exactly the same
3 repair movements that the SAA authorizes. And
4 it also -- if applied under the SAA, their
5 understanding would mean that that safe harbor
6 from civil penalties protects the railroad
7 against literally no civil penalties, and that
8 can't be the correct understanding of the
9 statute.

10 And the right -- Justice Breyer, I
11 think that your instinct that -- that we should
12 read the statute that Congress wrote is the
13 right instinct. Everyone understands the desire
14 for a bright-line rule, but sometimes Congress
15 writes statutes that require the application of
16 some common sense. And, here, that's the
17 section that they wrote.

18 JUSTICE BREYER: Well, why doesn't
19 common sense -- look, Brady does seem like
20 common sense. The car is traveling along. It
21 comes to the place where it stops. It stops.
22 It's still on the track. It's just about to go
23 to the Wabash Railroad, and the inspector whose
24 job it is to inspect goes and falls, and the
25 defect is there.

1 Okay. This was a car that came along.
2 It was coming from Salem, I guess, or going to
3 Salem, Chicago. It was there in the middle of
4 the -- a decision about whether to keep it as a
5 car, use it as a railroad. The engine is still
6 running, although I agree there's -- I don't
7 know about traction. Whatever that is, it may
8 not be there. And they have the accident.

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

13 MR. BALLENGER: So can I clarify the
14 --

15 JUSTICE BREYER: Yeah.

16 MR. BALLENGER: -- the total
17 circumstances here? The total circumstances
18 are, on the record, that this string of -- of
19 cars and three locomotives came from Chicago
20 more than an hour before, not 10 minutes before,
21 and it left Salem for Dexter, Missouri, not an
22 hour later but at least four hours later. The
23 accident happened at 3 in the morning.

24 And it took them three train movements
25 and more than four hours to put together a

1 different train for the run to Dexter.

2 And the court of appeals and the
3 district court looked at all of these facts,
4 that it was parked on -- on a backtrack, that no
5 one was even planning to use this locomotive as
6 a locomotive for the forward movement, the train
7 crew had been sent home, and they still needed
8 to put the train together for its next -- next
9 movement, and said, no, they're parked. Right?

10 And -- and that sort of commonsense
11 factual insight, I -- I think, is the sort of
12 judgment that Congress intended for courts to
13 make under this statute.

14 And Petitioner accuses us of adding
15 words to the statute by suggesting that we want
16 to draw a distinction between use as a
17 locomotive and use as a vehicle.

18 Again, I think that the safe harbor
19 difference between the two statutes absolutely
20 demands that you recognize that locomotives are
21 sometimes in use as vehicles and sometimes in
22 use as -- as locomotives.

23 But, also, this Court's SAA precedence
24 already recognize that vehicles can be in use in
25 different capacities. The holding of the Erie

1 case is that during yard-switching movements to
2 put a train together, those -- those cars and
3 those locomotives are in use as vehicles and
4 maybe as locomotives, respectively.

5 But they're not in use as a train for
6 purposes of the SAA's distinct requirements that
7 apply only to trains. It's not a train until
8 the train is fully put together and it's ready
9 to move out on to the mainline.

10 And so the lesson is that, when you
11 are using a locomotive under its own power to
12 move cars around a yard, that locomotive is in
13 use as a locomotive, absolutely. It is applying
14 tractive power. It and the cars are in use as
15 vehicles. None of them are a train yet.

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

25 I mean, whatever you need for a boxcar

1 or -- or a hopper car to passively move it to be
2 safe for everyone involved is within the
3 coverage of the SAA. And if you're moving a
4 locomotive dead, all of those same requirements
5 apply.

6 All of the holdings of this Court's
7 SAA cases apply. The only question is, is that
8 locomotive also being operated as a locomotive?
9 And I think that the context --

10 JUSTICE SOTOMAYOR: I'm sorry. Is
11 there better coverage under the LIA than the
12 SAA? Because you seem to be saying this was
13 covered by the SAA but not the LIA.

14 MR. BALLENGER: It -- it certainly was
15 once it started moving covered by the SAA
16 because it's a vehicle.

17 JUSTICE SOTOMAYOR: Oh, okay.

18 MR. BALLENGER: The definition of
19 vehicles --

20 JUSTICE SOTOMAYOR: So the fact that
21 it was going to be moving with the -- as a dead
22 locomotive, that's not enough for you because
23 the -- the actual locomotive that was picked and
24 wasn't powered down hadn't started to move
25 anything yet? Is that what your position is?

1 MR. BALLENGER: Our -- our position is
2 that while it's sitting there on the track it
3 might or might not have been -- been idling.
4 That tells you literally nothing about whether
5 anybody had ever used this locomotive or was
6 planning to use this locomotive.

7 It's -- it's sitting there --

8 JUSTICE SOTOMAYOR: Well, I don't
9 think it's ever -- you don't get that from it
10 sitting there. You get it from what the intent
11 of the railroad, and we always have to look at
12 that, don't we?

