

1 IN THE SUPREME COURT OF THE UNITED STATES
2 - - - - -X
3 CITY OF COLUMBUS, ET AL., :
4 Petitioners :
5 v. : No. 01-419
6 OURS GARAGE AND WRECKER :
7 SERVICE, INC., ET AL. :
8 - - - - -X
9 Washington, D.C.
10 Tuesday, April 23, 2002
11 The above-entitled matter came for oral argument
12 before the Supreme Court of the United States at 10:10
13 a.m.
14 APPEARANCES:
15 JEFFREY S. SUTTON, ESQ., Columbus, Ohio; on behalf of the
16 Petitioners.
17 MALCOLM L. STEWART, ESQ., Assistant to the Solicitor
18 General, Department of Justice, Washington, D.C.; on
19 behalf of the United States, as amicus curiae,
20 supporting the Petitioners.
21 RICHARD A. CORDRAY, ESQ., Grove City, Ohio; on behalf of
22 the Respondents.
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7	as amicus curiae, supporting the Petitioners	17
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P R O C E E D I N G S

(10:10 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument
now in No. 01-419, City of Columbus v. Ours Garage and
Wrecker Service, Inc.

Mr. Sutton.

ORAL ARGUMENT OF JEFFREY S. SUTTON

ON BEHALF OF THE PETITIONERS

MR. SUTTON: Thank you, Mr. Chief Justice. May
it please the Court:

The question presented in this case is whether
Congress in 1994 divested the States of their traditional
authority to delegate police powers over local safety
matters to their political subdivisions. It would be no
small matter for Congress to impose such a restriction on
the States, and we submit they did no such thing in this
instance.

In making that point, it may be helpful to look
at the text of the statute, which is reprinted in full in
the appendix to our brief, the blue brief. And page A-2
of that appendix specifically repeats the language of
(c)(2)(A), the operative provision at issue here.

And our first point, as a matter of the language
of the statute, is that Congress specifically said that
the preemption provision, quote, "shall not restrict the

1 safety regulatory authority of a State."

2 Now, prior to 1994, Ohio, the State of Ohio, had
3 exercised regulatory authority in this area by delegating
4 its power specifically over tow truck regulations to local
5 political subdivisions. It's very difficult for us to
6 understand how the court of appeals interpretation does
7 not in fact, quote, "restrict the safety regulatory
8 authority of a State." That's --

9 QUESTION: Well, I think the argument on the
10 other side, Mr. Sutton, is that the first section (a)(1)
11 does say, no State or political subdivision thereof and no
12 interstate agency. It talks about a political subdivision
13 so that when you come down to the section you've just
14 quoted, and it only says State, there's perhaps a fair
15 inference that only a State and not a political
16 subdivision is included.

17 MR. SUTTON: Yes, Your Honor. And the normal
18 Russello argument is that a litigant like myself is trying
19 to read into another provision a term that is specifically
20 mentioned elsewhere in the statute. Here the suggestion
21 is that we're trying to read the term, political
22 subdivision, into (c)(2)(A). That's not what we're trying
23 to do.

24 What we're saying is the traditional safety
25 regulatory authority of a State was preserved by (c)(2)(A)

1 and traditionally States, including Ohio, had specifically
2 exercised that authority by delegating it in some
3 instances to State executive branch agencies and in other
4 instances, specifically here, to political subdivisions.

5 QUESTION: Would your argument be the same if
6 the State had not made a specific delegation? Did it make
7 a specific delegation with respect to tow trucks?

8 MR. SUTTON: Actually it did, although it's --
9 it's backwards, in the sense that they generally regulate
10 all motor carriers at the State level, but they exempted
11 tow trucks, therefore allowing political subdivisions like
12 Columbus to enact their own tow truck ordinances. So, in
13 fact, in this case it would be specific, although I
14 wouldn't say our argument rests on that point. Many
15 States like Ohio are home rule States, which in their
16 constitutions give general grants to political
17 subdivisions to have powers of local self-government. So,
18 in this case, I -- I would say it's a little easier
19 because there was something specific as to tow trucks, but
20 I wouldn't say that our argument rests on that point.

21 QUESTION: Mr. Sutton, would -- would you look a
22 little further down in, in the provision set forth in the
23 appendix to your brief? Look on page A-3. You were
24 reading from (c)(2)(A) --

25 MR. SUTTON: Yes, Your Honor.

1 QUESTION: -- in which it says, shall not
2 restrict the safety regulatory authority of a State. And
3 you say that includes, you know, political subdivisions of
4 a State.

5 MR. SUTTON: No. That it includes the right to
6 delegate political subdivisions.

7 QUESTION: All right. Okay. Just read two --
8 two lines later, (2)(C) where it says, does not apply.

9 MR. SUTTON: Right.

10 QUESTION: Again, it uses the same -- shall not
11 restrict, does not apply to the authority of a State, or a
12 political subdivision of a State, to enact or enforce a
13 law, regulation, or other provision. Why in that
14 provision does it say does not apply to a State or a
15 political subdivision? Because you're telling us, when
16 you say State, it includes whatever authority the State
17 has to delegate to a political subdivision.

18 MR. SUTTON: We're not saying --

19 QUESTION: You wouldn't have --

20 MR. SUTTON: We're not --

21 QUESTION: -- you wouldn't have needed that
22 language there.

23 MR. SUTTON: We're not saying States are
24 political subdivisions. We're simply saying the
25 preservation of a State, deregulatory authority of a State

1 includes the power to delegate.

2 But as to (c)(2)(C), keep in mind that was a
3 1995 amendment. That was not part of the original
4 legislation. So, the suggestion would be that
5 Congress's --

6 QUESTION: Well --

7 MR. SUTTON: -- style in 1995 modified the 1994
8 act. And no one is arguing --

9 QUESTION: I think we always look at an act in
10 toto and -- and don't try to piece it apart as to what was
11 enacted when. It seems to me we have to make sense of
12 this statute as a whole.

13 MR. SUTTON: That's -- that's true, Your Honor.
14 But I -- in O'Gilve, the Court said specifically that a
15 later act cannot modify the terms of an earlier act.

16 But let me -- I think there's another answer
17 that --

18 QUESTION: It doesn't modify it, but it -- it
19 can give clear indication of what -- of what it meant. I
20 mean, you're assuming that it modifies it.

21 MR. SUTTON: Right. Well, Your Honor, the --
22 the thing that I think may be helpful in thinking about
23 (c)(2)(C) and the other mentions of political subdivision
24 throughout 14501 is they're all in the context of --
25 context of the enact or enforce language, which is exactly

1 how (c)(1) reads. (c)(1) says these political bodies may
2 not enact or enforce these particular laws. That, of
3 course, is not the way (c)(2)(A) or, for that matter,
4 (a)(2) -- (a)(2) does exactly the same thing. It
5 preserves the safety regulatory authority of the State
6 over these various other provisions elsewhere identified
7 in title 49.

8 When it comes to (c)(2)(C), it's dealing with a
9 topic specifically mentioned in (c)(1), prices. And it
10 follows the exact same structure of (c)(1), not
11 surprisingly, because it's dealing with a topic that is
12 covered in (c)(1).

13 (c)(2)(A) --

14 QUESTION: Mr. Sutton, are you making the
15 distinction there between the safety regulations which
16 would be covered under (c)(2) and the economic regulation
17 which would be the main prohibition?

18 MR. SUTTON: Exactly, Your Honor. And there was
19 a division of authority, going back to 1966, where the old
20 ICC had regulated all of the economic issues over motor
21 carriers, and the Department of Transportation had
22 regulated all the safety issues. And what happens in 1994
23 is they're simply deregulating. The ICC is deregulating
24 this area. They wanted to make sure, as this Court said
25 in Morales, that States wouldn't undo that particular

1 deregulatory effort. But at the same time, as (c)(2)(A)
2 and (a)(2) makes clear, they wanted to preserve the
3 provisions of a separate part of title 49 dealing with
4 safety issues, something that DOT, a separate agency, had
5 always regulated. And I hope, Justice Scalia, this will
6 help in getting to your -- your point.

