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COURT OF APPEALS
STATE OF NEW YORK

SECOND CHILD,

Appellant,

-against-

EDGE AUTO, INC.,

Respondent

NO. 30

265 East 161st Street
Bronx, New York
March 11, 2026

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

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Chrishanda Sassman-Reynolds
Official Court Transcriber



1 CHIEF JUDGE WILSON: First case on the calendar
2 is Second Child v. Edge Auto.

3 Counsel?

4 MR. SANTIAGO: Good morning. And may it please
5 the court. Walter Santiago, Jr. of DAC Beachcroft, LLP on
6 behalf of appellants. I'd like to reserve three minutes
7 for rebuttal.

8 CHIEF JUDGE WILSON: Yes.

9 MR. SANTIAGO: Thank you.

10 The certified question put before this court from
11 the First Department is whether the First Department's
12 decision upholding the lower court's decision was properly
13 made. The issue is whether the primary coverage under
14 Vehicle and Traffic Law 370 as it applies to rental car
15 agencies doing business in the state of New York is
16 preempted by the Graves Amendment.

17 Now, primacy of coverage under Vehicle and
18 Traffic Law 370 is not a new issue for this court. In
19 fact, it's a decided issue that was decided in the case of
20 ELRAC Inc. v. Ward in 2001. Where this court held that the
21 language of Vehicle and Traffic Law 370 is plain and
22 precise. It requires car rental agencies, such as
23 respondent Edge Auto, to obtain the mandatory minimum
24 amounts of insurance. And those minimums shall inure to
25 the benefit of every permissive user of a motor vehicle.

1 JUDGE GARCIA: But why isn't that preempted,
2 really? That's the question, right? And ELRAC is before
3 the Graves Amendment. So why isn't that statute preempted
4 by Graves?

5 MR. SANTIAGO: Sure. And it's not preempted by
6 the Graves because the Graves Amendment includes a
7 financial responsibility savings clause that carves out
8 financial responsibility laws of the State of New York.
9 And under that financial responsibility savings clause
10 Vehicle and Traffic Law 370 is saved because it's - - -
11 it's not a vicarious liability statute.

12 JUDGE GARCIA: What is it?

13 MR. SANTIAGO: It's compulsory insurance
14 coverage.

15 JUDGE GARCIA: To cover liability?

16 MR. SANTIAGO: To cover the renter or - - - the
17 renter when they are renting the vehicle, not to cover
18 liability.

19 JUDGE GARCIA: But how is that substantively
20 different than liability?

21 MR. SANTIAGO: Well, vicarious liability is being
22 held vicarious - - - vicariously liable for the acts of
23 another. Whereas, compulsory insurance coverage is
24 coverage that must be obtained and provided, so in that way
25 - - -

1 JUDGE GARCIA: Well, if they said - - -

2 MR. SANTIAGO: - - - innocent victims have - - -

3 JUDGE GARCIA: - - - cannot be held vicariously
4 liable and the - - - no - - - no state law can do that.
5 And then the state puts in a law that says you're not
6 vicariously liable, but you are liable?

7 MR. SANTIAGO: Well, not - - - not that you're
8 liable. Because effectively the renter becomes an insured
9 underneath the rental company's insurance policy. And
10 because they're an insured under that policy, then those
11 minimums kick in.

12 JUDGE GARCIA: But it seems to me, and maybe I'm
13 reading it wrong, that the New York legislation is not
14 that. It does not say they become an insured. It says you
15 have to have this insurance. And my understanding, at
16 least in the last EAG, this is - - - there's some type of
17 penalty for not having that insurance that somehow
18 transfers into you're liable for defending an action and up
19 to the minimum standards of the insurance. Which kind of
20 sounds a lot like vicarious liability to me.

21 MR. SANTIAGO: What the statute says, Your Honor,
22 is that those minimums shall inure to the benefit of every
23 permissive user. And in ELRAC v. Ward, that was determined
24 to be primacy of coverage. And - - - and understanding
25 that 2001 was ELRAC v. Ward, and then in 2005, we had the

1 Graves Amendment - - -

2 CHIEF JUDGE WILSON: But was ELRAC - - -

3 MR. SANTIAGO: - - - it still does not preempt
4 Vehicle and Traffic Law 370.

5 CHIEF JUDGE WILSON: Was ELRAC deciding primacy
6 and noncontributory status under both 388 and 370, or just
7 370?

8 MR. SANTIAGO: Your Honor, although it discusses
9 an interplay between 388 and 370, there's no analysis of
10 388 in the ELRAC v. Ward case. It's all pertaining to 370
11 and what's required of 370.

12 JUDGE HALLIGAN: Do you - - - do you concede that
13 - - - that 388 is preemptive?

14 MR. SANTIAGO: Correct, Your Honor.

15 JUDGE HALLIGAN: Okay. So what about this
16 argument - - - and it's touched on in ELRAC as you say - -
17 - that the two provisions, 370 and 388, are completely
18 intertwined? Shouldn't one fall if the other does?

19 MR. SANTIAGO: Well, they're - - - they're not
20 completed intertwined. What the court said was it - - - it
21 was discussing an interplay. But there was no analysis
22 about an interplay between 388 and 370 in Ward. In fact,
23 in one of the opening lines of Ward, the court
24 automatically says that they were found liable under 388,
25 and then it goes into a now - - - do an analysis on what's

1 required under 370. And that's that the rental company has
2 to have the minimums and that they shall inure to the
3 benefit of every permissive user.

4 The savings clause underneath the Graves
5 Amendment was not by mistake; that was by design. And
6 that's because of the McCarran-Ferguson Act which states
7 that - - -

8 JUDGE HALLIGAN: Do you think there is interplay,
9 or there is not?

10 MR. SANTIAGO: At - - - at one point there was.
11 There was an interplay between them. But - - -

12 JUDGE HALLIGAN: And - - - and the reason there's
13 not now is that 388 is preempted?

14 MR. SANTIAGO: Well, 388 was preempted, but 370
15 was left intact. The legislature could have changed 370
16 when the - - - when it enacted the Graves Amendment, but it
17 did not.

18 JUDGE SINGAS: But isn't it really our
19 interpretation of 370 via Ward that now is - - - is not
20 really relevant anymore after Graves?

21 MR. SANTIAGO: Well, no. 370 is still relevant
22 because - - -

23 JUDGE SINGAS: No, but it - - - it - - - but - -
24 - but you're relying on our interpretation of 370 via Ward.

25 MR. SANTIAGO: Well, the - - - the starting place

1 for any statutory interpretation is the language of the
2 statute itself and 370 could not be any clearer. It says
3 that those minimums shall inure to the benefit of every
4 permissive user. The word "shall" is a word of command.
5 There's no discretion there. It - - - it compels
6 compliance with the statute that those minimums shall inure
7 to the benefit of every permissive user.

8 JUDGE CANNATARO: Counsel, where's the faulty
9 reasoning in the view that 370 exists in service of 388?
10 388 creates the liability and 370 creates the financial
11 obligation that guarantees that that liability is going to
12 be covered financially. So if you don't have 388 anymore,
13 then you don't really need those provisions of 370. And
14 that's the - - - I don't know if you want to call it
15 intertwining or interdependence, but you - - - if one leg
16 of the stool goes, you really don't need the other one.
17 Although a two-legged stool would be a very bad thing to
18 have.

19 MR. SANTIAGO: Well, again, 388 was preempted by
20 the Graves Amendment. What it did not preempt was 370 - -
21 -

22 JUDGE CANNATARO: No. But my question is why do
23 you even need 370 if there's no 388? And that sort of
24 leads you to thinking maybe it really was part of what the
25 amendment was trying to get to.

1 MR. SANTIAGO: Well, because again, we're
2 comparing vicarious liability to compulsory insurance
3 coverage. That's apples and oranges. Vicarious liability
4 would be the rental company being held liable for the acts
5 of the renter, which in this case they're not. What we're
6 saying is that under VTL 370 the renter is an insured
7 underneath the rental company's insurance policy and by the
8 rental company to the extent that they're seldom sure - - -

9 JUDGE RIVERA: But the - - - but the - - - over
10 here. I'm sorry.

11 MR. SANTIAGO: Sorry.

12 JUDGE RIVERA: But the insurance company is the
13 one that pays the premiums and it's - - - it's their
14 insurance, so yes, the throughline is going all the way to
15 the insurance company. Why isn't that effectively, right?
16 It's not - - - yes. I think you're right. It's not
17 obviously vicarious liability but it's effectively the
18 same.

19 MR. SANTIAGO: Well, I would argue that it's not
20 because under New York Insurance Law 3420, every single
21 motor vehicle insurance policy written in the state of New
22 York has to insure the permissive user of that vehicle.
23 And that is why the renter becomes an insured underneath
24 Maya, in this case, insurance policy, and to the extent
25 that such - - -

1 JUDGE TROUTMAN: Does the fact that you're
2 insured equal liability?

3 MR. SANTIAGO: No, it does not equal liability.
4 But we also have a slew of statutes in the state where
5 there's no liability such as no-fault, underinsured,
6 uninsured. This is compulsory insurance coverage. So that
7 way innocent victims of traffic accidents have means to
8 critical insurance benefits.

9 JUDGE HALLIGAN: Can you respond to what I take
10 to be a conflict preemption argument which is that the
11 purpose of Graves is to reverse the cost-shifting that had
12 taken place, and that allowing 370 to - - - to continue to
13 be applied is fundamentally inconsistent with that
14 objective?

15 MR. SANTIAGO: Sure. So Vehicle and Traffic Law
16 388 formerly imposed vicarious liability on an owner of a
17 motor vehicle simply by them just being an owner without
18 any evidence of any wrongdoing. That is what Graves
19 Amendment sought to do away with. In fact, Vehicle and
20 Traffic Law 388 - - -

21 JUDGE HALLIGAN: Well, that's - - - that's - - -

22 MR. SANTIAGO: - - - was describing - - -

23 JUDGE HALLIGAN: - - - the question, I think.
24 Right? I mean in the conflict preemption analysis I think
25 the question is what did Congress mean to achieve? And I

1 think that your adversary is arguing that there was a
2 broader goal which is, there was an intent to stop the - -
3 - the cost-shifting that was effectuated by 370 and 388,
4 and similar statutes in other jurisdictions. So why isn't
5 that broader purpose the actual objective?