13 MR. BALLENGER: Well, I -- I think, if
14 you're looking at the intent of the railroad,
15 nobody intended to use this locomotive as a
16 locomotive, even for its next movement. And it
17 was not. And Petitioner was -- was injured in
18 --

19 JUSTICE SOTOMAYOR: So you should have
20 sued under the SAA, is what you're saying to me,
21 maybe?

22 MR. BALLENGER: It -- there certainly
23 would have been a much better argument. So the
24 FRA's own definition of "in use" for purposes of
25 the Safety Appliance Act is in its Mode of Power

1 Compliance Manual and in 49 CFR 232.9, and their
2 definition is that a -- a railcar, including a
3 locomotive, which is a car under the -- the SAA,
4 comes into use when it's -- it's moving or
5 shortly before movement if all inspections have
6 been completed and it's deemed ready for
7 imminent movement.

8 And I --

9 JUSTICE SOTOMAYOR: Thank you,
10 counsel.

11 MR. BALLENGER: Thank you.

12 Are we done?

13 JUSTICE KAVANAUGH: Your -- your test
14 would be imminent, right, would encompass
15 imminent movement?

16 MR. BALLENGER: It -- it would. The
17 -- the case law and FRA have always recognized
18 that a -- a railcar can come into -- to use
19 shortly before imminent movement, just as if you
20 get in your car and you turn the key and you put
21 your foot on the brake and put it in gear.

22 JUSTICE KAVANAUGH: Should we flesh
23 out what "imminent" means any more than that if
24 you were to prevail?

25 MR. BALLENGER: I -- I think it's a

1 commonsense concept. And -- and it is tied in
2 FRA's compliance manual, in the case law, and in
3 232.9 to whether the inspections have been
4 completed.

5 And it is Petitioner's position
6 throughout this case and at this argument that
7 this locomotive still needed its inspection if
8 it was going to be used at the time. It was not
9 ready for use.

10 CHIEF JUSTICE ROBERTS: Justice
11 Thomas, any questions?

12 JUSTICE THOMAS: Yes. Thank you, Mr.
13 Chief Justice.

14 Mr. Ballenger, was there any
15 indication that this locomotive had been cleared
16 for use? It -- it seems as though I'm confused
17 as to whether or not anyone ever suggested that
18 it's okay to use this particular locomotive.

19 MR. BALLENGER: Union Pacific's
20 operating manual forbids the use of locomotives
21 that are overdue for inspection.

22 Petitioner's position throughout this
23 litigation, including today, has been that this
24 locomotive is overdue for inspection.
25 Therefore, Union Pacific did not deem this

1 locomotive ready for use until it was inspected.

2 JUSTICE THOMAS: The other thing, the
3 -- I asked Petitioner and the government
4 about -- and I know it's a little bit off
5 topic -- towing my car, which, in the motor home
6 world, is referred to as a dinghy, to -- to
7 various places.

8 And they suggested that the mere fact
9 that I was towing and the lights worked and I
10 had a braking system, which, by the way, is
11 independent from the car's vehicle -- I mean,
12 the -- the towed vehicle's braking system, that
13 -- that I was using that vehicle.

14 Could you react to that just briefly?

15 MR. BALLENGER: So I think it's
16 debatable as to the motor coach. I think it's
17 not debatable as to the towed vehicle.

18 The -- the hypo that -- that I would
19 propose is you tow your motor coach to a
20 campground with the towed vehicle?

21 JUSTICE THOMAS: No, I'm towing -- I'm
22 towing the car, not the -- the motor coach is
23 the --

24 MR. BALLENGER: Oh.

25 JUSTICE THOMAS: -- yeah, it's towing

1 the vehicle.

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

4 JUSTICE THOMAS: Exactly.

5 MR. BALLENGER: I -- I think that --
6 that that car is not in use while you -- as a
7 car while you are passively towing it. I had in
8 mind the -- the more, you know, a tow-behind RV
9 and you tow it to a campground and you park and
10 you go out to dinner.

11 Clearly, the tow vehicle that you used
12 to pull your -- your RV is no longer in use when
13 it's parked at the campground.

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

17 You -- you -- there was some talk
18 about stationary locomotives. The -- is there
19 any instance in which a stationary locomotive is
20 in use, not being hauled around the yard for
21 repairs, as you suggested, you did discuss that,
22 but just sitting on the track?

23 MR. BALLENGER: I -- if it is -- is
24 sitting there as part of a train and the train
25 is stopped at -- at a red light, you know,

1 waiting for a switch, then I think it hasn't
2 been taken out of use yet.

3 I think, if it is parked on a
4 backtrack and the train crew goes home, it is
5 out of use. And I think the Raudenbush case
6 from the Third Circuit in 1947 explains those
7 distinctions.

8 JUSTICE THOMAS: Okay. Final
9 question: You seem to suggest that our test
10 should be a totality of circumstances.

11 Could you give us an indication of
12 what circumstances or what considerations are
13 required in order to make the determination as
14 to whether or not a vehicle is in use?

