No. 01-270

In the Supreme Court of the United States

YELLOW FREIGHT SYSTEM, INC.,

Petitioner,

v

STATE OF MICHIGAN, *ET AL*,

Respondents.

On Petition For Writ Of Certiorari To The Michigan Supreme Court

BRIEF FOR THE STATE OF MICHIGAN, *ET AL* IN OPPOSITION

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QUESTION PRESENTED

Under the Single State Registration System, 49 USC 14504(c)(2)(B)(iv)(III), a State is authorized to charge a fee "that is equal to the fee, not to exceed $10 per vehicle, that such State collected or charged as of November 15, 1991." In September, 1991, the Respondents State of Michigan, *et al* mailed renewal registration forms to the Petitioner charging $10 per vehicle for the 1992 registration year. In October, 1991, the Petitioner paid those registration fees. The question presented is whether such fees were "collected or charged as of November 15, 1991" within the meaning of 49 USC 14504(c)(2)(B)(iv)(III).

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STATEMENT OF THE CASE

The Petitioner asserts that the Court should grant review because the Michigan Supreme Court decision below is in conflict with a decision of the D.C. Circuit. However, this case, which was litigated on facts not before the D.C. Circuit, does not warrant this Court's review. Indeed, the Petition provides scant information about how and why the controversy arose. Moreover, the Petition creates the impression that critical facts below were undisputed, particularly as to the amount of the fee that was charged and collected as of November 15, 1991. The Respondents, however, have consistently maintained throughout this litigation that the challenged $10 per vehicle fee was lawful precisely because it was charged and collected from Petitioner prior to the statutory cut-off date of November 15, 1991. Moreover, the Respondents did not ignore or cancel any reciprocity agreements. While the Michigan Supreme Court did not agree with the D.C. Circuit, it clearly reached the proper result in this case for reasons other than stated in its opinion. Finally, the Petitioner's parade of horribles is baseless as it is unlikely that the Michigan Supreme Court's decision will result in a stampede of states canceling long-standing reciprocity agreements in an effort to increase revenues. In short, this case is a poor vehicle for resolving the conflict alleged by the Petitioner. After briefly outlining the background legal framework applicable to this case, the Respondents set forth critical facts not contained in the Petition.

1. Congress enacted the Motor Carrier Act of 1935, 49 USC 301 *et seq*, to provide for limited state regulation of interstate commercial transportation. Through various amendments, States were authorized to register interstate motor carriers, subject to supervision of the Interstate Commerce Commission (ICC). Under this registration program, which began in 1965, States choosing to participate were allowed to charge up to $10 for each vehicle registered. As proof of registration each State issued a stamp for each vehicle and

these stamps were placed in the appropriate state spot on "bingo cards" carried in the cab of each vehicle.[1]

2. In Michigan, although the Michigan Public Service Commission (MPSC) had reciprocity agreements with several states and provinces pertaining to fees for motor carriers in interstate commerce, it did not issue bingo card stamps to interstate, foreign and exempt interstate motor carriers until the Michigan Legislature enacted 1988 PA 347 (Act 347), an amendment to the Michigan Motor Carrier Act, 1933 PA 254, MCL 475.1 *et seq.* Act 347, which became effective January 1, 1989, authorized the MPSC to begin charging fees[2] for each vehicle of interstate motor carriers. See, MCL 478.7(4). Additionally, Act 347 permitted the MPSC to enter into reciprocity agreements with other states that did not charge vehicles licensed in this state. Thus, beginning in the fall of 1989, the MPSC began issuing bingo card stamps for the registration year beginning 1990.