6 MR. SANTIAGO: Sure. And that's because under
7 the former 388 there was limitless liability. The rental
8 companies would be held vicariously liable up to whatever
9 the judgment - - -

10 JUDGE HALLIGAN: I'm not sure that's responsive -
11 - - and maybe I'm missing it - - - to - - - to the question
12 of what Congress intended though with Graves. I - - - I
13 take it your view of Graves is that the objective was
14 somewhat modest, which is simply to - - - to end vicarious
15 liability, but not more broadly to prohibit the cost-
16 shifting that is effectuated by the kind of requirement at
17 play in 370.

18 So what's the support for that in - - - in Graves
19 in its legislative history?

20 MR. SANTIAGO: Well, sure. The support for that
21 is the enactment of the financial responsibility clause
22 that goes along with the Graves Amendment. The legislature
23 did not have to include that but they did it by design
24 because they recognize that matters of insurance are left
25 to the states to regulate. And then, when it comes to the

1 preemption analysis, you also have the - - - the - - - the
2 state that regulates the business of insurance. And then
3 you have the McCarran-Ferguson Act which states that no act
4 of Congress shall invalidate, impair, or supersede any
5 state law that has been enacted to regulate the business of
6 insurance. Which is exactly what we have here.

7 If the Graves Amendment stood for the principle
8 that respondents suggest that it does, then it would
9 preempt the preemptory mandate of Vehicle and Traffic Law
10 370 that those minimums shall inure to the benefit of every
11 permissive user.

12 CHIEF JUDGE WILSON: So if I understand your
13 argument correctly, you believe that what Congress was
14 trying to do was to stop sort of what you called limitless
15 vicarious liability, but to allow states to say - - - to
16 set whatever amount they want of insurance that a company
17 must hold on its own?

18 MR. SANTIAGO: Exactly.

19 CHIEF JUDGE WILSON: That's your argument?
20 That's not - - - that's preserved by the savings clause?

21 MR. SANTIAGO: Exactly.

22 CHIEF JUDGE WILSON: Right.

23 JUDGE GARCIA: Counsel, so following up on that.
24 If the statute had said - - - the New York statute 370 - -
25 - had said you are required to have a policy to cover

1 whatever damages. If there were no limits in 370 - - - the
2 same language, but no limits - - - that would be okay or
3 not okay?

4 MR. SANTIAGO: Well, that's what 388 previously
5 did. There was subsection 4 of 388 - - -

6 JUDGE GARCIA: Well, let's say now it's in 370.
7 Same language without the policy coverage limits. Okay or
8 not okay?

9 MR. SANTIAGO: Well, then, at that point, the
10 rental company would not be able to seek indemnification.
11 There would be no limits. But what Congress did was, they
12 did impose those limits: twenty-five, fifty, ten. 25,000
13 - - -

14 JUDGE GARCIA: But my question. If the statute
15 read, without the limits, same language, no policy dollar
16 limits but it's 370 language. Would that be okay in your
17 view, or not okay under Graves?

18 MR. SANTIAGO: Well, it would be okay. And the
19 insurance would then have to respond to that - - -

20 JUDGE GARCIA: Well, then why are you arguing
21 it's the limits that makes the difference?

22 MR. SANTIAGO: Well, because the limits are
23 what's in play if we're going by the exact language of the
24 statute. The statute doesn't say that it's limitless.

25 JUDGE GARCIA: But it doesn't matter in you view.

1 MR. SANTIAGO: No, it doesn't matter. It doesn't
2 matter if the - - - if the renter is at fault - - -

3 JUDGE GARCIA: So how can that - - -

4 MR. SANTIAGO: - - - then they're an insured
5 underneath that policy.

6 JUDGE GARCIA: - - - be the distinction between
7 what's allowed and what's not allowed under Graves?
8 Because I thought your argument was before that this is
9 different because there are policy limits in there up to
10 certain amounts. But now it seems your answer to this
11 question is it doesn't matter.

12 MR. SANTIAGO: Well - - - well, again, we're
13 going by the exact language of the statute. And just using
14 that - - - your hypothetical, if the statute said that
15 those minimums, or whatever the case may be, whatever those
16 amounts were had to inure to the benefit of every
17 permissive user - - -

18 JUDGE GARCIA: No. I want the exact language the
19 statute has now but without the dollar limits. Is that
20 good or bad under Graves?

21 MR. SANTIAGO: Well, then that would still
22 survive under Graves because of the financial
23 responsibilities toward that.

24 JUDGE GARCIA: So it's not the dollar limits that
25 make it okay?

1 MR. SANTIAGO: No, it's not the dollar limits
2 that make it okay. Because again, it's the insurance
3 policy for the rental company that comes into play. The
4 renter is an insured under that policy even under 3420. So
5 if we're saying that 370 is preempted, then we're also
6 saying that 3420 is preempted.

7 JUDGE GARCIA: Under that theory then, you just
8 could put 388 into 370 basically because it could be
9 limitless amount that you are not liable for but insuring
10 the driver for.

11 MR. SANTIAGO: Well, there - - - there's a
12 difference here because 388 was vicarious liability. This
13 is - - -

14 JUDGE GARCIA: No, I know. You just rephrased it
15 - - -

16 MR. SANTIAGO: - - - compulsory insurance
17 coverage.

18 JUDGE GARCIA: - - - it as it's not your
19 liability, you're just paying for someone's coverage for
20 their liability.

21 MR. SANTIAGO: Well, Your - - - Your Honor, let's
22 say that there was a third party at fault and those - - -
23 and those minimums kicked in, or if it was a limitless
24 policy that kicked in, then the rental company would be
25 able to subrogate - - - or their insurer will be able to

1 subrogate and go after the affluent third party to recover
2 the amounts that they had to pay out. That's the
3 difference. This is insurance and not liability, not
4 vicarious liability.

5 JUDGE SINGAS: Does it really matter if it's
6 vicarious liability or primary coverage? Why isn't the AD
7 right about that? It doesn't even matter. And why aren't
8 the other states right about that?

9 MR. SANTIAGO: Well, absolutely because - - -
10 well, number one, the other states they either address
11 vicarious liability statutes and/or their statute did not
12 have the preemptory mandate. It did not have that word
13 "shall" in there.

14 What the First Department did was, they
15 effectively read the word "shall" out of the statute - - -

16 JUDGE SINGAS: Yeah. But even if they have caps,
17 other states have said it doesn't matter, it's preempted.
18 Graves preempts it.

19 MR. SANTIAGO: Again, this is - - - not vicarious
20 liability. This is compulsory insurance coverage under the
21 State of New York. And the State of New York is left with
22 the ordeal to deal with that by virtue of the McCarran-
23 Ferguson Act, and so the State of New York's present here
24 today and their amicus filing demonstrate that they agree
25 with appellant's position on that issue.

1 JUDGE SINGAS: But why doesn't the savings clause
2 just apply to the other types of insurance: property
3 insurance, no-fault insurance? Why do we read it - - - why
4 should we read it the way you want to read it?

5 MR. SANTIAGO: Because Vehicle and - - - Vehicle
6 and Traffic Law 370 is in fact a financial responsibility
7 statute and - - - and the dimensional case cited in the
8 briefs, the Second Department also found that it was.
9 Other courts have also found that it falls within that
10 financial responsibility clause, so it's saved.

11 Then the question becomes is - - -

12 JUDGE SINGAS: But anything could be - - - you
13 could argue that anything is a financial responsibility
14 clause, and then the exceptions swallow the rule.

15 MR. SANTIAGO: Well, in - - - in the other case,
16 the Graves Amendment would swallow the preemptory mandated
17 Vehicle and Traffic Law 370 that those minimums shall inure
18 to the benefit of every permissive user.

19 JUDGE SINGAS: I mean, I feel like that argument
20 is a little circular.

21 MR. SANTIAGO: I would argue it's not, Your
22 Honor.

23 CHIEF JUDGE WILSON: What is it you think that
24 the savings clause was intended to preserve?

25 MR. SANTIAGO: The savings clause was - - - is

1 intended to preserve the state's right to regulate the
2 business of insurance at the state level. In this case we
3 have Vehicle and Traffic Law 370.

4 CHIEF JUDGE WILSON: Well, it can't be quite that
5 broad, because 388 is preempted?

6 MR. SANTIAGO: Correct.

7 CHIEF JUDGE WILSON: So what is the limit on the
8 savings clause?

9 MR. SANTIAGO: Well, there is actually no limit
10 written into it, but what we do have is, we have limits
11 written into the Vehicle and Traffic Law 370. So the
12 savings clause saves financial responsibility laws of the
13 states, and then we have Vehicle and Traffic Law 370 which
14 no longer imposes this limitless liability. Which is what
15 Graves Amendment was concerned with.

16 JUDGE HALLIGAN: But what does financial
17 responsibility standards mean? I mean, it - - - isn't that
18 a key question? How - - - how are we supposed to know how
19 broad - - - broadly to read that?

20 MR. SANTIAGO: Sure. So what it does is it
21 imposes the minimums, again, commonly referred to as
22 twenty-five, fifty, and ten.

23 JUDGE HALLIGAN: No. I'm asking about - - -

24 MR. SANTIAGO: But it doesn't stop there, Your
25 Honor.

1 JUDGE HALLIGAN: - - - in the Graves Amendment,
2 how do we know what a financial responsibility law
3 encompasses?

4 MR. SANTIAGO: I don't recall whether there is an
5 actual definition or if they go into defining it within the
6 Graves Amendment - - -

7 JUDGE HALLIGAN: But why should we read it as
8 broadly as you're proposing?

9 MR. SANTIAGO: Because it's the pure language of
10 the statute.

11 JUDGE HALLIGAN: Well, I'm not sure sitting here
12 that I know what financial responsibility law means? What
13 do - - - that - - - that's what I'm asking you, what do
14 those words mean to you?