7 QUESTION: There's a --

8 MR. SUTTON: Oh, I'm sorry.

9 QUESTION: There's a question I think that still
10 would be left open even if you prevail; that is, whether
11 these regulations are appropriately characterized as
12 economic or safety. You say they're all safety.

13 MR. SUTTON: Absolutely.

14 QUESTION: But that hasn't been adjudicated yet.

15 MR. SUTTON: Absolutely. And -- and if -- if
16 the court of appeals decision would reverse, it would
17 certainly be within the rights of respondents to go back
18 to the Sixth Circuit and say, as to some of these
19 provisions of the Columbus code, they are not in fact
20 safety ordinances or safety provisions, and therefore they
21 could be regulated as a price, route, or service.

22 But there's another, I think, important point
23 that responds to this issue of the mention of political
24 subdivisions elsewhere in 14501. I think there is general
25 agreement in the case that as to (c)(2)(A), all of the

1 other words, every single other word in (c)(2)(A)
2 including, for example, the definition of the term safety,
3 is defined not from 1994 on by looking at the difference
4 of -- between safety and price, routes, or services
5 mentioned in (c)(1) -- in other words, you would not
6 define safety after 1994 based on its contextual
7 comparison to prices --

8 QUESTION: Where -- where exactly is (c)(2)(A)?

9 MR. SUTTON: Excuse me, Your Honor. It's on
10 A-2 of our appendix, and it's -- it's labeled motor
11 carriers of property. Excuse me. I should have made that
12 more clear.

13 The point I was trying to make is that these
14 other terms in (c)(2)(A) I think all would agree would be
15 defined by other provisions in title 49. For example, the
16 word safety would be defined by the provisions in chapter
17 311 of title 49, which is a large -- a large section of
18 the code dealing with safety provisions. It would not be
19 within the States' rights after 1994 to suddenly start
20 reinventing new definitions of safety, new definitions of
21 hazardous materials routing restrictions or size and
22 weight routing restrictions. We would be stuck with all
23 of those definitions, including notably those preemption
24 provisions. We think it would be a rather odd
25 interpretation of (c)(2)(A) to say that, yes, you

1 determine the meaning of all of these preserved matters by
2 reference to other parts of title 49, but you do not do so
3 when it comes to what the meaning of safety regulatory
4 authority of a State is.

5 And when you look at those other provisions of
6 title 49, it's quite clear that Congress contemplated in
7 all of them -- routing restrictions, safety -- that States
8 could delegate their power to local subdivisions. That's
9 not only in some of the statutory provisions, but it's in
10 the regulations.

11 QUESTION: Well, but it's not defined. It
12 doesn't -- there's not a definition that says, State
13 includes political subdivision of a State.

14 MR. SUTTON: That's not our argument, Your
15 Honor. We're not saying a State --

16 QUESTION: I understand it's not your argument.

17 MR. SUTTON: We're not saying --

18 QUESTION: It would be a stronger argument if
19 that were your argument. That -- that's my point.

20 (Laughter.)

21 MR. SUTTON: I -- I disagree, Your Honor. We're
22 not saying that -- Congress -- let me put it this way.
23 Congress has no right to empower a city. Congress can't
24 create a city. They can't give it a power. That's a
25 power the States have. It made perfect sense in (c)(2)(A)

1 to preserve the safety regulatory authority of a State
2 because it's the State legislature's job to determine what
3 other political bodies, if any, regulate in that area.

4 QUESTION: Well, in that connection, I was going
5 to ask could this -- suppose that you do not prevail in
6 this case and we accept the respondents' interpretation.
7 Could the State then every year have a cleanup statute in
8 which it says the State hereby adopts -- or authorizes
9 cities that are no less than X number of persons, no
10 greater than Y number of persons, obviously referring to
11 the City of Columbus, that -- that the State then allows
12 specifically Columbus to regulate, that it have an
13 ordinance and it just tracks the whole ordinance?

14 MR. SUTTON: Absolutely, Your Honor. And that
15 we think --

16 QUESTION: So, then we're not arguing about very
17 much in your view.

18 MR. SUTTON: Well, Your Honor, that would strike
19 me as an extraordinary hoop for Congress to ask the States
20 to step through. We're not aware of a single statute that
21 this Court has ever construed to mean that State
22 legislatures alone, but not their political subdivisions,
23 can regulate a particular area. I'm not aware of a single
24 statute where that's ever happened.

25 QUESTION: There's a -- there's a problem with

1 cities when you get to safety regulation for trucks. Can
2 you give me an example of a safety regulation that a city
3 might want to have that wouldn't have a negative impact or
4 some impact on routes?

5 MR. SUTTON: Right. Excuse me? The last word?

6 QUESTION: On routes.

7 MR. SUTTON: Right. The -- and I think the
8 respondents' point is or suggestion is that it would be
9 quite natural for Congress to say, as to routing
10 restrictions, we want uniform laws. We want them to be
11 the same throughout the State, and we don't want to bother
12 with municipalities establishing different regulations for
13 a routing restriction. Well, the -- the whole point of a
14 routing restriction is to account for differences within
15 the topography or geography of the States.

16 QUESTION: Yes, but I mean, there's a long
17 history in the ICC of trying to create, say, dynamite
18 truck routes. Well, you can imagine what something like
19 that does once you start talking about it within the city.
20 And -- and every neighborhood in sight says, send it
21 somewhere else. So, it's not illogical that people who
22 are worried about creating uniformity of routes would say,
23 keep the cities out of this. It's -- it's a nightmare.

24 And -- and -- but I have no reason to know
25 whether this is so or not. And so I ask you, is there any

1 kind of safety regulation that doesn't get into that kind
2 of routing nightmare when you talk about cities?

3 MR. SUTTON: Well, hazardous -- I -- I don't
4 think the general rule has been that either the Federal
5 Government or the States have been concerned about heavily
6 populated regions deciding, for example, to route
7 hazardous materials around their beltway as opposed to
8 through the middle. Everyone thinks that's a good idea,
9 and the cities generally, including Columbus, have been
10 left in control of that kind of decision, which is
11 something obviously one doesn't need to worry about --

12 QUESTION: But I'm looking for specifically --

13 MR. SUTTON: In a size and weight situation, of
14 course, you're going to situations where bridges or
15 particular roads in, you know, densely populated areas
16 require different rules than in rural regions of a State
17 where, for example, the roads are bigger and even if
18 they're not bigger, they're not as near to either
19 businesses or heavily populated areas.

20 QUESTION: How about a restriction that on a
21 particular residential street that's, nonetheless, an
22 arterial highway, no trucks over 10 tons?

23 MR. SUTTON: Could -- could a -- a -- the
24 question, first of all, would be whether that relates to
25 interstate commerce, and if it relates to interstate

1 commerce -- that is, commerce between States -- then the
2 Department of Transportation is -- is going to very
3 heavily regulate that particular route restriction and --
4 and has authority to preempt it, even as a matter of
5 regulation. If it's purely intrastate, traditionally
6 that's been something that Congress or the agencies hardly
7 regulated at all, and to the extent they regulated them,
8 it was only when there was Federal funding. But for the
9 most part, the regime has been that a locality makes that
10 decision through a delegation of power from their State
11 legislature.

12 QUESTION: Mr. Sutton, can I ask you, do you
13 regard -- just assume the -- assume the other side is
14 right on their interpretation. Would that mean that a
15 city could not fix speed limits in neighborhoods? Speed
16 limit is a safety regulation, isn't it?

17 MR. SUTTON: It is, Your Honor, but title 49 --
18 I think it's 31147 -- specifically says that traffic laws
19 -- I think a speeding limit would fall under that --

20 QUESTION: It would be a traffic law?

21 MR. SUTTON: -- is something that the Department
22 of Transportation does not regulate and neither does
23 Congress, which to me is one more indicator that you
24 don't, after 1994, start having free-form debates about
25 what safety means.

1 QUESTION: But even if the -- if it's not
2 federally regulated, would there, nevertheless, not be
3 preemption under their interpretation of this provision of
4 speed limit rules?