3. As of 1991, 38 States, including Michigan, participated in this registration system. Some, but not all States entered into reciprocal arrangements under which they would discount or waive the fee for carriers based in each other's state. Most States used the motor carrier's principal place of business as the basis for determining reciprocity. Michigan, however, used the State in which the vehicle was base-plated, i.e. where it was registered or license plated, as the basis for determining reciprocity. Under this approach, for registration years 1990 and 1991, Michigan did not charge a fee for

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[1] Motor carrier vehicles may carry any number of different cab cards in the cab of each vehicle. Examples include cab cards for the International Registration Plan (IRP), the International Fuel Tax Agreement (IFTA), the "bingo stamp" card for vehicles that operate interstate, and cab cards for each state in which a vehicle may operate intrastate.

[2] As originally enacted, 1988 PA 347 provided that the MPSC was required to charge an annual fee equal to the charge levied on Michigan-licensed motor carrier vehicles in the other state. In 1989, the Michigan Legislature enacted 1989 PA 221 which amended this section by changing the annual registration fee on each vehicle to $10.00.

vehicles base-plated in a State that did not charge a fee for vehicles that were base-plated in Michigan.

4. Early in 1991 the MPSC determined that granting reciprocity using base-plating, rather than place of business, was unduly complex, inefficient to administer, and inconsistent with the registration system used by virtually all other states. See Affidavit of Thomas R. Lonergan. Respondents' Appendix (Res. App.), p. 4b. For example, vehicles operated by a single motor carrier but base-plated in several different States required several different calculations. *Id.* This significantly increased the possibility of error in reciprocity waivers. *Id.* Further, it became apparent to Michigan that it was one of a very few number of States using this system as opposed to the principal place of business as the basis for affording reciprocity.[3]

5. Contemporaneous with Michigan's determination that its method for determining reciprocity was difficult to administer and inconsistent with the approach of other States, Congress was considering legislation to streamline the state registration system. Recognizing that such legislation could include a mandatory uniform approach by participating states, the MPSC decided to terminate its use of base-plating as the method of determining reciprocity in favor of the "place of business" method of determining reciprocity to be consistent with other states. Res. App., p. 4b. Thus, early in 1991, Michigan brought its registration program in line with other state programs by adopting a revised reciprocity system based on the motor carrier's principal place of business. Rather than immediately implementing this change, the MPSC decided, for the convenience of the industry, it would implement the change in the fall of 1991 when the annual renewals occurred.

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[3] Other states that had used base-plating included Oklahoma, North Carolina and Indiana. All the foregoing states participate in the Single State Registration System (SSRS) and now use principal place of business for determining reciprocity.

6. On December 18, 1991, the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA) was enacted into law. Pub L 102-240. 105 Stat 1914-2207. Included within ISTEA was Section 4005, "Single State Registration System" (SSRS). 105 Stat 2146-2148. 49 USC 14504(c). The SSRS created a streamlined system for the registration of a motor carrier's vehicles engaged in interstate commerce. Previously, motor carriers were required to separately register their vehicles in each state that the vehicles operated in. The SSRS implemented a single state filing concept where a motor carrier would only file in and submit payment to the state in which it was based. That single filing and payment would cover vehicle registrations and fees for all states where the motor carrier operated vehicles. The state in which the motor carrier is based then sends the registrations and fees to all other states where such vehicles are operated.

7. Congress provided that the SSRS was to take effect by January 1, 1994. 105 Stat 2148.[4] It further provided that the ICC was to prescribe standards for the SSRS. With respect to the fee system under the SSRS, Congress provided as follows at 49 USC 14504(c)(2)(B)(iv)(III):

> (B) Receipts; fee system. Such amended standards—
>
> > (iv) shall establish a fee system for the filing of proof of insurance as provided under subparagraph (A)(ii) of this paragraph that (I) will be based on the number of commercial motor vehicles the carrier operates in a State and on the number of States in which the carrier operates, (II) will minimize the costs of

[4] The effective date of the SSRS was set forth in Section 4005 of ISTEA and codified as 49 USC 11506(c)(3) and may be found at 105 Stat 2148. Subsection (c)(3) of 49 USC 11506 was not included in the subsequent recodification that occurred in 1995 when 49 USC 11506 became 49 USC 14504.