15 MR. SANTIAGO: So financial responsibility means
16 in - - - in terms of this instance, that the rental company
17 has to obtain those minimum amounts of insurance. But
18 again, the statute does not stop there.

19 JUDGE HALLIGAN: But - - - but if we look at the
20 text, it's - - - it seems to me that it - - - it is perhaps
21 something distinct. It's financial responsibility or
22 insurance standards. So that suggests to me that maybe
23 it's something other than insurance.

24 MR. SANTIAGO: Well, we - - - we actually have
25 both in Vehicle and Traffic Law 370. You have - - - you

1 have the minimums and then you have the insurance standard.
2 The renter effectively becomes an insured - - -

3 JUDGE SINGAS: But why doesn't it mean - - -

4 MR. SANTIAGO: - - - underneath the policy.

5 JUDGE SINGAS: - - - what other states have taken
6 it to mean: that it's their own liability and negligence
7 for something that their drivers have done? Like, if
8 you're on a lot and one of their agents is moving that car
9 and it hits somebody, then for their negligence they have
10 to have insurance? Like, why doesn't that make sense?

11 MR. SANTIAGO: Well, that - - - that makes
12 complete sense that they have to have negligent - - -
13 insurance for their own negligence. But in this case, they
14 also have to have insurance to cover the renter of the
15 vehicle up to just a minimum amount.

16 JUDGE GARCIA: Your - - - your interpretation
17 conflicts, it seems to me, with a fundamental goal of the
18 Graves Amendment. But to read financial responsibility - -
19 - which I think is more of a natural reading - - - as
20 whatever your liabilities are, you have to be able to cover
21 them. So I think Judge Singas gave an example, or you
22 lease somebody a car that hasn't been properly maintained,
23 it causes an accident, we, in New York state, want to
24 ensure that people may - - - can recover who are injured
25 because of your negligence. And that, to me, is financial

1 responsibility.

2 Financial responsibility isn't extending your
3 liability and then making sure you can cover it. Which I
4 think, it seems to me, is the purpose of the Graves
5 Amendment, not to extend that liability.

6 MR. SANTIAGO: So the - - - the driving force
7 behind the Graves Amendment was Vehicle and Traffic Law
8 388. Its purpose was to do away with limitless liability.
9 Again, it - - - when Congress enacted - - -

10 JUDGE GARCIA: But you - - -

11 MR. SANTIAGO: - - - the Graves Amendment they
12 could have done away with - - -

13 JUDGE GARCIA: - - - told me recently, I think -
14 - -

15 MR. SANTIAGO: - - - VTL 370.

16 JUDGE GARCIA: - - - I think that you could
17 impose limitless liability through the 370 mechanism.

18 MR. SANTIAGO: That's not what the statute says.
19 Again - - -

20 JUDGE GARCIA: No, I know. But under your
21 reading of Graves, I believe you told me that you think it
22 could be limitless liability under 370. And if we decide
23 on that theory, tomorrow, the legislature could pass a
24 limitless liability standard under - - - under 370.

25 MR. SANTIAGO: What the - - - what the

1 legislature intended again, Your Honor, was to do away with
2 vicarious liability up to limit - - - limitless limits.
3 That's - - - that's - - - that's not what we have here. It
4 is not vicarious liability; this is insurance coverage.
5 Again, if the rental company is not at fault and there's a
6 third-party, they can subrogate to go after those amounts
7 that they - - -

8 JUDGE CANNATARO: Counsel, relative to that
9 point, can I just ask you under the current state of the
10 law 370 which includes just the minimum - - - you know,
11 statutory minimum requirements. Could a renter's carry - -
12 - I'm sorry. Could a rental agency's carrier subrogate its
13 claims for - - - to persons liable?

14 MR. SANTIAGO: If it was the renter, no. Because
15 then that would go against the anti-subrogation rule.

16 JUDGE CANNATARO: What? No, no. The rental
17 company's carrier.

18 MR. SANTIAGO: Could the rental company's carrier
19 - - -

20 JUDGE CANNATARO: The rental company that's
21 required to carry the - - - the policies with the statutory
22 minimums. Under the law as it exists today could they seek
23 subrogation?

24 MR. SANTIAGO: Correct. If there was an at-fault
25 third party? Yes, absolutely, they could seek

1 indemnification for the amounts that they had to pay out.

2 JUDGE GARCIA: But they still have to defend?

3 MR. SANTIAGO: I'm sorry?

4 JUDGE GARCIA: They have a duty to defend?

5 MR. SANTIAGO: Correct. Under Vehicle and
6 Traffic Law 370.

7 CHIEF JUDGE WILSON: Thank you.

8 MR. SANTIAGO: Thank you.

9 MR. YANNI: May it please the court. Stephen
10 Yanni for the New York Attorney General.

11 Vehicle and Traffic Law 370 doesn't impose
12 vicarious liability on rental car companies - - -

13 JUDGE HALLIGAN: Can you - - - can you address -
14 - - over here. Can you address what you think financial
15 responsibility standards in the amendment encompasses?

16 MR. YANNI: It encompasses - - -

17 JUDGE HALLIGAN: And why?

18 MR. YANNI: It encompasses any minimum insurance
19 requirement, and that's borne out in the legislative
20 history of the Graves Amendment. While the - - - the - - -
21 the - - - Congress was clearly concerned about limitless
22 liability without fault, but at the same time even the - -
23 - even the proponents of the Graves Amendment recognized
24 the problem of having - - - having - - - limiting the
25 recoveries by accident victims, and they referred - - -



1 JUDGE SINGAS: I - - - I don't think they were
2 concerned with limiting. I think they were concerned that
3 car rental companies shouldn't have to deal with the
4 liability of things that their agents and their negligence
5 caused.

6 I think it was very clear that they were saying -
7 - - and they looked at New York as an example. That we
8 shouldn't - - - they shouldn't be footing the bill unless
9 they were liable. So I - - - I don't see where the
10 limiting has come in. I think it's come in through your
11 interpretation of it. But I think that's a little
12 revisionist history.

13 MR. YANNI: So clearly Congress was - - -
14 mentioned multiple times the problem with limitless
15 liability without fault. The problem that was creating is
16 that rental car companies were being subjected to huge
17 judgments from statutes like Vehicle and Traffic Law 388.
18 But at the same time the proponents of the amendment
19 clarified that rental cars on the road would still need to
20 meet the state's minimum insurance requirement. So they
21 struck a balance - - -

22 CHIEF JUDGE WILSON: They will focus - - -
23 Congress was thinking about New York, right?

24 MR. YANNI: Yes. Congress - - -

25 CHIEF JUDGE WILSON: And by that point in New

1 York we had decided Snappy, right? Which allowed
2 indemnification by the - - - by the renter, yes?

3 MR. YANNI: Yes. That's correct.

4 CHIEF JUDGE WILSON: How does that then square
5 with the idea that Congress was worried only about the
6 limitless liability because there were contractual limits
7 on the liability in place in New York?

8 MR. YANNI: Well, Congress never mentioned laws
9 analogous to Section 370 in the legislative history. They
10 only meant - - - they were only talking about laws that
11 impose this kind of limitless liability as we were
12 discussing.

13 And I want to - - - and I want to make clear that
14 vicarious liability and - - - and insurance standards are
15 both ways of mitigating risk, but they're distinct, both
16 legally and practically, in really important ways. So
17 vicarious liability is - - - is imposed ex post based on a
18 duty of care that arises out of a relationship of control,
19 and you're exposed to potentially unlimited liability.

20 Whereas insurance standards like Section 370
21 impose an ex ante duty to obtain insurance that spreads
22 costs among the industry participants and you're
23 responsible only for - -

24 JUDGE GARCIA: Counsel, do you - - - do you agree
25 with your cocounsel that they could put a limitless

1 provision in 370? It has limits in it now, but what if
2 they took that out?

3 MR. YANNI: If there - - - if there weren't
4 limits then it would still fall under the saving - - - the
5 express text of the saving - - -

6 JUDGE GARCIA: Why do you keep talking about
7 limits? It doesn't matter under your theory.

8 MR. YANNI: Well, what's - - - what's critical is
9 where the - - - the duty runs. That's what distinguishes
10 vicarious liability from duty to insure - - -

11 JUDGE GARCIA: But if we were to agree with your
12 argument here on the preemption point, tomorrow the
13 legislature could amend 370 and take the limits out.

14 MR. YANNI: But at the same time, Congress could
15 then prohibit states from imposing onerous insurance
16 standards if that was the problem it was trying to address.
17 But it was trying to - - -

18 JUDGE GARCIA: You just - - - you just told me
19 they were trying to address limitless liability. But now,
20 under your theory, this legislature could put limitless
21 liability in 370 and then they'd have to go back and say,
22 no, we really meant it.

23 MR. YANNI: Well, Congress was taking aim at a
24 very specific problem that was being caused by vicarious
25 liability laws. They could have enacted a law saying that

1 states can't have minimum insurance requirements that have
2 very high limits. The could have done that but they
3 didn't.

4 JUDGE HALLIGAN: When - - - when you - - -

5 MR. YANNI: Perhaps in that - - -

6 JUDGE HALLIGAN: Go ahead. Sorry.

7 MR. YANNI: As I say, perhaps in that case, there
8 might be a stronger conflict preemption argument if like,
9 in fact, you were imposing the same kind of onerous costs
10 that prevent businesses from doing business in the state.
11 But it's not relevant to whether it falls under the express
12 text of the preemption clause, which it doesn't.

13 JUDGE HALLIGAN: When - - - when you say the
14 legislative history supports your reading of Graves as
15 allowing statutes like 370, I see some references at pages
16 3 to 4 of your brief. Is that the extent - - - you know,
17 comment from - - - from Senator Graves? Is that the extent
18 of the legislative history you would point us to?