5 MR. SUTTON: On what ground? I mean, it would
6 have to be a price, route, or service for there to be
7 preemption.

8 QUESTION: No. I mean, if -- if you read the
9 (c)(2)(A) --

10 MR. SUTTON: As -- I see what you're saying.

11 QUESTION: -- as -- as saying only States are --
12 can -- are -- preserve the right to -- to regulate
13 safety --

14 MR. SUTTON: Right.

15 QUESTION: -- it seems to me that would preempt
16 a local government's right to fix a 15-mile limit in a
17 school zone.

18 MR. SUTTON: I understand what you're saying. I
19 think the position they would take -- and maybe they could
20 clarify this -- is that if it's not a price, route, or
21 service, you ignore (c)(2)(A), and you simply go to the
22 rest of title 49. But I'm not -- I don't know the answer
23 to that.

24 If I could make one more point, Justice Scalia,
25 and I hope this responds somewhat to the point you raised

1 earlier. State laws, even if you think of them as State
2 legislative acts, are being preempted in this case. Let's
3 ignore the State of Ohio. New York. The State of New
4 York says as to populations with more than 1 million
5 people, the cities in -- those populations can enact tow
6 truck ordinances. This interpretation that the court of
7 appeals embraced preempts that State law. There's no --
8 strictly speaking, there's no such thing as a city law
9 divorced from a State law. The city power comes from the
10 States and there's just no such thing. And we think, as
11 the lack of parallelism between (c)(1) and (c)(2)
12 indicates, all they were doing was preserving that
13 traditional safety regulatory authority of a State.

14 If I could save the rest of my time for
15 rebuttal, I'd appreciate it. Thank you.

16 QUESTION: Very well, Mr. Sutton.

17 Mr. Stewart, we'll hear from you.

18 ORAL ARGUMENT OF MALCOLM L. STEWART

19 ON BEHALF OF THE UNITED STATES,

20 AS AMICUS CURIAE, SUPPORTING THE PETITIONERS

21 MR. STEWART: Mr. Chief Justice, and may it
22 please the Court:

23 The phrase, safety regulatory authority of a
24 State, in section 14501(c)(2)(A) is most naturally read to
25 encompass the State's traditional authority to delegate

1 its powers to political subdivisions. That view is
2 supported by the larger statutory context in which the
3 phrase appears and by the purposes of the 1994 act.

4 As Mr. Sutton has explained and as this Court
5 has frequently recognized, one integral component of the
6 State's ability to regulate within its borders is to
7 delegate as much or as little power as it wishes to
8 subordinate political units.

9 QUESTION: We understand all that, of course.
10 And -- and in isolation, that phrase most naturally would
11 -- would mean safety regulatory authority of a State,
12 including, of course, its ability to delegate it to
13 municipalities.

14 But what is sticking in our craw is the fact
15 that elsewhere in the statute, the language is very
16 careful to distinguish between the authority of a State,
17 on the one hand, and the -- and the separate authority of
18 political subdivisions of the State. Now, what -- what is
19 your explanation for those other separations?

20 MR. STEWART: I guess there are about three
21 responses we would make.

22 The first is, as Mr. Sutton points out, this is
23 not a case in which the other provisions are identical but
24 for the inclusion of the word political subdivision. For
25 instance, in subsection (c)(2)(C), which is at the -- the

1 top of A-3 of the --

2 QUESTION: Right.

3 MR. STEWART: -- petitioners' brief, it refers
4 to the authority of a State or a political subdivision of
5 a State to enact or enforce a law. Now, even though
6 delegating power to municipalities is an integral feature
7 of the State's regulatory authority, it would certainly be
8 less than clear that when a municipality enacted or
9 enforced a law, pursuant to such delegation, it could not
10 necessarily be said that the State had enacted or enforced
11 that law.

12 And so, if the provision left out political
13 subdivisions and simply said that the preemption rule does
14 not apply to the authority of a State to enact or enforce
15 a law, there would be ambiguity, and Congress -- whether
16 it was necessary or not, Congress might rationally choose
17 to eliminate that potential ambiguity through an express
18 reference to political subdivision.

19 But the phrase that appears in subsection (2)(A)
20 is simply safety regulatory authority of a State, and
21 that, as you say, would most naturally be construed to
22 encompass the authority to delegate power to
23 municipalities.

24 The second point is that based on the country's
25 traditions, it would certainly be an unusual thing for

1 Congress to interfere with the States' decisions as to the
2 amount of power that should be delegated to subordinate
3 political units.

4 QUESTION: Has there been any -- what's the
5 closest case respondents could cite to show a contrary
6 practice?

7 MR. STEWART: I believe the respondents have
8 cited a couple of court of appeals cases which have
9 held --

10 QUESTION: From this Court?

11 MR. STEWART: None from this Court. The -- the
12 respondents have not cited any case in which this Court
13 has held that any Federal statute had the effect of
14 divesting a State of its authority to delegate power to
15 political subdivisions.

16 QUESTION: Well, there are many Federal statutes
17 that -- that make grants to municipalities for various
18 functions and don't make it to the State. This is a --
19 certainly the Federal Government interfering in the
20 relationship between the State and its municipalities.
21 And the State has no -- no ability to veto whether the
22 municipality is going to accept those funds or not. And
23 there's -- there's been a lot of controversy within the
24 States between the municipalities and the State government
25 as to -- as to what money should be accepted and so forth.

1 It seems to me that has exactly the same effect as what
2 you're talking about here. The Federal Government has,
3 indeed, indeed, intervened in the relationship between the
4 State and its -- and its political subdivisions.

5 MR. STEWART: We cited the Lee Deadwood case in
6 our brief as support for the proposition that Congress
7 would constitutionally be authorized to preempt municipal
8 law without preempting State law if it chose. Our only
9 point is it would be sufficiently unusual that we would
10 expect Congress to address the matter fairly directly.

11 QUESTION: Mr. Stewart, would you be able to
12 give us any examples of municipal safety regulations that
13 are preempted by this section as it's been interpreted
14 below?

15 MR. STEWART: We -- I think that as it's been
16 interpreted --

17 QUESTION: As a practical matter?

18 MR. STEWART: As it's been interpreted below, I
19 believe the types of regulations that have been held
20 preempted are -- are fairly similar to the City of
21 Columbus's regulation, namely, a licensing scheme in which
22 the vehicle is inspected, the driver is tested to ensure
23 proficiency in the operation of the vehicle. And those
24 have been held to be preempted on the ground that they
25 relate to routes --

1 QUESTION: So, we're really talking about
2 licensing schemes.

3 Is this anything that the State couldn't
4 undertake to do itself with its State driver's license and
5 so forth?

6 MR. STEWART: I -- I think that the licensing
7 scheme, while we would respect Ohio's decision to delegate
8 that to municipalities, it -- in truth I think this is
9 something that could fairly realistically be accomplished
10 at the State level.

11 Now, with respect to some of the other matters
12 that are specified in (c)(2)(A), for instance, route
13 controls based on size and weight or hazardous nature of
14 the cargo, because the determination at issue is whether a
15 particular vehicle or a particular cargo is suitable for a
16 particular stretch of road, those are the sorts of things
17 that can't realistically be expected to be done in their
18 entirety at the State level. And therefore, it would be a
19 particular disruption of the State's processes --

20 QUESTION: Mr. Stewart, before your time goes
21 out, will you give us your third point too? You gave us
22 the first two.

23 MR. STEWART: The third point is that to the
24 extent that the provision at issue here is ambiguous and
25 the Court wants to interpret it by reference to other

1 relevant statutory provisions, it is important to examine
2 the larger statutory context. That is, (c)(2)(A) is not
3 limited to safety. It specifies these other matters, and
4 as Mr. Sutton was pointing out, the other matters are
5 covered in detail in different provisions of title 49. In
6 general, those other provisions of title 49 contain their
7 own preemption provisions. They explain at -- at great
8 length what States can and can't do. At least in the area
9 of safety, State law is specifically defined to include
10 the law of the local governmental unit, and so the -- the
11 safety regime in the other parts of title 49 specifically
12 contemplates municipal safety regulation. And it would be
13 odd to think that Congress, in this oblique way, has
14 superseded that carefully developed statutory framework.