> complying with the registration system, and (III) *will result in a fee for each participating State that is equal to the fee, not to exceed $10 per vehicle, that such State collected or charged as of November 15, 1991.* 49 U.S.C. 14504(c)(2)(B)(iv)(III). (Emphasis added.)

8. In September 1991, two months prior to the November 15, 1991 cut-off date specified in 49 USC 14504(c)(2)(B)(iv)(III), Michigan sent out renewal interstate cab (i.e. bingo) card stamp application forms to motor carriers for the 1992 registration year. Res. App., p. 25b. On the back of the application form were instructions which stated that "[t]he cab card stamp fees are based on the state or province shown on the ICC certificate or permit as the carrier's base of operations." Res. App., p. 28b. The amount of fees appropriate to a motor carrier's fleet was determined by reference to an accompanying chart identifying cab card stamp fees. Res. App., p. 30b.

9. No change was made to Michigan's registration fee of $10.00 per vehicle, as authorized by MCL 478.7(4). Nor was there any change to Michigan's long-standing practice of collecting renewal fees in the fall for registration in the upcoming year, as is the practice with most, if not all, other States.[5] Moreover, there was no change in which states Michigan had reciprocity with. Michigan continued to exercise reciprocity with the same states, both before and after November 15, 1991. The only change was the basis for determining reciprocity, i.e. the fee would be determined on the carrier's principal place of business rather than on the license plating of a particular vehicle. The result was that some carriers that previously qualified for reciprocal fee discounts

[5] In fact, the SSRS requires motor carriers to register in the fall preceding the registration year. The SSRS procedures manual states that registrants must file an application for registration and pay fees no earlier than August 1 and no later than November 30 of each year for the upcoming year.

upon the base-plating methodology were no longer afforded a discount while others that had not been eligible for discount under base-plating were eligible for a discount under the principal place of business methodology.

10. One of the carriers affected by this change was Yellow Freight. In the calendar years 1990 and 1991, Yellow Freight had 3,730 vehicles base-plated in Illinois and Indiana. Under the base-plating method of determining reciprocity that Michigan had in effect at that time, Yellow Freight was not charged for those bingo card stamps as those states did not charge fees for vehicles base-plated in Michigan. See Affidavit of Thomas R. Lonergan, Res. App., p. 5b. Yellow Freight, however, was charged for five vehicles that were base-plated in Oklahoma. Res. App., p. 5b. After Michigan changed its method for determining reciprocity based on a company's principal place of business, Yellow Freight paid a $10.00 per vehicle registration fee for all its vehicles, as its principal place of business was in Kansas, and Michigan had no reciprocity with the State of Kansas. Res. App., p. 26b. The application form for the 1992 calendar year was mailed to Yellow Freight in September 1991. The application form was returned on October 3, 1991 with payment in full. Res. App., p. 25b. Since September, 1991 Michigan has annually charged and Yellow Freight has annually paid a registration fee of $10.00 per vehicle for each vehicle operated in Michigan inasmuch as Yellow Freight's principal place of business remains in Kansas and Michigan has no reciprocity with that state.

REASONS FOR DENYING THE PETITION

I. THE CONFLICT ALLEGED BY THE PETITIONER IS NOT A "SQUARE" CONFLICT SINCE THE CHALLENGED FEES WOULD BE LAWFUL UNDER THE D.C. CIRCUIT'S DECISION IN *NATIONAL ASS'N OF REGULATORY UTILITY COMM'RS v ICC.*

The Petitioner claims that certiorari should be granted to rectify an open and direct conflict between the D.C. Circuit

and Michigan Supreme Court. While the Michigan Supreme Court candidly noted its disagreement with the D.C. Circuit, the Respondents believe that the result in this case would be the same regardless of how the conflict is decided. This is entirely due to facts in this case that were not before the D.C. Circuit.