19 MR. YANNI: So those, I think are the most
20 helpful provisions. Page - - - in the legislative history
21 at page 4099 and - - -

22 JUDGE HALLIGAN: But what that says is that the
23 rental vehicles have to meet the state's requirements for
24 insurance. How does that go to who - - - who bears the
25 cost of that? I mean, it seems - - - it seems, maybe,

1 self-evident - - - I don't know - - - to me, a car on the
2 road is going to have to meet insurance requirements. That
3 doesn't answer who pays for that insurance.

4 MR. YANNI: I think one thing that's relevant to
5 that consideration is that, as we've cited, the insurance -
6 - - one of the insurance treatises in our brief, Couch on
7 Insurance, this - - - it's very common for financial
8 responsibility laws to require coverage for permissive
9 drivers.

10 JUDGE HALLIGAN: But how do we know from the
11 legislative history that you're pointing us to, that that
12 reflects the intent that you're suggesting it does?

13 MR. YANNI: Well, I think another comment that
14 was made in legislative history is that - - - from the
15 sponsor of Graves, is that vicarious liability doesn't
16 protect against uninsured drivers. It simply provides
17 higher compensation based solely on the fact that the
18 individual owns the vehicle.

19 So I mean, we - - - they were trying to - - - and
20 the - - - they're responding to the arguments about having
21 no recourse for victims by pointing to a state minimum
22 insurance standards - -

23 JUDGE HALLIGAN: But I think we're trying to
24 understand what the carve out - - - what the savings clause
25 encompasses, right? I think that's the crux of the

1 question. So I just want to make sure this is the extent
2 of the legislative history. Because it seems to me,
3 perhaps it's - - - it's not quite as pointed as you suggest
4 it is. Doesn't mean it's not what they meant, but - - -

5 MR. YANNI: Well, I would say there's nothing to
6 suggest in legislative history that these minimum standards
7 that were preserved did not include coverage that would
8 extend to the drivers.

9 I would note there was also an effort to repeal
10 the Graves Amendment in 2010. And there was testimony
11 received in relation to that - - - to that proposed
12 amendment from the industry groups that wanted to preserve
13 - - - preserve the amendment and they pointed to the fact
14 that these minimum insurance standards were preserved as a
15 reason to keep the Graves Amendment and argue against the -
16 - - the - - - the need to repeal it.

17 CHIEF JUDGE WILSON: Is it - - - is it possible
18 to read the Graves Amendment and - - - the Graves Amendment
19 and the savings provision and the legislative history and
20 conclude that what Congress was trying to do was to preempt
21 the primary nature of insurance held by rental car
22 companies but not the requirement to insure?

23 MR. YANNI: No. I don't there is - - - I don't
24 think there is a way to read it like that. The respondents
25 here don't explain how 370 doesn't qualify as a financial



1 responsibility or insurance standard under the plain text.
2 In fact, they agree that Section 370 is not preempted as
3 applied to uninsured drivers, and which they call secondary
4 coverage. But in that scenario, the rental car company's
5 insurance is still paying up to the specified minimum
6 limits. So if that's not vicarious liability, then nor is
7 providing primary coverage to an otherwise insured driver.

8 JUDGE GARCIA: Counsel, could I ask you about
9 some language in your - - - your brief? On page 13 of your
10 brief it says, Section 370 leaves renters responsible for
11 their own negligence. I understand that position. While
12 rental car companies' liability is limited to the harm
13 resulting from the breach of their duty to provide
14 insurance. What does that mean?

15 MR. YANNI: So I'll say if the rental company is
16 complying with the statute then it has no liability, it's
17 just responsible for covering the insurance premium. But
18 if they - - - if the rental car company doesn't obtain the
19 insurance as required by Section 370, then any liability
20 that arises from that is a result of their breach of their
21 statutory obligation to obtain insurance. It's not
22 liability that arises from the rent - - - the driver's
23 negligence.

24 JUDGE GARCIA: So if they have insurance, they're
25 liable. In theory, they're not liable, but in - - - they

1 are responsible, let's say, for paying up to a certain
2 amount and defense costs.

3 But if they don't have insurance as required,
4 they are liable for that same thing?

5 MR. YANNI: Well, the liability arises from a
6 different source. It's not vicarious liability.

7 JUDGE GARCIA: But what's the dollar amount of
8 that liability? The penalty?

9 MR. YANNI: The liability is limited to what the
10 insurance would have provided. So it would be the minimum
11 liability standards and the defense costs. But that's a -
12 - - but those damages - - -

13 JUDGE RIVERA: Even - - - even if they - - - even
14 if they did not get coverage? Is that what you mean?

15 MR. YANNI: Yes. If they fail to abide by
16 Section 370 and didn't attain the required coverage, then
17 they would be responsible for - - - for their own damage
18 that they caused by violating the statute and failing to
19 obtain that insurance. Yes.

20 JUDGE RIVERA: Which would - - - which would be
21 up to whatever the insurance would have covered?

22 MR. YANNI: Correct.

23 JUDGE RIVERA: And is there some formula about
24 what it would have covered? I mean, people get different
25 kind of insurance packages.

1 MR. YANNI: Well, they - - - they'd be
2 responsible for the minimum liability standards in - - -
3 that are laid out in the statute.

4 JUDGE RIVERA: Okay.

5 MR. YANNI: So \$25,000 for injury - - -

6 JUDGE RIVERA: I see. Okay. So it would be
7 whatever the statutory minimum is. Okay.

8 MR. YANNI: That's exactly right. And - - -

9 JUDGE RIVERA: Okay.

10 MR. YANNI: - - - I also - - -

11 JUDGE RIVERA: But - - - you know, I understand
12 your - - - of course, doctrinally, your distinction between
13 the liability and - - - and these insurance coverage and
14 the payments, but the point of liability is just to make
15 someone pay, just to make it very practical. That - - -
16 that's the bottom line. Who is going to pay for whatever
17 damages are established? Liability is a means to figure
18 out who is going to be held accountable for those payments
19 once - - - once you've established the - - - the - - - the
20 causation and the damages.

21 So again, you're still back to the insure - - -
22 the - - - excuse me, the rental company through their
23 insurance company - - - let's just assume for one moment
24 they have coverage and complied with the statute, otherwise
25 - - - is going to be paying as - - - has already been noted

1 by several members of the court, for damages, injuries
2 caused by someone else. And that does seem to be right at
3 the heartland of what Graves is trying to address.

4 MR. YANNI: Well, what they'd be paying for is
5 the damages that they have caused by failing to obtain the
6 insurance. I think that's the critical distinction where
7 the - - - where the duty is arising from.

8 They're not being held vicariously liable based
9 on a duty - - -

10 JUDGE HALLIGAN: I'm not - - - I'm not - - -

11 JUDGE RIVERA: No, no. I don't - - - I don't see
12 that. The - - - their - - - they are paying for, again,
13 the damages or the injuries that's caused by someone else.
14 Not by their own negligence. Let's just take a simple
15 hypothetical.

16 Not by their own actions and negligence, right?
17 By someone else's. We can all agree that that's the
18 hypothetical. The fact of the pool of funds by which they
19 pay that off strikes me as not a very good differentiating
20 line. They're still responsible as you've conceded and
21 counsel is going to concede. They already conceded they
22 have to pay for the premiums. So there is some payment
23 that's coming from the insurance company based on these
24 damages or injuries that have been established.

25 MR. YANNI: Yes. There's payment from the

1 insurance - - -

2 JUDGE RIVERA: Right.

3 MR. YANNI: - - - the insurance company.

4 JUDGE RIVERA: Yeah.

5 MR. YANNI: But there's no - - - but there - - -
6 but the - - - in any event, the - - - the rental car
7 company is not being held responsible for the actions of
8 the driver. They're only - - -

9 JUDGE RIVERA: But - - - but it doesn't appear
10 that Congress cared about the - - - the doctrinal argument
11 for why they're responsible. They cared about the fact
12 that you're making these rental companies pay and that's a
13 burden on their business, maybe putting them out of
14 business. Or am I misunderstanding - - -

15 MR. YANNI: I mean, I - - -

16 JUDGE RIVERA: - - - the - - - the purpose behind
17 that amendment?

18 MR. YANNI: I do disagree with that, Your Honor.

19 JUDGE RIVERA: Okay.

20 MR. YANNI: I think that the - - - through the
21 savings clause they expressly wanted to save standards like
22 Section 370. And 370 is both - - -

23 JUDGE RIVERA: Well, to make insurance companies
24 - - - using your term now - - - liable, responsible for
25 payment when they caused the damages and injuries, not when

1 someone else does that, even if it's the renter.

2 MR. YANNI: Well, there's no limit in the savings
3 clause that says that the required minimum coverage can't
4 extend to protect the driver as an insured. And then - - -
5 Section 370 fits under both of the prongs of the savings
6 clause. It's both, the - - - it's an insurance standard
7 that's tied to the privilege of registering and operating a
8 motor vehicle. That's clear from Section 375.

9 JUDGE RIVERA: Let me ask you this. What - - -
10 what happen - - - let's say we disagree with you, okay? We
11 don't read it that way. What - - - what happens the next
12 day when it comes to someone who is a renter and there's an
13 injury not caused by the rental company but by the - - -
14 the renter or a third party? How are they protected?
15 Because, obviously, New York State is very concerned about
16 some type of reimbursement for those who are injured in
17 these rental cars?

18 MR. YANNI: I - - - I think that's a difficult
19 question. The statutory scheme would probably have to be
20 reworked a little bit. It might fall to some of the other
21 back up insurance coverage such as - - - there's uninsured
22 motorist coverage that might kick in, or the MVAIC has
23 potential coverage. But this would, you know, destabilize
24 the insurance market in New York. I just wanted to - - -

25 JUDGE RIVERA: I assume that you're - - - because

1 I think this was your argument before, that your argument
2 would be, well, along these lines. There's some statutory
3 retooling, some amendment, whatever, to address primary
4 coverage but because they've agreed that they're liable
5 for, or responsible for secondary coverage, whatever might
6 be the overflow, they're going to pay. Is that right?

7 MR. YANNI: That's the argument. But I really
8 fail to see how that distinction holds up because if the -
9 - - if there - - - if it's the case that any time someone -
10 - -

11 JUDGE RIVERA: Yeah.

12 MR. YANNI: - - - any time an insurance company
13 is paying, whether it's primary or secondary, then that's
14 vicarious liability, it's difficult to see how that
15 survives under the statute, which is why we think that
16 argument's wrong.