15 And to put this in larger historical context, to
16 follow up on Mr. Sutton's point, from 1966 to 1995, at the
17 Federal level there was division of regulatory authority
18 between the ICC which did economic regulation and the
19 Department of Transportation which did safety regulation.
20 And it's no coincidence that State law as to economic
21 matters was preempted at about the same time that the ICC
22 saw its powers diminished and the ICC was eventually
23 eliminated altogether. This was part of a larger program
24 of deregulating the economics of commercial trucking.
25 But --

1 QUESTION: Who -- who administers this statute?
2 Is there a Federal agency that -- that can be said to be
3 administering this -- this statute?

4 MR. STEWART: There -- there is no Federal
5 agency entrusted with the administration of this
6 particular statute. The Department of Transportation
7 administers the related provisions of title 49 that are
8 specifically addressed to these matters, and their
9 implementation of their responsibilities under those
10 provisions would be affected by this Court's decision in
11 this case because if there is no municipal safety
12 regulation at all, that would obviously have an impact on
13 their administration of the scheme for determining when
14 municipal regulation is and is not permitted. But they
15 are not specifically entrusted with authority over this
16 scheme.

17 So -- so to return to the point about the
18 division of responsibilities, Congress eliminated the ICC,
19 eliminated Federal economic regulation of commercial
20 trucking, and at the same time it preempted State law in
21 order to ensure that the States didn't undo the Federal
22 deregulatory efforts. But there's been no Federal
23 deregulation in matters of trucking safety. The prior
24 provisions of title 49 remain on the books.

25 There's no expression of congressional

1 discontent with the manner in which power in those areas
2 has been divided between the Federal, State, and local
3 governments. To the contrary, the conference report
4 accompanying the 1994 act refers specifically to those
5 preexisting provisions and expresses the intent that their
6 administration continue unchanged.

7 QUESTION: May I ask this question on the
8 division of responsibility? Is it your view -- your
9 understanding that the cities would not be able in their
10 licensing scheme to regulate the rates that the truckers
11 charge?

12 MR. STEWART: That's correct.

13 If there are no further questions, I have
14 nothing further.

15 QUESTION: To what extent, Mr. Stewart, does the
16 Department of Transportation -- you said there's no
17 administrator of the statute, but they do have authority
18 under the motor safety -- motor carrier safety assistance
19 program that seems to be relevant.

20 MR. STEWART: The motor carrier safety
21 assistance program, and they also have authority under
22 other provisions of title 49 to review and declare to be
23 preempted State and local laws -- State and local safety
24 laws that apply to transportation in interstate commerce.
25 Again, those are not provisions of this particular

1 statute. They are among the preexisting provisions of
2 title 49 that were intended to be preserved by subsection
3 (c)(2)(A).

4 QUESTION: Thank you, Mr. Stewart.

5 Mr. Cordray, we'll hear from you.

6 ORAL ARGUMENT OF RICHARD A. CORDRAY

7 ON BEHALF OF THE RESPONDENTS

8 QUESTION: Mr. Cordray, I hope you'll tell us
9 the practical effects of the decision below.

10 MR. CORDRAY: The practical effect of the
11 decision below, as you uncovered it in your questioning
12 earlier, is that Federal law preempts municipalities and
13 other local governments from imposing their own individual
14 licensing schemes upon motor carriers of property and that
15 is --

16 QUESTION: Well, it also speaks to routes or
17 weight limitations. Are there situations where the city
18 or town is particularly aware of traffic problems within
19 the city or a weak bridge or something and that its
20 limitations are needed?

21 MR. CORDRAY: Size and weight limitations, as
22 the other matters addressed in (c)(2)(A), would be
23 regulated at the State level, not at the local level under
24 the proper reading of this statute. And the reason is
25 that Congress did not want to open up the trucking

1 industry, where it was attempting to do something new,
2 which is deregulate it nationwide and create an unfettered
3 free market for trucking and transportation services.

4 QUESTION: So that if a city says no trucks
5 through the park with the public playground between
6 certain hours, that has to be the -- the State? That's
7 the only one that could do that?

8 MR. CORDRAY: That could be done at the State
9 level and it could be done either by going to the State
10 legislature, as you suggested, or it could be done by
11 setting up a very simple administrative scheme at the
12 State level where you would go to the State department --

13 QUESTION: Well, why would --

14 QUESTION: Well, most cities I've been in had --

15 QUESTION: -- why would Congress choose to -- to
16 regulate in that way, say we want the State to do it but
17 not the locality?

18 MR. CORDRAY: Specifically because they were
19 trying to deregulate this market nationwide. To leave in
20 place every municipality with the option to license
21 different motor carriers of property is not only --

22 QUESTION: No. I'm not talking about licensing.
23 I'm talking about the -- the example of, say, that no
24 trucks over 10 tons on this particular road.

25 MR. CORDRAY: Again, I think that petitioners

1 agree and all the courts have agreed that every subsection
2 of (c)(2)(A) has to be read together, and to the extent
3 municipal authority is being preempted in one respect,
4 it's being preempted in all. And the reason is that
5 Congress was recognizing that schemes directed
6 specifically to motor carriers of property at the local
7 level simply incorporated too much regulation that would
8 interfere with and impede a free market for transportation
9 services and motor carriers --

10 QUESTION: May I ask a similar question?
11 Supposing that there's a heavy rain storm in a city or
12 something and it becomes unsafe to use a certain street if
13 the truck is over a certain size. Could -- the police
14 would not be permitted to divert the traffic around that
15 particular flooded area, I suppose.

16 MR. CORDRAY: Certainly they could. This goes
17 to your question you asked earlier which is whether
18 traffic laws, ordinary, general traffic laws, would be
19 preempted under our --

20 QUESTION: No. This is for safety reasons.

21 MR. CORDRAY: -- statute --

22 QUESTION: They figure it's -- it's dangerous
23 because the thing is too deep and the trucks have to over-
24 set -- overturn or something like that.

25 MR. CORDRAY: They -- they would be -- they

1 would be diverting --

2 QUESTION: It would be preempted, I guess.

3 MR. CORDRAY: They would be -- no. They would
4 be diverting presumably all traffic that's heavy enough to
5 create a safety problem.

6 QUESTION: Supposing -- truck size traffic, yes.

7 MR. CORDRAY: Yes, but -- but it's not directed
8 simply to motor carriers of property. It's directed to
9 all trucks, all oversize vehicles. It could be private
10 vehicles, RVs that people use to take vacations, whatever
11 it might be. That would be permissible.

12 And traffic laws, I want to stress, are not
13 preempted by this statute. This statute is not limitless.
14 As this Court has --

15 QUESTION: Well, then what about the -- the
16 answer that you gave earlier to the question that the
17 Chief Justice and I had? No -- no trucks through the
18 playground or -- or through a residential neighborhood at
19 a certain time. I thought you said that would be
20 preempted, but now you're saying it applies only if
21 they're motor carriers of property?

22 MR. CORDRAY: Let me step back. If the
23 ordinance related to all oversize vehicles -- that would
24 be a general traffic regulation -- that would be
25 permissible. And I'll -- and I'll get to that in a

1 moment, why traffic laws are not preempted by the statute.
2 They -- they are not related to price, route, or service
3 of motor carriers of property.