In *National Ass'n of Regulatory Utility Comm'rs v ICC,* 41 F3d 721 (DC Cir, 1994), the United States Court of Appeals for the District of Columbia Circuit upheld an ICC determination that under the SSRS participating states could not disregard reciprocity agreements and could not charge more than was collected as of November 15, 1991. The National Association of State Regulatory Utility Commissioners (NARUC) had appealed the ICC decision arguing that the ICC's decision unreasonably limited the States to charges that were assessed under circumstances not covered by the statute. *Id.* 41 F3d at 729. Additionally, NARUC argued that the ICC had failed to provide an adequate explanation of its decision, considering that the ICC had originally proposed to allow the States to disregard reciprocity agreements. *Id.* The D.C. Circuit rejected NARUC's challenge finding that because "[f]ederal law merely states that a state may not charge more than was charged or collected in the past" … "the plain language of the statute precludes petitioners' interpretation." *Id.* (emphasis in original). The D.C. Circuit then added "[i]t does not matter whether Congress actually focused on the reciprocal discount practice or even was aware of it." *Id.*

In its decision below the Michigan Supreme Court, like the D.C. Circuit, found that the plain language of the statute controlled the outcome and applied the statute as written. The Michigan Supreme Court correctly noted that the ISTEA "refers only to the fee collected and charged, and contains no reference to reciprocity agreements." Pet. App., p. 9a. It notes that 49 USC 14504(c)(2)(B)(iv)(III) directed the ICC to "establish a fee system" that "result[s] in a fee, not to exceed $10 per vehicle, that such State collected or charged as of

November 15, 1991." *Id.* The Michigan Supreme Court then concluded:

> The new "fee system" is based not on the fees collected from one individual company, but on the fee system that the state had in place on November 15, 1991. We must look not at the fees paid by plaintiff in any given year, but at the generic fee charged or collected as of November 15, 1991. Pet. App., p. 9.

The Michigan Supreme Court held, as a matter of state law, that the fee charged and collected as of November 15, 1991 was $10. Pet. App., p. 10a. It also found that the ICC's position that States must consider fees charged or collected under reciprocity agreements when determining the fees charged and collected under 49 USC 11506(c)(2)(B)(iv) added a concept not within the express language of the statute. Pet. App., pp. 10a-11a.

What is striking is that under the facts of this case resolution of the conflict alleged is not necessary since the Respondents' actions are lawful under both the D.C. Circuit's and Michigan Supreme Court's decisions. This is because: 1) the Respondents did not disregard any reciprocity agreements; and 2) the Respondents charged and collected the challenged $10 per vehicle fee from Petitioner prior to November 15, 1991. In short, the conflict alleged by the Petitioner is not a "square one" or "on all fours" because under these facts, the Respondents' actions comply with the D.C. Circuit's decision.

Tellingly, the Petition neither fairly nor fully describes the facts in this case. At page 9, it claims that Respondents decided to ignore fees being charged under reciprocity agreements. It then, in a carefully worded sentence, claims that "it is undisputed that the fee which Michigan was charging as of November 15, 1991 for registering Illinois-plated vehicles to conduct interstate operations on that date was zero." It then

states that "[e]ffective February 1, 1992, however, Michigan changed its policy and began assessing a $10 per vehicle fee for Illinois-plated vehicles." The Petition, however, fails to disclose to the Court a number of critical facts.

First, contrary to the Petition's claim, none of the reciprocity agreements that Michigan had with other States were either ignored or canceled. The Respondents maintained and continued reciprocity with the State of Illinois both before and after the charging and collection of the challenged fees. All that changed was the method for determining reciprocity. Moreover, this change had nothing to do with increasing revenues. The effect was essentially a revenue wash since some carriers paid more while other carriers paid less. Furthermore, the changeover to using the principal place of business methodology for determining reciprocity was critical to the Respondents being able to participate in the SSRS. Res. App., p. 4b.