17 And I do want to note that if there's any doubt -
18 - -

19 JUDGE RIVERA: Well, there - - -

20 MR. YANNI: - - - about whether there's - - -

21 JUDGE RIVERA: You both may be wrong about the
22 point, but okay. I understand.

23 MR. YANNI: I do also want to note that if
24 there's any doubt about whether this is vicarious liability
25 or not, the McCarran-Ferguson Act plainly precludes reading

1 the - - - reading Section 370 as being preempted here. Two
2 of the three prongs are undisputed by the parties. This is
3 - - - and - - - and the Graves Amendment doesn't
4 specifically relate to insurance. Subsection (a) doesn't
5 mention insurance. In fact, Congress disclaimed an intent
6 to regulate insurance in subsection (b). And it - - -
7 Section 370 plainly regulates the business of insurance.
8 It's law that sets the terms of insurance contracts.
9 That's in the heartland of laws that are protected by the
10 McCarran-Ferguson Act. And the only reason that the
11 Appellate - - - Appellate Division's distinction was that
12 Section 370 is not entirely superseded by the Graves
13 Amendment. But that's not a requirement under - - - under
14 the Supreme Court's case law or in the statute.

15 JUDGE SINGAS: I'd like to ask you about the
16 language the privilege of registering and operating a motor
17 vehicle, and ask you what the work is that those words are
18 doing? And I'd like you to consider in Connecticut their
19 trial court said, the privilege of registering and
20 operating a motor vehicle under state law is a
21 consideration apart from issues of liability for accidents
22 involving those motor vehicles when operated by lessees.
23 Car rental companies would have to register their vehicles
24 and employees on occasion would have to operate them as
25 agents. But what does this have to do with the operation

1 of such a vehicle by a lessee?

2 And I think that's a fair question. What does it
3 have to do with it? Why can't it be separate? And why
4 can't the savings clause speak directly to the negligence
5 of the car rental company? Why are we making that bridge?

6 MR. YANNI: Well, the negligence of the car
7 rental company is mentioned in subsection (a). They
8 expressly carve that out from the Graves Amendment
9 preemptive scope. They didn't do so in subsection (b) even
10 though they could have. And it's common for financial
11 responsibility laws and insurance standards to require
12 permissive drivers to be covered.

13 So there's nothing from the text of the Graves
14 Amendment that would suggest Congress wanted to - - -
15 wanted to carve that out. And - - - and just to return - -
16 -

17 JUDGE SINGAS: But there's nothing suggesting
18 that they were adopting your view that it was only about
19 minimum liability either.

20 MR. YANNI: Well, the Congress - - - the - - -
21 the legislative history is replete with references to
22 vicarious liability, but those are the kinds of statutes
23 that they were trying to get at. Vicarious liability that
24 imposes that limitless - - - limitless liability without
25 fault. But that's simply not the liability that's - - -

1 that's simply not being imposed under Section 370. It's
2 what's being imposed under - - - that's what was imposed
3 under 388.

4 This is - - - you know, the respondents argue
5 that Section 370 is trying to be - - - is a backdoor
6 somehow to imposing vicarious liability. But it's not the
7 case. The state enacted 370 after 388 was preempted. Both
8 of these statutes were on the books at the time that the
9 Graves Amendment was enacted and they served different
10 functions.

11 JUDGE RIVERA: Is - - - is there any other impact
12 on the rental company and/or their insurance company if - -
13 - if indeed, this is vicarious liability? If we saw it
14 that way?

15 MR. YANNI: Well - - -

16 JUDGE RIVERA: Other than this particular primary
17 insurance coverage. Is there something else that flows
18 from identifying it as essentially vicarious liability?

19 MR. YANNI: Well, the - - - a judgment of - - -
20 they could be held be held liable and negligent in the
21 first instance - - -

22 JUDGE RIVERA: Yeah.

23 MR. YANNI: - - - which is a - - - which is a
24 distinction. Otherwise, the accident victim has to obtain
25 a judgment against the tortfeasor driver after - - - and

1 the insurance coverage would be litigated afterward.
2 That's one distinction. And there's other legal
3 distinctions, like I said, about when the duty arises and
4 also the potential exposure that the rental company has.

5 CHIEF JUDGE WILSON: Thank you.

6 MR. YANNI: Thank you.

7 MR. MERCURIO: Good morning. May it please the
8 court. My name is Eric Mercurio from Masiakos, Mercurio &
9 Associates for respondents Edge Auto Inc. and Maya
10 Assurance Company.

11 The Graves Amendment express - - -

12 JUDGE RIVERA: Could you address this - - - I'm
13 over here.

14 MR. MERCURIO: Sure.

15 JUDGE RIVERA: This issue? As I think I
16 understood your argument in your briefs, that you're not -
17 - - you and your insurance company, you're not liable as
18 primary insurers, but you might be liable after excess?
19 And - - - and why that isn't just the same as you - - - if
20 you're - - - if you're willing to concede that under the
21 statutory framework the Graves Act does allow for some
22 measure of liabilities. So why aren't they right?

23 MR. MERCURIO: Sure. So that argument was made
24 in response to the appellants' argument that there could be
25 circumstances where there would be injured people with no

1 recourse, with no insurance.

2 And my - - - my argument in response to that is
3 that there - - - there is no circumstance in which someone
4 is injured on the road in the State of New York and that
5 they would have no coverage. There's - - - as counsel
6 noted, there's other statutory schemes with - - - with no-
7 fault and - - - and uninsured motorists and other
8 compulsory insurances. And you have an insured vehicle on
9 the road. You know, subject to a coverage analysis whether
10 or not that would apply, as counsel said that - - - you
11 know, coverage could be litigated afterwards.

12 But my point in - - - in making that - - - that
13 argument was that there's no uninsured vehicles on the
14 road. No one is arguing that rental car companies are - -
15 -

16 CHIEF JUDGE WILSON: I think - - - I think Judge
17 Rivera is trying to ask - - -

18 MR. MERCURIO: - - - out of state - - -

19 CHIEF JUDGE WILSON: - - - you something a little
20 different. Which is how do you square your view on
21 preemption by the Graves Amendment with your argument that
22 you would still be secondarily liable?

23 MR. MERCURIO: I'm - - - I'm not arguing that it
24 would necessarily be secondary and - - -

25 CHIEF JUDGE WILSON: Oh, was that preempted as



1 well?

2 MR. MERCURIO: To the extent that it would be
3 vicarious liability, yes.

4 CHIEF JUDGE WILSON: Well, I don't understand
5 that answer. Is it all vicarious liability?

6 MR. MERCURIO: Yes. If - - - if a - - - if a
7 rental car company - - -

8 CHIEF JUDGE WILSON: So, sorry. So your view
9 then is the Graves Amendment frees you from the obligation
10 to take out any insurance other than for your own direct
11 negligence?

12 MR. MERCURIO: Correct.

13 CHIEF JUDGE WILSON: Okay.

14 JUDGE HALLIGAN: And I take it you do not require
15 renters to show proof of their own insurance; is that
16 right?

17 MR. MERCURIO: Some rental companies can. They
18 rent - - - there's contract - - -

19 JUDGE HALLIGAN: Do all rental companies require
20 renters to - - - to - - - to show proof of insurance?

21 MR. MERCURIO: I - - - I'm not aware of whether
22 they all require it. I know certain companies do require
23 it in their rental contracts.

24 JUDGE RIVERA: And - - - and don't some companies
25 - - -

1 JUDGE HALLIGAN: So it sounds like you may - - -

2 JUDGE RIVERA: - - - offer to extend insurance?

3 MR. MERCURIO: Yes.

4 JUDGE RIVERA: Yes. If they pay, obviously? If
5 the renter pays.

6 MR. MERCURIO: Yes. The customer can purchase
7 insurance through the rental company.

8 JUDGE HALLIGAN: But if there's not a
9 requirement, then it sounds like there may well be - - -
10 under your reading of Graves, there may well be renters who
11 are driving cars without any insurance to cover that?

12 MR. MERCURIO: No, I don't - - - I don't believe
13 that - - - that that's accurate.

14 JUDGE HALLIGAN: Well, tell me why that is?
15 Because if - - - if - - - if we don't know that all rental
16 companies require a renter to show proof of insurance, and
17 for example, I have car insurance for my vehicle. I don't
18 - - -

19 MR. MERCURIO: Right.

20 JUDGE HALLIGAN: - - - know if that covers
21 whatever I would drive a - - - if I would drive a rental
22 vehicle. But let's assume that it would. If you're not
23 requiring some display of proof, then why wouldn't there be
24 some drivers who are driving rented cars without insurance?

25 MR. MERCURIO: I do believe that most rental

1 companies in their contracts do require their drivers to
2 have insurance. I know in this particular case, Edge - - -

3 JUDGE HALLIGAN: It sounds like we can't rule the
4 possibility out that in fact happens.

5 JUDGE CANNATARO: Most rental companies require
6 that the people who rent their cars have their own
7 insurance?

8 MR. MERCURIO: Or purchase - - - or purchase the
9 insurance through - - - through - - - through them at the
10 time of rental.

11 JUDGE HALLIGAN: Can I ask you a different
12 question? Are you making an express preemption argument or
13 a conflict preemption argument or both?

14 MR. MERCURIO: Both. Well, it is - - -

15 JUDGE HALLIGAN: And so if - - - if - - -

16 MR. MERCURIO: I'm sorry.

17 JUDGE HALLIGAN: - - - if you're making both, if
18 we were to read the savings clause as the plaintiffs would
19 have it as encompassing - - - as - - - as encompassing 370,
20 can you still bring a conflict preemption claim, or does
21 the text then preclude any conflict preemption claim?
22 What's the interplay between the two?

23 MR. MERCURIO: The appellants' position, if
24 adopted, would be preempted to the extent that they - - -
25 they are saying that 370, it requires primary insurance

1 coverage in that it would result in - - - as the First
2 Department concluded, it would result in the functional
3 equivalent your - - - of - - - of vicarious liability.