4 If it was directed specifically to a type of
5 motor carrier of property, as this licensing scheme is --
6 it applies directly, specifically, and only to tow trucks
7 -- that would be a different matter. Municipalities are
8 not permitted to do that, and Congress specifically wanted
9 to do that because although there was a tradition of lots
10 of regulation at the State and local level, Congress was
11 making a policy decision, as it's free to do, to say that
12 all of that is impeding a free market for transportation
13 services and motor carriers that's affecting broad
14 segments of the American economy. We want to bring down
15 costs, rid us of these inefficiencies --

16 QUESTION: I understand that, but I'm at the
17 same question that I think everyone has asked. In my mind
18 -- and I might be misremembering -- there are lots of
19 streets -- there used to be in San Francisco and you'd see
20 a sign, and it would say, no trucks over 3-and-a-half
21 tons. And it seems to me in Boston I can think of seeing
22 signs. I thought maybe they said, no trucks over such and
23 such. Maybe they just say no vehicle over such and such.
24 And my impression is that in many cities there are many
25 such streets, and which streets there are is a matter for

1 the municipality to decide. And it's a shifting pattern,
2 and typically it's in residential areas. And there's lots
3 of local regulation of that kind. That's my impression.

4 And I want to know, on your reading of this
5 statute, does this change when I'm thinking of those signs
6 on one street after another? Does that all change because
7 they're preempted, and now each neighborhood has to go to
8 Sacramento, if they're in California, and convince the --
9 the legislature? I'd be very surprised if that is so,
10 that Congress changed so well established a municipal
11 pattern of behavior without saying anything about it. And
12 therefore, I think everyone is driving at the same
13 question. I understand about all the licensing stuff, but
14 I want to know the answer to that question.

15 MR. CORDRAY: All right. Again, it's not what's
16 specifically at issue in this case, but I understand the
17 Court wants the answer to the hypothetical. Absolutely.

18 QUESTION: It has nothing to do with this case.
19 I'm saying when your -- accept the fact that if I accept
20 your position in this case --

21 MR. CORDRAY: Yes.

22 QUESTION: -- at the moment I'm thinking all
23 this traditional regulation of what street you can use if
24 you're a truck is being wiped out. I mean, that's
25 relevant.

1 MR. CORDRAY: It could be dealt with either of
2 two ways, Your Honor. Either it could be regarded as a
3 general traffic law, like a one-way street, like a speed
4 limit, and the like, in which case we believe that it
5 would not come within the preemption clause ex ante
6 because it has to have a connection with or reference to
7 motor carriers of property to come within the terms of
8 this preemption clause --

9 QUESTION: Motor carriers of property or just
10 motor carriers?

11 MR. CORDRAY: Motor carriers of property which
12 is what --

13 QUESTION: In other words, if they -- if they
14 don't say on the street motor carriers of property cannot
15 use this, then it's not preempted.

16 MR. CORDRAY: Then it is a general traffic
17 regulation no different from where the speed limit says 55
18 miles per hour and trucks have to obey it, just as cars
19 do. And motor carriers --

20 QUESTION: Well, does the term, motor carriers
21 of property -- does that mean motor carriers of property
22 for hire or any motor carrier that is carrying property?

23 MR. CORDRAY: Well, it would be those who come
24 within the terms of this specific preemption clause.

25 QUESTION: Yes, that's what I want to know.

1 Which does it mean?

2 MR. CORDRAY: Yes. I -- I believe that this
3 statute is referring to for hire carriers of -- motor
4 carriers of property.

5 QUESTION: So -- so, if a State were to say all
6 prices of all trucks in this State have to be \$50 -- all
7 trucks -- and they don't say motor carriers of property,
8 that's not preempted.

9 MR. CORDRAY: No, that is not correct because
10 it's specifically referenced --

11 QUESTION: Of course, it's not correct. And
12 similarly, if they say on a street, no truck can use this
13 street --

14 MR. CORDRAY: Yes.

15 QUESTION: -- and they don't say motor carriers
16 of property, it's the same.

17 MR. CORDRAY: The reason is -- no. The reason
18 is that specifically references price. There are lots of
19 laws that in -- tangentially will affect routes. All
20 right? A one-way street law, for example, has to be
21 obeyed by trucks, just as it is by cars. That's not
22 within this preemption clause. So, that's one way to
23 address it. All right. And -- and that would be true of
24 all general traffic laws, just as it's true of all general
25 tort laws, general tax laws.

1 QUESTION: Mr. Cordray, on this point, look at
2 on page A-2, (c)(1), the general rule. It has at the very
3 end of it the phrase, with respect to the transportation
4 of property.

5 MR. CORDRAY: Right.

6 QUESTION: Where are you reading from?

7 QUESTION: I'm reading on page A-2, (c)(1), the
8 general rule from which (c)(2) is -- is an exception. And
9 the general rule is, except as provided, blah, blah, blah,
10 blah, no State, political subdivision shall enact any
11 provision having the force and effect of law related to a
12 price, route, or service of any motor carrier. And then
13 there's a lot of other language. And then at the very
14 end, with respect to the transportation of property. Does
15 that phrase at the end go all the way back to related to a
16 price, route, or service with respect to the
17 transportation of property?

18 MR. CORDRAY: I believe it does, Your Honor, and
19 it's just -- it's just --

20 QUESTION: Well, that would make it a very
21 narrow provision then, wouldn't it, that -- that we're
22 excluding the -- the municipalities from?

23 MR. CORDRAY: I believe it is.

24 QUESTION: They just couldn't say you're not
25 allowed to use this street to carry -- to carry moving

1 goods or --

2 MR. CORDRAY: This is a key point.

3 QUESTION: But you're -- you're asking -- you're
4 asking us to -- to have a very careful grammatically
5 correct reading of the act, and in your answer that --
6 that you've just given to Justice Scalia, transportation
7 of property is preceded by an or. It seems to me the
8 first clause is quite independent, related to a price,
9 route, or service of any motor carrier. That's it.

10 MR. CORDRAY: With --

11 QUESTION: So, I'm not sure the qualification
12 you urge on us, in order to mitigate the effects of this
13 holding works.

14 QUESTION: Well, I don't know what it would go
15 to if it didn't go to that. It can't go to the stuff
16 after the or. Or any motor -- motor private carrier,
17 broker or freight forwarder with respect to the
18 transportation of -- what is a -- what is a motor private
19 carrier with respect to the transportation of -- of
20 property? It has no meaning unless you read it all the
21 way back up to price, route, or service with respect to
22 the transportation --

23 MR. CORDRAY: And the title of the provision is
24 motor carriers of property. That's specifically what
25 they're dealing with, as distinguished from motor carriers

1 of passengers, which are addressed earlier in the same
2 section of the statute, 14501(a).

3 QUESTION: It's not the best statute, is it?

4 MR. CORDRAY: I beg your pardon?

5 QUESTION: It's not the best statute.

6 (Laughter.)

7 MR. CORDRAY: It's -- it's clear enough with
8 respect to the things we care about here, which is that --

9 QUESTION: Well, but I don't think it is.

10 MR. CORDRAY: -- Congress very carefully
11 attempted to distinguish between a State and a political
12 subdivision of a State. And it did so repeatedly in the
13 statute for the specific purpose of drawing a distinction
14 between them. And the only way --

15 QUESTION: There's not a word of legislative
16 history I take it --

17 QUESTION: If you read (c)(1) as narrowly as
18 you're suggesting, you don't even need the exemption
19 because it only relates to law, regulation, or other
20 provision related to price, route, or service. So -- and
21 it doesn't even reach safety.

22 MR. CORDRAY: No, that's not true, Your Honor.
23 And this case is a good example of it. They are
24 attempting to impose a licensing scheme with respect to
25 tow trucks and could do it with respect to any motor

1 carrier of property, parcel delivery service, or the like.
2 And their -- their rationale for doing so apparently is
3 safety. But in fact, that is exactly what is preempted by
4 this statute and by this clause.

5 QUESTION: But, Mr. Cordray, that's open. Mr.
6 Sutton said that that question whether these regulations
7 are genuine safety regulations or, on the other hand,
8 economic is not determined by this case. Here the
9 question is whatever is safety, may the State delegate
10 that authority to the municipalities.

11 I did want to get your response to a question
12 Justice Kennedy asked Mr. -- and it was answered for you
13 by Mr. Sutton. Suppose the State says, okay, we do
14 business by dealing with municipalities. So, we will
15 simply take the municipal regulation of Toledo and the
16 municipal regulation of Columbus, and we'll put it all
17 together in one package. It will say, State regulation of
18 safety, and -- and we'll preserve everything. Would that
19 be permissible under your reading of this Federal statute?