Second, the MPSC policy change referred to by the Petitioner occurred in 1991, not 1992. Moreover, the policy change was implemented in September, 1991 when the Respondents, consistent with past practice, began charging and collecting the $10 per vehicle fee for the upcoming calendar year.

Finally, the Petition's statement that, as of November 15, 1991, it is undisputed that the fee charged for registering Illinois-plated vehicles to conduct operations on that date was zero is both misleading and irrelevant. As the Respondents' Statement of the Case clearly demonstrates the $10 per vehicle fee being challenged in this case was both *charged to and collected from* the Petitioner prior to November 15, 1991. Although the Michigan Supreme Court noted this fact, it did not figure in its disposition of the case. The D.C. Circuit's disposition of the case before it, however, was decided on whether a State's fee was charged or collected as of November 15, 2001. Because the challenged fees in this case were actually charged and collected as of November 15, 1991, the

conflict alleged by the Petitioner is not a "square" conflict since the fees challenged by the Petitioner would be lawful under the D.C. Circuit's decision in *National Ass'n of Regulatory Utility Comm'rs v ICC, supra.*

II. THE MICHIGAN SUPREME COURT EXPRESSLY FOLLOWED THE DECISION OF THIS COURT IN *CHEVRON.*

The Petitioner contends that the Michigan Supreme Court erred in that it was required to defer to the ICC's interpretation with respect to reciprocity agreements because the ICC was delegated the authority to interpret the underlying statute to address such an issue. The Petitioner argues that this result is mandated by this Court's decisions in *Chevron USA, Inc v Natural Resources Defense Council, Inc*, 467 US 837 (1984) and *United States v Mead Corp*, ___ US ___; 121 S Ct 2164 (2001). The Michigan Supreme Court's decision, however, does not conflict with either decision.

In its decision, the Michigan Supreme Court quoted directly from *Chevron*, and applied its review criteria. Pet. App., pp. 8a-9a. The Michigan Supreme Court noted that under *Chevron*, a court must first determine whether a statute's meaning is clear; if so, then the Court must apply the statute as written. Pet. App., p. 8a. If, however, the statute is ambiguous, then the court must give deference to the agency's interpretation. *Id.*

In applying *Chevron* to this case, the Michigan Supreme Court first looked to the statute itself. Because it found the plain meaning of the statute to be clear, it followed this Court's directive in *Chevron* that the statute be applied as written. The Petitioner's reference to this Court's decision in *Mead*, which was issued subsequent to the Michigan Supreme Court's decision below, fails to add any luster to its argument.

The issue in *Mead* was whether a Customs Service tariff classification ruling was entitled to *Chevron* deference. In *Mead*, this Court held that "administrative implementation

of a particular statutory provision qualifies for *Chevron* deference when it appears Congress delegated authority to generally make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *supra*, 121 S Ct at 2171. This Court found that a Customs Service tariff classification ruling was not entitled to deference under *Chevron*, but was eligible to claim respect according to its persuasiveness under *Skidmore v Swift & Co*, 323 US 134 (1944). *See*, 121 S Ct at 2168.

The reference to *Mead* as well as the Petition's extended discussion of the nature of the ICC's rulemaking authority, however, are beside the point. This is because the Michigan Supreme Court applied the *Chevron* criteria when making its ruling.

III. THE PETITIONER'S PARADE OF HORRIBLES IS BASELESS.

The Petition claims that certiorari should be granted because this case involves a significant federal statute that impacts 38 states, the nation's trucking industry and has the potential of increasing charges to motor carriers by millions of dollars. The Petitioner's parade of horribles is baseless.