4 JUDGE HALLIGAN: I'm just asking, I think, a
5 different question, which is about whether or not as a
6 broad matter - - - not tied to 370 but as a matter of
7 preemption doctrine - - - can conflict preemption still
8 proceed if you look at the text, and you say that the text
9 not only doesn't expressly preempt, but it's within the
10 scope of the savings clause; does that control?

11 I mean, the reason I ask is - - -

12 MR. MERCURIO: I'm sorry. I didn't understand
13 your question, Your Honor.

14 JUDGE HALLIGAN: - - - it seems to me conflict
15 preemption is about asking what the legislature intended,
16 right? As is express preemption.

17 MR. MERCURIO: Right.

18 JUDGE HALLIGAN: And so if the text is - - - is
19 clear enough that something's within a savings clause, then
20 it seems to me that - - -

21 MR. MERCURIO: Well - - -

22 JUDGE HALLIGAN: - - - a conflict preemption
23 argument would fall away.

24 MR. MERCURIO: Sure. I'm not certain that the
25 text is - - -

1 JUDGE HALLIGAN: I know you - - - you have a view
2 that the text does - - - that the savings clause does not
3 encompass 370, obviously. But I'm just asking if the - - -

4 MR. MERCURIO: Well, 370 - - -

5 JUDGE HALLIGAN: - - - one took a different view?

6 MR. MERCURIO: - - - it - - - it encompasses 370
7 to - - - we are not arguing that the Graves Amendment
8 completely preempts 370, and that - - - because we do
9 understand that the rental companies still must obtain
10 insurance. 370 is not preempted to the extent that it - -
11 - that it - - - it says that now rental companies no longer
12 have to have any insurance.

13 JUDGE HALLIGAN: Insurance for what specifically
14 do you think survives?

15 MR. MERCURIO: Any liability that survives Graves
16 as the - - -

17 JUDGE CANNATARO: But you are saying that it
18 doesn't require them to provide coverage for their
19 permissive users? The rental company's permissive users?

20 MR. MERCURIO: No, not - - - not the renters.

21 JUDGE RIVERA: Okay. So let's - - - let's go
22 back to this response you just gave for - - - they're
23 liable for anything that survives Graves, so let's talk
24 about that.

25 MR. MERCURIO: Yeah.

1 JUDGE RIVERA: So your view is what doesn't
2 survive Graves is primary insurance coverage for the
3 renter?

4 MR. MERCURIO: The negligence of the renter.

5 JUDGE RIVERA: Okay. When - - - when - - - when
6 your company, when the - - - excuse me. When the rental
7 company has no negligence. They're not the cause of the
8 damages or the injuries - - -

9 MR. MERCURIO: Yes.

10 JUDGE RIVERA: - - - correct? Okay.

11 MR. MERCURIO: Correct.

12 JUDGE RIVERA: So where does this secondary
13 insurance responsibility come in? When would that kick in,
14 if at all?

15 MR. MERCURIO: Like I said, it would be - - - it
16 was in response to the argument that there would be no
17 insurance, and I'm arguing that there are other avenues.
18 And subject to a coverage analysis, it may or may not apply
19 as a secondary basis. That's a - - - you know, every case
20 to be determined on - - - on its - - -

21 JUDGE RIVERA: But what would be the basis for
22 the secondary insurance? If your view is that Congress
23 didn't intend for the rental companies to pay for the
24 liability, the - - - the - - - the actions, the negligence
25 of renters or perhaps third parties?

1 MR. MERCURIO: It - - - it would not, Your Honor.
2 It would - - - it would not be a - - - it would not be a
3 secondary. Under that - - -

4 JUDGE RIVERA: So then, again, back to your
5 response to Chief Judge Wilson that this - - - despite what
6 other language might be in your brief, your position is
7 you're only liable for your own negligence. That's it.
8 And that's what Graves intended.

9 MR. MERCURIO: Yes.

10 JUDGE RIVERA: The Graves Act amendment, then?

11 MR. MERCURIO: Yes.

12 CHIEF JUDGE WILSON: So if you - - - if - - - if
13 a rental company, under your view then of - - - of what the
14 Graves Amendment does. A rental company rented to somebody
15 who had no insurance themselves, is that negligent?

16 MR. MERCURIO: Well, if they provided - - - if
17 they provided proof. Let's say they provided a certificate
18 of insurance that - - -

19 CHIEF JUDGE WILSON: No. Suppose they don't ask?
20 They don't ask. They rent me a car without asking if I
21 have insurance.

22 MR. MERCURIO: I find that scenario to be
23 unlikely that they would rent - - - allow a car - - -

24 CHIEF JUDGE WILSON: I have to tell you, I rent a
25 lot of cars. I have never been asked to prove that I - - -

1 I have insurance.

2 MR. MERCURIO: Oh.

3 CHIEF JUDGE WILSON: Never.

4 MR. MERCURIO: Okay.

5 JUDGE RIVERA: Now, you do have contracts that
6 someone who rents some insurance - - -

7 MR. MERCURIO: Right.

8 JUDGE RIVERA: - - - there's some rental
9 companies that indicates, yes, I have coverage.

10 MR. MERCURIO: Yes.

11 JUDGE RIVERA: Okay.

12 MR. MERCURIO: In - - - in this instance, the
13 rental agreement in this case with Edge Auto, they do
14 require their - - - their renters - - -

15 JUDGE RIVERA: Was that part of what you mean in
16 terms of the different ways that rental companies handle
17 this particular - - -

18 MR. MERCURIO: Yes.

19 JUDGE RIVERA: - - - situation?

20 MR. MERCURIO: Yes.

21 JUDGE RIVERA: But do you agree that there are
22 rental companies who will rent to someone who either
23 doesn't represent they have insurance, or cannot prove they
24 have insurance, or has refused insurance coverage?

25 MR. MERCURIO: I cannot speak for every rental

1 company.

2 JUDGE RIVERA: Okay.

3 MR. MERCURIO: I don't - - -

4 JUDGE RIVERA: That's fine.

5 JUDGE CANNATARO: Do you think there's some sort
6 of difference of practice at various levels of the
7 industry? Because I think Chief Judge Wilson is right.
8 For most of us who go to these big national car rental
9 companies when we're traveling domestically or overseas, no
10 one asks us to provide proof of insurance when we rent a
11 car. Maybe you have to be older than twenty-five, which
12 I've been able to do for a while, and have a credit card,
13 which I've also been able to do for a while. But I agree,
14 I've never been asked to prove that I have insurance.

15 MR. MERCURIO: Okay.

16 JUDGE CANNATARO: And I've - - - and I've done
17 it. I've rented cars at a time when I didn't own my own
18 car and didn't have a driver's policy. So are we possibly
19 talking about there's a difference between the way the
20 national companies do it, and more regional and local
21 companies do it?

22 MR. MERCURIO: Sure. I mean, I can speak for - -
23 - like I said, my client in this case is Edge Auto. Edge
24 Auto is a rental company that specializes in commercial
25 rentals with their clients, and customers typically are

1 television and movie or video production companies. They
2 rent commercial vehicles. Those contracts are negotiated
3 at arm's-length, usually with other attorneys and their - -
4 - and their contracts require - - -

5 JUDGE CANNATARO: But this statute is going to
6 apply to the whole industry, right?

7 MR. MERCURIO: Right.

8 JUDGE CANNATARO: Including some rental companies
9 who I think there's a strong suspicion, at least among some
10 members of this court, do not really inquire or - - - or
11 take into account whether or not the person renting a
12 vehicle from them has their own insurance.

13 And as an addendum to that comment, if you want
14 to address it, I think the end result is that you're
15 definitely going to have more people shunted into the
16 uninsured motorist coverage part of this scheme?

17 MR. MERCURIO: Yes, I understand that.

18 What was the question?

19 JUDGE CANNATARO: The question is, I mean, is
20 that a natural consequence of - - - of your position?

21 MR. MERCURIO: Could be. Yes, it could be. Yes.

22 JUDGE RIVERA: Let me ask you this. Since the
23 attorney general's representative already discussed a
24 potential statutory tweaking, or that the legislature could
25 perhaps consider that. Could the legislature - - - unless

1 it already does, I don't know. You may know.

2 Does the legislature - - - or could it require
3 that all rental companies have the renter provide proof of
4 insurance coverage?

5 MR. MERCURIO: Sure.

6 JUDGE RIVERA: And if they don't provide such
7 proof, they may not rent to them?

8 MR. MERCURIO: Could the legislature enact - - -

9 JUDGE RIVERA: Yes. I'm asking you that.

10 MR. MERCURIO: Yes. I - - - I don't see any
11 reason why they would not be able to enact such a - - -
12 such a law.

13 JUDGE RIVERA: Okay.

14 CHIEF JUDGE WILSON: What do you think the
15 purpose of the savings provision is?

16 MR. MERCURIO: The purpose of the savings
17 provision is to save laws. Like, 370, they say for the - -
18 - for the privilege of putting a vehicle on the road in - -
19 - in your state. So for anyone to put a vehicle on the
20 road in the State of New York, it has to have minimum
21 levels of insurance.

22 JUDGE HALLIGAN: But what does that - - - what
23 does that mean operationally? I think you're telling us it
24 means - - - it doesn't mean that - - - that - - - that 370
25 survives, right? So - - - so how does that actually - - -

1 MR. MERCURIO: Well, 370 survives to the extent
2 that, yes, they - - - if a rental or a leasing company has
3 to have the minimum levels of insurance to put it - - - to
4 put a car on - - - to register the vehicle for any type of
5 liability that survives Graves that's what the First
6 Department held. So for any of the negligence of its - - -
7 of its agents or employees or any - - - or for its own act
8 of negligence or criminal wrongdoing - - -

9 JUDGE HALLIGAN: But - - -

10 MR. MERCURIO: - - - in connection with its
11 vehicles.

12 JUDGE HALLIGAN: Okay. But that type of
13 insurance, as I understand it - - - tell me if I'm - - - if
14 I'm getting this wrong, though - - - has to do with the
15 direct negligence of the car rental company.