20 MR. CORDRAY: Yes, it would, Your Honor. It
21 would. If the State is doing the regulating or enacting
22 the law, under this statute, the way it reads and the --
23 the way it was designed, that would be permissible, even
24 if it's nonuniform. If we wanted to make it uniform, we'd
25 have to go to the legislature and try to get that package

1 amended or go perhaps to the State department of
2 transportation which also could do this through an
3 administrative scheme.

4 QUESTION: So, it's strictly a question of form
5 that we're dealing with, that States, you can delegate to
6 your cities, as you always have, just say, cities, what do
7 you want and we'll give it to you by enacting a State law.

8 MR. CORDRAY: No. It's not simply a matter of
9 form because Congress made a judgment that if there were
10 50 different States imposing their own schemes, that would
11 be less impediments and -- and tangle of restrictions
12 impeding a free market than if 39,000 municipalities and
13 local governments around the country were free on their
14 own to do what they wished, and that that -- that was in
15 fact very much undercutting the desire to get to a free
16 market in transportation services.

17 But I also want to go back to your comment and
18 your question earlier. This statute does not itself
19 distinguish between economic regulation that's preempted
20 on the one hand and safety regulation that's not on the
21 other. The phrasing of the statute is much broader. It
22 is related to price, route, and services of a motor
23 carrier of property. That may not only be economic
24 regulation. And so the notion that that's the divide and
25 we can simply remand, the lower court can sort it out, I

1 believe is not correct.

2 Now, as we've seen here, the fact that the --
3 the statute is broad does not mean it's all encompassing.
4 I mean, I could see an argument that truck -- trucking
5 companies no longer now have to pay corporate tax because
6 that affects their price. But that's a general provision.
7 As this Court has said in construing ERISA and needs to be
8 imported here in the Dillingham case and the like, there
9 has to be a connection with or reference to the specific
10 item at issue. Here motor carriers of property. And
11 that's what we have with this licensing scheme here which
12 is directed specifically at tow trucks and will have a
13 very direct relation and -- and effect on their prices and
14 services.

15 I also want to mention the problem of surplusage
16 because it's not been mentioned on the other side, and
17 it's very important here. What possible reason would
18 Congress have had for including in the statute what
19 obviously is a key phrase? It shows up seven times in the
20 course of the single statute. Political subdivision of a
21 State. Why would that be included at all if the authority
22 of a State is to be read, as petitioners would have it, to
23 always include within it the authority of a political
24 subdivision.

25 QUESTION: Their -- their answer is that -- that

1 when you speak of the regulatory authority of a State,
2 that naturally connotes the authority to -- to delegate
3 that to -- to municipalities. But when you speak of the
4 authority of a State to enact or enforce a law, that --
5 that much less naturally includes the authority of a
6 municipality to enact or enforce a law so that -- and all
7 of those other references are in connection with that
8 phrase, to enact or enforce a law. Are they not?

9 MR. CORDRAY: Two reasons why that does not
10 work, Your Honor. They agreed that the subsections of
11 (c)(2)(A) have to be read in parallel and the second one
12 with respect to size and weight and the like. It doesn't
13 say anything about regulatory authority. It just says
14 authority of a State.

15 Second, in the preemption clause itself --

16 QUESTION: Wait, wait. I --I missed that.

17 MR. CORDRAY: Well, regulatory authority is the
18 phrase used in the first subclause --

19 QUESTION: Right.

20 MR. CORDRAY: -- of (c)(2)(A) related to safety.

21 QUESTION: Yes.

22 MR. CORDRAY: But they're not talking about
23 authority to regulate. They're just talking about
24 authority of a State with respect to the size and weight,
25 hazardous cargo, and then with respect to insurance. And

1 insurance is an excellent example I'll get to in a moment.

2 But also in the preemption clause itself,
3 (c)(1), it refers to the authority of a State to enact or
4 enforce a law or regulation. That is regulatory
5 authority, and it distinguishes it full stop from the
6 authority of a political subdivision of a State to do the
7 same thing. What? Enact or enforce a regulation. So,
8 the regulatory authority is being discussed specifically
9 in the preemption clause itself.

10 That's the fallacy of starting the analysis here
11 by jumping all the way to (c)(2)(A) and wrenching that
12 text out of context and divorcing it from the preemption
13 clause that it's meant to be a savings subordinate to.
14 But the preemption clause itself --

15 QUESTION: No, but (c)(1) uses may enact or
16 enforce just as -- as (c)(2)(C) does, whereas (c)(2)(A)
17 does not. The to enact or enforce language applies in
18 every subsection except the one that we're arguing about.

19 MR. CORDRAY: That's correct, which is a telling
20 point. In every subsection, Congress went out of its way
21 to add political subdivision of a State. I've still not
22 heard a single sensible explanation for why they would
23 bother to do that.

24 QUESTION: Well, if -- but if you didn't add the
25 political subdivision in those States and if you had a

1 home rule State, then a local government could -- would
2 not be affected by it.

3 MR. CORDRAY: No, not correct because their
4 notion is that State includes delegating to its local
5 government as a delegated power from the State. They want
6 to read the two as being encompassed within one another.

7 QUESTION: When you described the regulatory --
8 regulatory authority in gross as you do in (2)(A), then it
9 would apply to the authority to delegate. But when you're
10 talking about authority to enact or enforce, then you have
11 to identify the entities that do the enacting and the
12 enforcing. It seems to me that's a perfectly logical
13 distinction.

14 MR. CORDRAY: Well, I don't believe it is, Your
15 Honor. And again, there's nothing about regulatory
16 authority that is unique in this statute because (c)(2)(A)
17 does refer to regulatory authority with respect to safety,
18 but it doesn't refer to regulatory authority with
19 respect --

20 QUESTION: Well, don't you agree that if you
21 didn't have all the other subdivisions in here, that would
22 be the normal reading of regulatory authority, which would
23 include the authority to delegate?

24 MR. CORDRAY: I would agree that if (c)(2)(A)
25 alone were the statute --

1 QUESTION: Correct.

2 MR. CORDRAY: -- that would be a sensible
3 reading. But if you -- that -- that's taking it out of a
4 context where Congress specifically is dealing with a
5 State and a political subdivision regularly in the statute
6 and then in one instance a special kind --

7 QUESTION: Yes, but in one -- but in one
8 provision, they say regulatory authority, which has a
9 plain meaning that you'd be -- brings a result you
10 disagree with. In the other they consistently use
11 authority of a State or a political subdivision to enact
12 or enforce.

13 MR. CORDRAY: But it doesn't --

14 QUESTION: If you don't refer to political
15 subdivision, it just wouldn't include it.

16 MR. CORDRAY: It doesn't have a plain meaning.
17 It doesn't really have any meaning because in the
18 preemption clause itself, they're referring to the
19 authority of a State to regulate, and they're separately
20 referring to the authority of --

21 QUESTION: No. It says a State or a political
22 subdivision may not enact or enforce. That's the language
23 of the preemption clause.

24 MR. CORDRAY: Correct. That's right. Enact or
25 enforce what? A regulation, which is the same thing as to

1 regulate.

2 QUESTION: (c)(2)(A) at the bottom of page A-2
3 in the same sentence uses this shall not restrict the
4 safety regulatory a State -- authority of a State with
5 respect -- or the authority of a State. They don't use
6 the adjective regulatory even in the second clause.

7 MR. CORDRAY: That was my point. I was trying
8 to make it earlier. I -- I didn't make it as clearly as
9 you just did. But that's exactly --

10 QUESTION: Well, obviously, I -- I missed it, so
11 say it again.

12 (Laughter.)

13 MR. CORDRAY: Well, that's exactly right.
14 Trying to give some special meaning --

15 QUESTION: Where? What -- what section are you
16 talking about?

17 MR. CORDRAY: We're talking about (c)(2)(A).

18 QUESTION: At the bottom of page A-2.

19 MR. CORDRAY: This is a point I tried to make
20 earlier and I did not make it as clearly as the Chief
21 Justice just did.