The facts underlying the Michigan Supreme Court's decision are unique to Michigan and not likely to recur in any other state. Nor is there any evidence that states in other jurisdictions will begin canceling reciprocity agreements in an effort to increase revenues as a result of the Michigan Supreme Court's ruling. As noted, Michigan's change in the methodology for determining reciprocity was not undertaken as a revenue increasing measure. Rather, it was done for ease of administration and to ensure Michigan's ability to participate in the SSRS. In short, the measure was revenue neutral in nature. Finally, while the Respondents did change the methodology for determining reciprocity, the Respondents continued to maintain reciprocity agreements with the same states both before and after changing such methodology. In short, no reciprocity agreements in this case were either ignored or canceled. Thus,

the uncertainty that is said to exist is conjecture rather than fact.

IV. THE MICHIGAN SUPREME COURT CORRECTLY RULED THAT THE REGISTRATION FEES CHARGED TO AND COLLECTED FROM YELLOW FREIGHT PURSUANT TO MCL 478.7(4) ARE AUTHORIZED BY THE PLAIN AND UNAMBIGUOUS LANGUAGE OF 49 USC 14504(c)(2)(B)(iv)(III).

At the core of the dispute in this case is whether the Respondents collected *or* charged the $10.00 fee, authorized by MCL 478.7(4), as of November 15, 1991. If the Respondents either charged or collected the $10.00 fee as of November 15, 1991 then 49 USC 14504(c)(2)(B)(iv)(III) authorizes it to continue to charge and collect that fee under the SSRS. As noted, the Respondents actually charged and collected the challenged $10 fee in question from the Petitioner prior to the November 15, 1991 deadline.

The Michigan Supreme Court viewed the fundamental question before it as whether Michigan's reciprocity agreements should be considered in determining what fees were charged and collected as of November 15, 1991. It correctly concluded that the reciprocity agreements were irrelevant in making that determination.

In arriving at its decision, the Michigan Supreme Court made a number of key findings. First, it correctly found that the SSRS refers only to the fee charged or collected and contains no reference to reciprocity agreements. Pet. App., p. 9a. Second, it found that because 49 USC 14504(c)(2)(B)(iv)(III) directs the ICC to "establish a fee system", the statute's focus is not on the fees collected from one individual company, but on the fee system that the State had in place on November 15, 1991. Pet. App., p. 9a. By way of further explanation, the Michigan Supreme Court stated under such an interpretation one looks not at the fees paid by the Petitioner in any given year, but at the generic fee Michigan

charged or collected from carriers as of November 15, 1991. Pet. App., p. 9a. It then found that consideration of what fees were charged under reciprocity agreements added a concept not contained in the express language of the statute, concluding that it was not for the ICC or the Court to insert words into the statute. Pet. App., pp. 10a-11a.

The Petition characterizes the Michigan Supreme Court's decision as advancing "virtually nothing in justification of its conclusion." Pet., p. 20. It criticizes the length of the Court's analysis saying it embraces less than two pages of the reported versions. Pet., p. 20. The Petition then argues that even the most strained attempt fails to breathe logic into the Court's ultimate conclusion. Pet., p. 21.

The Petition's hyperbole cannot, however, detract from the sound reasoning employed by the Michigan Supreme Court. The claim that the Court's decision offers virtually nothing in justification of its conclusion is spurious. As noted, the Court's decision was based on the actual language of the SSRS and its express reference to a "fee system." The Petition's attack on the length of the Supreme Court's analysis cannot be taken seriously since the legitimacy or strength of reasoning simply cannot be measured by the number of pages written. Indeed if it were, the Petitioner would be in trouble because the analysis and conclusion of the D.C. Circuit, which the Petitioner ascribes to, is less than a page in length. Finally, the claim that even the most strained attempt fails to breathe logic into the Court's ultimate conclusion is plainly wrong.

Throughout this litigation, the Petitioner has characterized the controversy according to what it was charged with regard to the November 15, 1991 deadline in 49 USC 14504(c)(2)(B)(iv)(III). The Michigan Supreme Court correctly recognized that this theory of the case was fundamentally flawed and inconsistent with the language of 49 USC 14504(c)(2)(B)(iv)(III), whose focus is on whether the State collected or charged a registration fee as of November 15,

1991 and not on what any individual motor carrier was charged.