16 MR. MERCURIO: Yes.

17 JUDGE HALLIGAN: I don't know what that might
18 encompass. Perhaps it would encompass, you know, a failure
19 to service a vehicle. You send a car out - - -

20 MR. MERCURIO: Yes.

21 JUDGE HALLIGAN: - - - with a flat tire or
22 something like that, but - - - but around the mechanics of
23 the car itself. I - - - I take it you're saying, though,
24 that it doesn't encompass any provision of insurance that
25 would cover an injury in the course of the renter driving

1 the car?

2 MR. MERCURIO: As that would violate the - - -
3 the Graves Amendment, yes.

4 JUDGE HALLIGAN: As you read it, right?

5 MR. MERCURIO: Yes.

6 JUDGE SINGAS: So are you saying there are other
7 types of insurance? Because the way I understand it, there
8 are four types of insurance, right? For motorists in New
9 York. There's liability, there's property, there's
10 underfunded insurance - - -

11 MR. MERCURIO: Right.

12 JUDGE SINGAS: - - - and I forget what the - - -
13 no fault.

14 MR. MERCURIO: No fault.

15 JUDGE SINGAS: Right. So is your position that
16 the savings clause only goes to the liability part, and
17 that the rental car company would still be liable to
18 register and insure their cars for these other insurance?

19 MR. MERCURIO: Whatever they're required to - - -
20 to - - - to obtain insurance for pursuant to the statute,
21 they still have to obtain that - - - that - - - that
22 insurance. Where - - - our position is that insurance
23 cannot be primary to cover the - - - the negligence of the
24 driver.

25 JUDGE HALLIGAN: But - - - but how is the type of

1 insurance for direct negligence - - - so flat tire,
2 whatever it is - - - how is that something for the
3 privilege of registering and operating a motor vehicle?
4 When I look at those words, I think about it as a car
5 owner, right? In order for me to register and operate my
6 car, I need the same no-fault insurance that everybody
7 needs, right?

8 Why isn't that the most natural reading of this
9 provision as opposed to the reading I think you're asking
10 us to give it, which is insurance that covers only direct
11 negligence?

12 MR. MERCURIO: We're not arguing that they don't
13 have to obtain those other insurances.

14 JUDGE HALLIGAN: Well, I thought you - - - the -
15 - - the crux of your argument was that your client doesn't
16 have to bear the cost of obtaining insurance for liability
17 occasioned by an accident on - - - on the road.

18 MR. MERCURIO: Right. Liability insurance for -
19 - - for the negligence of the driver.

20 JUDGE HALLIGAN: And why isn't why - - - isn't
21 liability insurance - - -

22 MR. MERCURIO: Uninsured motor - - - I'm sorry.
23 I'm sorry.

24 JUDGE HALLIGAN: It's okay. Why isn't liability
25 insurance the - - - the type of insurance that we - - -

1 that we obtain for the privilege of registering and
2 operating a motor vehicle, which is what the savings clause
3 covers.

4 MR. MERCURIO: Because that is expressly
5 preempted by the Graves Amendment. Liability insurance is
6 - - -

7 JUDGE HALLIGAN: I'm reading to you from the
8 savings clause. So - - - so the scope of the Graves
9 Amendment is constrained by the savings clause, right?

10 MR. MERCURIO: Right. So the only insurance that
11 is - - - that is impacted by the Graves Amendment is the
12 liability insurance.

13 CHIEF JUDGE WILSON: Why not the no-fault?

14 MR. MERCURIO: The Graves Amendment doesn't
15 impact the obligation to obtain no-fault insurance or - - -

16 CHIEF JUDGE WILSON: Why? But - - - but why not?

17 MR. MERCURIO: Because it's not - - - it's not
18 vicarious liability. Uninsured motorist - - -

19 CHIEF JUDGE WILSON: But wait.

20 MR. MERCURIO: - - - is not - - -

21 CHIEF JUDGE WILSON: But hold on. It's - - -
22 it's - - -

23 MR. MERCURIO: - - - is not coverage that is - - -
24 -

25 CHIEF JUDGE WILSON: It's liability. I mean,

1 your client wasn't driving the car that caused the crash,
2 even if it's covered by no-fault.

3 MR. MERCURIO: Right?

4 CHIEF JUDGE WILSON: So the liability arising
5 from the crash that is covered by no-fault is the
6 responsibility of the driver or drivers. We don't know
7 which between them because we don't care under our statute.

8 MR. MERCURIO: But it's not vicarious liability
9 for the negligence of the driver and - - -

10 CHIEF JUDGE WILSON: Why not?

11 MR. MERCURIO: - - - third-party liability.

12 CHIEF JUDGE WILSON: I mean, it's a third-party
13 whose negligence caused it - - -

14 MR. MERCURIO: An uninsured motorist's - - -

15 CHIEF JUDGE WILSON: - - - not - - - not yours.

16 MR. MERCURIO: - - - claim is irrespective of - -
17 - of liability. In fact, it's - - - it's because the
18 liable tortfeasor did not have adequate coverage. That's
19 why you purchased that insurance as - - - as protection.
20 It's - - - it's compulsory insurance to cover that exact
21 instance.

22 It's not a vicarious liability that is impacted
23 by Graves.

24 CHIEF JUDGE WILSON: But if you have to - - -

25 MR. MERCURIO: That is not the type of insurance

1 - - -

2 CHIEF JUDGE WILSON: - - - if you have to buy
3 that insurance policy, you are paying for something that
4 wasn't caused by you, which I thought was how you read the
5 Graves Amendment.

6 MR. MERCURIO: Graves Amendment is to prevent the
7 third-party liability for the negligence of the driver.
8 The uninsured motorist claim is not about the negligence of
9 the driver. You're not being vicariously liable for your
10 own - - - for your own driver. It's because of the
11 circumstance of - - - of getting into an - - - your vehicle
12 is in an accident with an uninsured - - - uninsured
13 tortfeasor, that's why you purchase that insurance. That
14 is not what Graves Amendment sought to preclude.

15 JUDGE RIVERA: Is it primary? Is no-fault
16 primary?

17 MR. MERCURIO: No-fault is - - - is primary.

18 JUDGE RIVERA: Is primary?

19 MR. MERCURIO: Yes. Typically, yes.

20 For that instance. It's for that reason why the
21 Congress enacted no-fault: is to have to make sure that
22 everyone who is involved at least has that level of
23 coverage.

24 JUDGE RIVERA: Uh-huh.

25 MR. MERCURIO: That is not the type - - - that is



1 not the coverage that the Graves Amendment sought to
2 preclude.

3 CHIEF JUDGE WILSON: Do you want to address the
4 McCarran-Ferguson Act?

5 MR. MERCURIO: Sure. The Graves Amendment does
6 not - - - does not impact or impair 370 to the extent that
7 it says that 370 says you have to obtain this insurance and
8 - - - and now the Graves Amendment is saying, no, you
9 don't. These rental companies still have to have the
10 insurance. They still - - - we're not - - - we're not
11 claiming that they don't have to have insurance. We're not
12 claiming that rental companies ought to be allowed to roll
13 cars out onto the streets of New York with no insurance.
14 That's not what we're arguing.

15 370 is alive and well post Graves to the extent
16 that it requires the companies to obtain insurance. We're
17 not arguing that they don't have to have any insurance.

18 JUDGE HALLIGAN: Well, certain kind of insurance
19 you're saying. A very specific kind. Not the kind that -
20 - - that covers what actually happens on the road due to
21 drivers, right?

22 MR. MERCURIO: Due to the negligence of the
23 driver, because that was the only circumstance that was
24 expressly preempted by - - - by the Graves Amendment.

25 Graves Amendment did not preempt the other - - -

1 the other forms of insurance.

2 JUDGE RIVERA: But you're saying it would not be
3 unlawful for a rental company to rent to someone who has no
4 insurance coverage? At least not as of now?

5 MR. MERCURIO: Correct. Okay.

6 Do you have any other questions?

7 CHIEF JUDGE WILSON: I don't think we do.

8 MR. MERCURIO: Okay. Thank you.

9 CHIEF JUDGE WILSON: Thank you.

10 MR. SANTIAGO: Your Honor, you - - - you posed a
11 great example. You yourself are a - - - a car owner. I'm
12 assuming you have insurance that was written in the State
13 of New York. I'm by no means saying that you would ever do
14 this, but suppose you rent - - - you let somebody use your
15 vehicle who did not have car insurance, you can be held
16 liable for their negligence. But thankfully you have
17 insurance that's written in the State of New York, and
18 under New York Insurance Law 3420 your insurance company is
19 required to insure the permissive user of your vehicle.

20 That's the same principle that applies in Vehicle
21 and Traffic Law 370.

22 JUDGE GARCIA: Congress didn't preempt that law,
23 right?

24 MR. SANTIAGO: No.

25 JUDGE GARCIA: So I - - - I'm having still a



1 little difficulty on the McCarran point. Could you go back
2 to that?

3 MR. SANTIAGO: Sure. So McCarran states that no
4 act of Congress shall invalidate, impair, or supersede any
5 state law that has been enacted to regulate the business of
6 insurance.

7 JUDGE GARCIA: And your point is this impairs,
8 right?

9 MR. SANTIAGO: Absolutely impairs. Because it
10 impairs, invalidates, or supersedes the peremptory mandate
11 of Vehicle and Traffic Law 370 that states that those
12 minimums shall inure to the benefit of every permissive
13 user. And then it continues to the same extent and in the
14 same manner as the owner.

15 If the owner's negligent, the insurance is going
16 to respond. Likewise, if the renter is negligent, the
17 insurance is going to respond up to those minimums: twenty-
18 five, fifty, ten. And it's not limitless, because if
19 there's more, the rental company can seek indemnification
20 from the renter. That was the holding of Morris.

21 JUDGE HALLIGAN: Do you - - -

22 MR. SANTIAGO: That was also in Ward.

23 JUDGE HALLIGAN: - - - do you read impair in
24 McCarran-Ferguson as just taking a little bite out of as
25 opposed to completely invalidating it? How broadly do you

1 think it swings?