22 QUESTION: I didn't get it.

23 MR. CORDRAY: But they're attempting to give
24 some special meaning to the phrase safety regulatory
25 authority, but by their own argument, that can't follow

1 because they want to -- they have to read all these
2 provisions the same way. And the second subclause there
3 refers --

4 QUESTION: The authority of a State.

5 MR. CORDRAY: -- to the authority of a State,
6 nothing about safety, nothing about regulatory, and has to
7 be read in the same fashion.

8 I would also point out that the third subclause
9 there, which relates to insurance requirements, they would
10 be saying that municipalities are free to impose their own
11 insurance requirements upon motor carriers of property.
12 So, FedEx, UPS in different municipalities would have to
13 meet different insurance requirements. They'd have to do
14 different kinds of filings and have very different kinds
15 of --

16 QUESTION: You're too fast for me. Where is the
17 insurance requirement?

18 QUESTION: At the very end of that provision.

19 MR. CORDRAY: It's the third subclause in
20 (2)(A).

21 QUESTION: (2)(A).

22 QUESTION: Oh, in -- in (2)(A), okay.

23 MR. CORDRAY: And that is completely at odds
24 with the statute because in 14504, which this Court is
25 going to take up in a case called Yellow Freight next

1 term, it says specifically there -- Congress said even 50
2 registrations by motor carriers of property in different
3 States for insurance purposes is too many for our taste.
4 We think there should only be one, and they said the
5 single State --

6 QUESTION: Well, what about the middle one?
7 What about the middle one? It says, the authority of a
8 State to impose highway limitations.

9 MR. CORDRAY: Yes.

10 QUESTION: Now, I can't figure out, for the life
11 of me, how -- why Congress would have wanted to say the
12 State can impose limitations on the use of highways, but
13 the city cannot impose limitations on the use of streets.
14 But your reading would lead to that.

15 MR. CORDRAY: That would be one respect, Your
16 Honor, in which either -- if it was a general traffic
17 regulation, then it would not be preempted at all. Or if
18 it were preempted, it would have to be done at the State
19 level and it could be done by the --

20 QUESTION: I thought part of your argument was
21 also that streets are not highways, and I'm surprised you
22 didn't make that point when we were talking about the --
23 you know, no trucks on a school street or something like
24 that. Isn't the term highways arguably different from --
25 from local residential neighborhood streets?

1 MR. CORDRAY: Arguably it could be, but I
2 believe for purposes of title 49, it's a defined term to
3 include streets. But our point there was that it's
4 perfectly sensible for Congress to say that the States
5 shall deal with these issues, but not the municipality.

6 QUESTION: And you found not a word -- am I
7 right? There is not a word in the history of this --
8 although there was some human being who wrote these words,
9 there is not a word in any document, hearing, report,
10 debate that casts any light on this one way or the other.

11 MR. CORDRAY: One way or the other. But again,
12 traffic regulations --

13 QUESTION: Is that right?

14 MR. CORDRAY: -- generally are not within the
15 preemption clause.

16 QUESTION: No, no. I'm just trying to -- it's
17 mysterious to me.

18 MR. CORDRAY: Yes. The legislative history
19 here --

20 QUESTION: And I'm having trouble, and therefore
21 I -- I just sometimes look at the legislative history --

22 MR. CORDRAY: Yes, I understand.

23 QUESTION: -- to try to figure it out. And you
24 haven't found anything, nor does the other --

25 MR. CORDRAY: The legislative history here is

1 confused and somewhat unilluminating.

2 QUESTION: I guess we'll have to use the
3 statute.

4 (Laughter.)

5 QUESTION: Mr. Cordray, is there -- is there an
6 example -- any other example of a Federal statute -- I
7 mean, it is unusual to say, States, you can no longer
8 decide how your authority is going to be exercised. An
9 ordinary mode of a State exercising its authority is to
10 delegate it to localities. Apart from this statute, is
11 there any other Federal statute that says, State, you may
12 do it but you may not delegate it to a regional or local
13 or municipal unit?

14 MR. CORDRAY: There are two responses to that
15 question. The first is the example that was already given
16 which is when the Federal Government puts a grant to a
17 municipality full stop and doesn't allow the State to
18 control the use of that grant, that's an example like
19 this.

20 But the other point I would make is throughout
21 its history, Congress has --

22 QUESTION: Well, that's a State -- that's --
23 that's --

24 MR. CORDRAY: May I --

25 QUESTION: -- Congress giving money to a

1 municipality. I asked an instance in which Congress says,
2 State, you may do it but you, State, may not delegate.

3 MR. CORDRAY: I know of none, but this is a new
4 departure for Congress. They have always taken free
5 markets and sought to regulate them. Here they're taking
6 a market they had regulated and the States and localities
7 had regulated and they're now trying to deregulate it.
8 That's a new development and it calls for new measures.
9 And the measure here was to try to clear away all this
10 underbrush of -- of State and local restriction --

11 QUESTION: Since it was -- since you say it's
12 singular and this is new, wouldn't you expect Congress to
13 make a clear statement that the State may not delegate
14 this authority because --

15 MR. CORDRAY: Congress did make a clear
16 statement by including the term, political subdivision,
17 whenever it wanted political subdivisions to either have
18 authority or be restricted in that authority, and then
19 specifically speaking only to States here. There could
20 not be a clearer statement of that. Why else ever use the
21 term, political subdivision? That is unexplained.

22 QUESTION: And the State may not delegate this
23 authority to a political subdivision. Just as simple as
24 that, to negate what has been the assumption all along.

25 MR. CORDRAY: They could have used the term

1 State everywhere alone and then said, State but not
2 political subdivision, here. Or they could this term,
3 State and political subdivision, everywhere and omit the
4 term, political subdivision, here. Those are the same
5 meaning and they're the same purpose.

6 And again, canons of construction have been
7 denigrated in this case, but they have to do with the
8 natural and ordinary reading of statutes. The baseline
9 that Congress uses to draft laws in some confidence that
10 the executive branch and the courts will interpret them as
11 Congress meant them, and that's exactly what's --

12 QUESTION: The executive branch. Now, you -- I
13 know you have said, and I quite agree, that the Department
14 of Transportation has no supervisory authority, it has no
15 Chevron deference. But doesn't it deserve some respect
16 from the courts simply because it has familiarity with the
17 area of motor carrier regulation that the courts don't?

18 MR. CORDRAY: That's a -- that's a statement I
19 couldn't disagree with more strongly. The Solicitor
20 General here has conceded they have no authority to
21 administer this statute. The notion that you have a --

22 QUESTION: They've not conceded the Department
23 of Transportation -- you -- deserves no respect.

24 MR. CORDRAY: The -- the notion that a
25 deregulatory statute that took governmental entities out

1 of an area to create a free market would now be subject to
2 umpiring by the Federal agency, in terms of the scope of
3 preemption, which is an issue this Court has always said
4 is for the courts to determine --

5 QUESTION: I didn't say umpiring. I said its
6 views on the proper construction of this statute. What
7 weight, if any, should this Court give to the Department
8 of Transportation's view, this is what the statute means?
9 Not as an umpire, not as a referee.

10 MR. CORDRAY: Their construction is to leave
11 them as an umpire. But I would say certainly not Chevron
12 deference. At most some sort of Skidmore respect, but
13 that's only entitled where there's some sort of reason to
14 think that before they got to their litigation position
15 here, which has migrated in the course of this case -- it
16 started off as an argument about repeal by implication.
17 It's now turned into argument about sort of reading
18 statutes together to import them into this statute -- is
19 entitled to really, I think, no respect here because it is
20 not persuasive. They have not analyzed the statute in
21 detail --

22 QUESTION: Well, if -- if you lose, you know --

23 MR. CORDRAY: -- in any of their prior --

24 QUESTION: If you're changing your argument --
25 you know, if you lost in the lower court, you'd probably

1 be well advised to change your argument.

2 (Laughter.)