15 MR. BALLENGER: I -- I -- I actually
16 am not sure it's totality of the circumstances.
17 I -- I think, in this context, use, the basic
18 concept is movement. FRA and the case law have
19 recognized that imminent movement can be enough
20 if all inspections are completed.

21 And then, on the back end, it goes out
22 of use when it's genuinely parked, not just
23 stopped at a switch but genuinely parked for the
24 night.

25 JUSTICE THOMAS: Thank you.

1 CHIEF JUSTICE ROBERTS: Justice
2 Breyer?

3 Justice Alito?
4 Justice Sotomayor?
5 Justice Kagan?
6 Justice Kavanaugh?

7 JUSTICE KAVANAUGH: In the SAA, if
8 there weren't the safe harbor, would that
9 otherwise be considered in use when it's being
10 moved to -- for repairs?

11 MR. BALLENGER: This Court's insight
12 in the Otos and Rigsby cases was that the -- the
13 -- the safe harbor definitely tells you that it
14 would be in use because otherwise the safe
15 harbor would be unnecessary. Right?

16 JUSTICE KAVANAUGH: Right.

17 MR. BALLENGER: And -- and I -- I
18 think that a -- a car being transported for --
19 only for purposes of repair, if that safe harbor
20 weren't there, I think that might be debatable,
21 but it's not debatable any more after the safe
22 harbor, as this Court recognized in Otos and
23 Rigsby.

24 But, in those cases, like Delk, I urge
25 Your Honor to read the Delk opinion. It clearly

1 equates use with movement. What the railroad
2 was blamed for in that case was moving the --
3 the railcar around the yard.

4 This -- this Court said that once the
5 defect was discovered it should have been
6 withdrawn from use. It was not. The railroad
7 continued moving it about in connection with
8 other cars. And that's why the SAA applied, not
9 because it was just sitting there, because they
10 moved it.

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

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

14 JUSTICE KAVANAUGH: -- you don't like
15 Brady, though?

16 MR. BELLENGER: It was tendered for --
17 for immediate onward movement. And if -- and if
18 you -- you interpret the case as holding that
19 parked railcars are always in use, then you
20 render the safe harbor meaningless, and I think
21 you can't do that.

22 JUSTICE KAVANAUGH: Thank you.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel.

25 Rebuttal, Mr. Frederick?

1 REBUTTAL ARGUMENT OF DAVID C. FREDERICK
2 ON BEHALF OF THE PETITIONER

3 MR. FREDERICK: So, in addition to the
4 brief, Respondents offered a new test, that it's
5 got to be torqued to the wheels constitutes use,
6 while later in his argument he said, and
7 conceded, that imminent movement was going to be
8 enough.

9 The problem with Respondent's test,
10 this torqued to the wheels concept, is that adds
11 words to the statute when what we're looking is
12 whether the carrier may use a locomotive and
13 whether it is safe to operate. That's what the
14 statute says.

15 The locomotive here can go on or off,
16 which means that we're going to defer the
17 application of the statute, according to the
18 railroad, by the particular technical equipment
19 on the locomotive. That makes no sense.

20 Locomotives perform the use of backup
21 power, braking services, connections. He never
22 addresses that at all in their brief or in their
23 argument. So if the locomotive is towed, it
24 still can perform the railroad's use of being at
25 a place where it can perform other logistics

1 necessary.

2 The railroad's theory now, and blaming
3 my client for being the one who got on the
4 locomotive, now turns the statute completely on
5 its head because it's not the carrier who
6 determines whether the locomotive is used; it's
7 the worker.

8 Well, that makes no sense because the
9 worker is the one who got hurt. And he's the
10 one who is deciding whether or not to keep the
11 locomotive powered on or off for its continuing
12 journey from Salem on to Dexter.

13 Mr. Chief Justice, the restaurant
14 example is not in use on the railroad's line,
15 and so it would be outside of the statute for
16 that reason; you wouldn't have to get into the
17 peculiarities of use.

18 The -- under the SAA, the car applies
19 and it is in use even if it is empty, so it
20 makes no sense to apply "use" in a different way
21 under the LIA, whether the locomotive is on or
22 off. And as we say, empty cars are clearly in
23 use under the SAA and workers can be hurt when
24 they are done in that particular function.

25 We urge a broader reading of "in use"

1 because that -- the whole purpose and the words
2 of the statute were to protect workers and --
3 but having a narrow constriction of the statute,
4 as proposed here by the railroad, would
5 completely gut the rules.

6 The slipping hazard here that is the
7 regulation is for an exterior walkway that no
8 worker uses when the locomotive is in -- is in
9 motion. The locomotive is being inspected and
10 being serviced or being put on or off by the
11 worker getting on the passageway that has to be
12 safe under the rules. So under their example,
13 it would be completely gutting the regulations.

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

23 Thank you.

24 CHIEF JUSTICE ROBERTS: Thank you,
25 counsel.

1 The case is submitted.

2 (Whereupon, at 11:41 a.m., the case
3 was submitted.)

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