2 MR. SANTIAGO: Well, the lower court erred
3 because they read the word entirely into the statute. They
4 forgot the maxim that the court should give effect to every
5 single word and clause of a statute.

6 JUDGE HALLIGAN: But is - - - is the case law
7 interpreting McCarran-Ferguson clear, in your view, that
8 impair mean - - - includes take a little bite out of? So
9 for example, if part but not all of 370 would be preempted
10 under - - - under your adversary's reading, is that
11 sufficient to trigger McCarran-Ferguson?

12 MR. SANTIAGO: Correct. It only has to impair,
13 invalidate, or supersede part of the state statute in order
14 to trigger an act. And that, in turn, triggers reverse
15 preemption.

16 JUDGE GARCIA: Different point. Could an
17 insurance company as part of the contract, rental contract,
18 say to the potential renter, you have to buy a policy from
19 me, rental company, that covers me for my liability under
20 370? So you're not liable because we don't use that word,
21 but you have to have insurance to cover my nonliability for
22 my insurance coverage.

23 MR. SANTIAGO: Well, that's exactly what 370
24 says. It says that you have to have those minimum - - -

25 JUDGE GARCIA: No. But can the car company make

1 the renter buy that from the car company? So the renter
2 then buys a policy covering the rental car company for the
3 obligation under 370?

4 MR. SANTIAGO: Well, no. Because the rental
5 company would still be primary. And again, that was the
6 holding of Morris; that was the holding of ELRAC v. Ward,
7 where they could seek to do that, but it has to be for
8 amounts above the minimum, not - - -

9 JUDGE GARCIA: So there's no way - - - and there
10 are a lot of questions about you could have them by a
11 policy, you could have them - - - there's no way the rental
12 car company can shift that risk to the renter under - - -

13 MR. SANTIAGO: Well, no. Because then they're
14 effectively trying to shift the statutory obligations that
15 they have under Vehicle and Traffic Law - - -

16 JUDGE GARCIA: So that's a - - -

17 MR. SANTIAGO: - - - 370.

18 JUDGE GARCIA: - - - different policy than
19 requiring somebody to have insurance on the road, because
20 that essentially would accomplish the same thing as 370.
21 It's just making sure the rental company pays.

22 MR. SANTIAGO: Not making sure the rental company
23 pays. This is making sure that there's critical insurance
24 benefits for - - - for innocent victims of traffic
25 accidents - - -

1 JUDGE GARCIA: And that the rental company pays
2 for those benefits?

3 MR. SANTIAGO: Up to the minimum.

4 JUDGE GARCIA: Right.

5 MR. SANTIAGO: There's not limitless payment. And
6 it's not the rental company unless the rental company is
7 self-insured. It's the insurance company behind - - -

8 JUDGE GARCIA: Which I know some of the bigger
9 ones do, I guess. But the point being, I think that
10 there's no way the rental car company could accomplish the
11 - - - the same consumer protection or driver safety,
12 whatever you want to call it, coverage by passing those
13 costs along. This statute mandates that the rental company
14 bear this financial responsibility.

15 MR. SANTIAGO: Primary coverage mandated. The
16 exact words of the statute state "shall". And that is what
17 the court determined in ELRAC v. Ward because that is
18 primary.

19 JUDGE CANNATARO: And for purposes of McCarran,
20 would that be an impairment as well of - - - of an
21 insurance regulation? In other words, if - - - if a car
22 rental company just decided we're going to build this into
23 our rental cost - - - you know, we're going to have the
24 consumer pay for the coverage. And mind you, that's not
25 vicarious liability, as I understand you've defined it.

1 That's just shifting a financial obligation to the
2 customer.

3 Does that - - - does that run afoul of reverse
4 preemption?

5 MR. SANTIAGO: Well, no. Insurance companies are
6 free to hike up their prices in order to cover their
7 premiums, as well as insurance companies to cover
8 themselves if they have to start insuring renters for every
9 single rental company up to those minimum limits. But
10 that's not the case. Because so far, what we've relied
11 upon was that the rental companies would come in at the
12 minimum, and then the renters' insurance would kick in for
13 amounts above that, or a third-party who was at fault. And
14 that's been the law of the land since 2001.

15 JUDGE CANNATARO: Well, that's better for the
16 industry, because I - - - I think the whole genesis of this
17 is that the car rental companies were claiming that their
18 costs were so high that they were being essentially driven
19 out of business. So I guess the question then becomes - -
20 - you know, whose goal are we serving if - - - if - - - if
21 - - - if - - - if you build it into the costs? You're not
22 helping the - - - you're not helping the rental companies.
23 You're not getting to what the original legislative intent
24 was - - - was - - - which was, I think, to sort of reduce
25 these onerous obligations on the rental companies. Would

1 that be fair to say?

2 MR. SANTIAGO: Well, they - - - they would not
3 have those onerous obligations because they would only be
4 held to those minimum limits. And so - - -

5 JUDGE CANNATARO: Onerous is in the eye of the
6 beholder, you know.

7 MR. SANTIAGO: Well, on - - - on the flip of
8 that, it would be onerous if, let's say you had someone who
9 was operating a rental truck with no insurance, and now an
10 innocent victim who was trying to seek financial recourse,
11 but then you had a renter with no insurance and a rental
12 agency saying, no, we don't have to provide primary
13 coverage.

14 JUDGE CANNATARO: Well, I think we've already
15 established that - - -

16 MR. SANTIAGO: We're not liable under Graves, so
17 we're not going to pay anything.

18 JUDGE CANNATARO: I mean, that - - - that seems -
19 - - that's a vivid image. But there's still forms of
20 coverage available out there, right?

21 MR. SANTIAGO: Well - - -

22 JUDGE CANNATARO: There's still underinsured,
23 uninsured motorist coverage that's - - - that's available.

24 MR. SANTIAGO: Well - - -

25 JUDGE CANNATARO: And the - - - and the car

1 rental companies are paying for that, even when they buy
2 their own policies for their own negligence.

3 MR. SANTIAGO: No-fault insurance by its very
4 nature is providing this insurance without having to prove
5 negligence. So in essence, it's vicarious liability. And
6 now that gives rental companies the opportunity to say,
7 wait a minute, this is vicarious liability in a sense. So
8 we don't have to provide no-fault. We don't have to
9 provide underinsured or uninsured motorists - - -

10 JUDGE CANNATARO: Well, that's really the next
11 case though, isn't it?

12 MR. SANTIAGO: Exactly. That has not been
13 briefed before this court - - -

14 JUDGE SINGAS: But that - - - that has nothing to
15 do with Graves.

16 MR. SANTIAGO: - - - but that could be the likely
17 effect of it.

18 JUDGE SINGAS: That has nothing to do with
19 Graves, because Graves is only talking about liability,
20 right?

21 MR. SANTIAGO: Well, exactly. So Graves is
22 talking about liability and that's VTL 388. We're talking
23 about compulsory insurance coverage under 370 - - -

24 JUDGE SINGAS: And the words "primary" - - -

25 MR. SANTIAGO: - - - in tandem with the 3420.

1 JUDGE SINGAS: - - - like the primary policy, did
2 that come from 370, or did that come from our
3 interpretation of Ward?

4 MR. SANTIAGO: Well, Ward took that from the
5 language of the statute that says, "shall inure to the
6 benefit of every permissive user".

7 JUDGE SINGAS: No. But I'm asking about the
8 words "primary" like when we're talking about it in that
9 regard. Is that based on our interpretation through Ward,
10 or is that based on 370?

11 MR. SANTIAGO: That does not appear in 370, that
12 came from Ward decision.

13 JUDGE SINGAS: Right. So now is our
14 interpretation of Ward still good law after Graves?

15 MR. SANTIAGO: Absolutely. It's still a good law
16 - - -

17 JUDGE SINGAS: How?

18 MR. SANTIAGO: - - - because there's no vicarious
19 liability. It's compulsory insurance coverage up to a
20 minimum limit.

21 JUDGE SINGAS: I don't understand what that
22 means. Because the insurance coverage is for the benefit
23 of somebody getting paid, right? Practically. That's what
24 we're talking about.

25 MR. SANTIAGO: Yes. To make sure that there is

1 access to critical insurance - - -

2 JUDGE SINGAS: And the Graves Amendment says the
3 rental company shouldn't be the one paying.

4 MR. SANTIAGO: Well, what Graves said was that
5 they should not be vicariously liable for these incidents.
6 It did not say we're going to restrict insurance; you
7 cannot get insurance. It just covered vicarious liability,
8 not insurance principles. That was left to the states.

9 JUDGE SINGAS: You're saying if there's any
10 liability it should - - - the rental car company shouldn't
11 bear that responsibility?

12 MR. SANTIAGO: Well - - -

13 JUDGE SINGAS: Clear as day.

14 MR. SANTIAGO: - - - again, they're not bearing
15 liability. What they're bearing is insurance coverage. So
16 the renter as a permissive user, as a - - -

17 JUDGE SINGAS: Again, but the insurance coverage
18 is for the purpose of funding someone, making someone
19 whole. That's the purpose, right?

20 MR. SANTIAGO: Yes. It's to make someone whole.
21 But again, the - - - the rental company is - - - and their
22 insurer, they're obligated under 3420 to insure the
23 permissive user of a vehicle.

24 So if we're going to preempt the preemptory
25 mandate of vehicle and Traffic Law 370, we're also going to

1 preempt 3420. That says that every single insurance policy
2 written in the state has to ensure permissive users of
3 vehicles.

4 JUDGE SINGAS: Well, I don't - - - I don't think
5 that necessarily follows, but I appreciate your argument.

6 MR. SANTIAGO: Thank you.

7 CHIEF JUDGE WILSON: Thank you.

8 (Court is adjourned)

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C E R T I F I C A T I O N

I, Chrishanda Sassman-Reynolds, certify that the foregoing transcript of proceedings in the Court of Appeals of Second Child v. Edge Auto, Inc., No. 30 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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