3 MR. CORDRAY: I wouldn't disagree with that,
4 Your Honor. But again --

5 QUESTION: Mr. Cordray, what -- what about the
6 point made that if -- if you accept your interpretation,
7 municipalities not only would not be able to enact
8 regulations themselves, they would not be able to enforce
9 regulations adopted by the -- by the State, which would be
10 a great inconvenience, that the only enforcement can be by
11 the State police and not by local -- local police.

12 MR. CORDRAY: We agree, but that's not what this
13 preemption clause is about or any preemption clause is
14 ever about. When they say enact or enforce here, they
15 don't use it in the terms of making law and executing the
16 law. They use it in the -- in the sense of enacting new
17 law or applying -- or enforcing and applying preexisting
18 law.

19 And the point of this preemption clause is to
20 say that municipalities do not have the authority to act
21 in this realm by imposing their own public policies. It's
22 a matter of either new law or preexisting law. That's the
23 structure of many of these preemption statutes the Court
24 has dealt with.

25 QUESTION: If we think this statute is -- that

1 there are arguments either way for interpreting it,
2 shouldn't we pay heed to the petitioners' point that it's
3 a very serious matter for the Congress of the United
4 States to tell States how they should govern themselves?

5 MR. CORDRAY: We think the language of the
6 statute is clear here, Your Honor. They explicitly
7 extinguished the power of the municipality --

8 QUESTION: Let's -- let's say we -- we disagree
9 with that. Is -- is that not -- let's say we find the
10 statute in -- in equipoise, or the arguments. Should we
11 not give force to the argument petitioner makes that the
12 States should be presumed to have the authority to
13 determine how best to govern themselves?

14 MR. CORDRAY: No. There's no substantive Tenth
15 Amendment issue here. There's no commandeering of States
16 or local governments to enact some sort of program. This
17 is the same as the Court in *Wolens* where they said this
18 statute must be read to say the State cannot legislate in
19 this area, but they can enforce contracts through their
20 courts. There's no Tenth Amendment problem with that.
21 That's Congress exercising its power under the Supremacy
22 Clause, anything in the laws or constitution of the States
23 notwithstanding.

24 And as the Solicitor General said in the brief
25 in the *Mortier* case, the notion that when Congress decided

1 that there could be State regulation but they had to
2 preempt local regulation, that they would somehow have to
3 be forced to preempt State regulation as well, simply
4 turns the Tenth Amendment on its head. So, we don't think
5 that there's any -- any serious constitutional issue here.

6 QUESTION: It seems to me your argument boils
7 down to the point that there are 10 provisions in the
8 statute. Nine of them are perfectly clear. The tenth
9 says the same thing, but we're not going to read it the
10 way it seems to read because it's not as clear as the
11 other nine.

12 MR. CORDRAY: No, that's not what it boils down.

13 QUESTION: That's about all it amounts to.

14 MR. CORDRAY: It boils down to the fact that
15 Congress deliberately inserted a phrase here, political
16 subdivision of a State, so that it can preempt --

17 QUESTION: In the -- in the nine, right.

18 MR. CORDRAY: And -- and it --

19 QUESTION: If you just read the one all by
20 itself, it's perfectly clear too.

21 MR. CORDRAY: Well, it's -- it is clear, I
22 believe, because it's clear because they said a State
23 cannot -- a political subdivision cannot --

24 QUESTION: But the only reason --

25 MR. CORDRAY: -- and they state the authority of

1 a State to do certain things.

2 QUESTION: The only support you have is they're
3 not as detailed and specific in the one in question as
4 they are in the other nine.

5 MR. CORDRAY: No. I think it is equally
6 detailed and specific. And -- and there's no rationale
7 for Congress legislating in this way or drafting this
8 language or enacting it unless they intended to make a
9 difference. That's -- that's the whole purpose of
10 including that language.

11 QUESTION: Your support is the context of the
12 statute, which --

13 MR. CORDRAY: No. Text and context. Text and
14 context. That's correct.

15 QUESTION: Thank you, Mr. Cordray.

16 Mr. Sutton, you have 4 minutes remaining.

17 REBUTTAL ARGUMENT OF JEFFREY S. SUTTON

18 ON BEHALF OF THE PETITIONERS

19 MR. SUTTON: I'd like to respond to a few of the
20 points --

21 QUESTION: Mr. Sutton, could you ask one --
22 answer one factual question for me? Your -- your brother
23 made the argument that in -- in reading (c)(2)(A), he went
24 to the last clause and said on your theory every political
25 subdivision could enact its own financial responsibility

1 and insurance laws and so on.

2 MR. SUTTON: Yes.

3 QUESTION: And that would be a crazy scheme. My
4 -- my question is, is there in fact any history of
5 municipalities enacting these kinds of statutes so that
6 it's something that might have been in Congress's mind?

7 MR. SUTTON: No, Your Honor, not in -- in the
8 insurance area. But there's a -- I think a better answer
9 to that concern, and the better answer is, our point is
10 that (c)(2)(A) incorporates all of these preexisting
11 preemption provisions. They are preemption provisions in
12 other parts of title 49, whether it's insurance, safety,
13 size and weight routing, or hazardous material routing.

14 So, the problem with Justice O'Connor's point of
15 practical consequences -- in reversing the Sixth Circuit,
16 there is no gap here. Why? Because for 60 years,
17 Congress and the Department of Transportation have been
18 regulating these very areas, both with respect to State
19 laws and city laws, to the extent they've been enacted.
20 So, the multiplicity of insurance regulations is a false
21 concern. I mean, the -- Congress has already indicated in
22 31138 and 39 what the rules are there. The Department of
23 Transportation has implemented regulations that do get
24 Chevron deference, and they lay out what the rules are.

25 QUESTION: The same problem, you didn't, is --

1 to me anyway, is -- is (3)(A). Do you see what I'm
2 thinking? I mean, the same human being at the same time
3 wrote the words in -- in (c)(2)(A) and he used the word
4 State, and at precisely the same time, he wrote the second
5 exception, which is (3)(A) --

6 MR. SUTTON: Right.

7 QUESTION: -- and he put in political
8 subdivision. And what I cannot get over is I don't see
9 how a single human being on the same day at the same time
10 could write two exceptions, use the word "State" in one
11 and use the word "political subdivision" in the other,
12 without meaning a difference.

13 MR. SUTTON: Right. Your Honor, look -- compare
14 (3)(A) to (c)(1). They follow the exact same enact or
15 enforce language. (c)(2)(A) does not use the enact or
16 enforce language.

17 QUESTION: That's the answer.

18 MR. SUTTON: That's the answer, number one.

19 Number two, remember, (c)(3) is for the benefit
20 of motor carriers. They want to make sure they could have
21 these rules, whether city or State, apply to them on a
22 city-by-city not State-by-State basis.

23 Now, the -- the regulatory purpose, Your Honor
24 -- the landmark legislation in this area was the 1980 law
25 that deregulated interstate commerce. Everyone agrees

1 that did not divest cities of authority.

2 The 1994 law at issue here was about intrastate
3 commerce, primarily to put FedEx and UPS on a level
4 playing field, and suddenly respondents are saying that
5 deregulated -- regulatory purpose required the divestment
6 of local authority?

7 QUESTION: Well, what's -- what's Congress's
8 authority to regulate intrastate commerce?

9 MR. SUTTON: It's at its outer edges, and that
10 to me is what is so odd about this particular
11 interpretation. They're saying in the intrastate area,
12 you could divest States of their authority to delegate,
13 but they've not done it in the interstate area? I mean,
14 how absurd is that? It's -- it's got it exactly
15 backwards.

16 Now, the practical consequences -- I want to go
17 back to again -- of their interpretation. (c)(2)(A),
18 they've agreed, has to be construed the same way
19 throughout, and there are countless -- as we indicated in
20 our opening brief, every State in the country has
21 delegations to cities that have size and weight controls,
22 size and weight rules that would be eliminated by this
23 particular construction.

24 Thank you.

25 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Sutton.

1 The case is submitted.

2 (Whereupon, at 11:10 a.m., the case in the
3 above-entitled matter was submitted.)

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