The flaw in Petitioner's reasoning was succinctly described by the Michigan Court of Claims in a companion case,[6] as follows:

> The fact that an individual carrier was not assessed fees one year and was assessed fees the next year is irrelevant. The determining factor is location and is not focused on the individual carrier's mere existence. This narcissistic argument produces absurd results. It is a basic rule of statutory construction carried over from common law that absurd results should be avoided. *Fortunate v. Dept. of Transp.,* 449 Mich 991; 538 N.W.2d 669 (1995). If, for example, a carrier expands operations into the State of Michigan after November 15, 1991, then the State will be forever precluded from assessing a fee because the State did not previously assess a fee against that carrier's vehicles. Even more absurd is the situation where a carrier was not yet in existence as of November 15, 1991. In that case, all participating states would be precluded from assessing fees against that carrier because it never paid fees to any state prior to November 15, 1991. These possible results are contrary to the legislative intent of creating a fee system for the filing of proof of insurance. *Schneider Motor Carriers, et al v State of Michigan,* November 24, 1997 Opinion. Michigan Court

[6] One other motor carrier contested the Respondents' collection of registration fees under the SSRS in *Schneider Motor Carriers, Inc, et al v State of Michigan.* Michigan Court of Claims No. 96-16473-CM. Schneider's challenge mirrored the one brought by Petitioner.

> of Claims Docket No. 96-16473-CM. Res. App., pp. 12b-13b.

As for the language of 49 USC 14504(c)(2)(B)(iv)(III), it authorizes:

> . . . a fee for each participating State that is equal to a fee, not to exceed $10 per vehicle, that such State collected or charged as of November 15, 1991.

The foregoing is a general requirement. The focus is whether the State had a registration fee system in place and not what any individual motor carrier was charged. Inasmuch as Respondents had a registration fee system in place at all relevant times, including the 1991 calendar year, the Michigan Supreme Court correctly found that Respondents' actions fully comply with 49 USC 14504(c)(2)(B)(iv)(III).

V. THE PETITIONER'S RELIANCE ON THE ICC'S DECISION IN *AMERICAN TRUCKING* IS MISPLACED.

Throughout the Petition, numerous references are made to the ICC's decision in *American Trucking Associations – Petition for Declaratory Order – Single State Insurance Registration,* 9 ICC2d 1184 (1993). However, it is important to note that that decision was not even mentioned in either the Michigan Supreme Court's majority decision or in either of the dissents. Additionally, it should be noted that *American Trucking* was not included in the review performed by the D.C. Circuit in *National Ass'n of Regulatory Utility Comm'rs v ICC, supra. American Trucking,* however, did figure prominently in the decisions of the lower courts hearing the Petitioner's case. Although the Petition invokes the ICC's *American Trucking* decision in support of its claim that this Court should grant review, it is clear that such reliance is misplaced.

A. The interpretation of 49 USC 14504(c)(2)(B)(iv)(III) in *American Trucking* is contrary to the statute's plain and unambiguous language because it adds an unwritten qualification.

On August 27, 1993, the American Trucking Associations (ATA) filed a petition requesting the Commission to determine whether certain State actions were inconsistent with the above-cited statutory and regulatory requirements. Specifically, ATA alleged, first, that Kentucky had commenced participating in the new registration program even though, in ATA's view, Kentucky was not eligible to participate. ATA alleged, second, that Texas was ignoring the requirement that fees be frozen as of November 15, 1991, and was charging all carriers an across-the-board fee of $10. In this regard, ATA pointed to the Commission's determination that States must continue to observe reciprocity agreements that had the effect of reducing carrier fees, citing, *Single State Insurance Registration*, 9 ICC2d at 617-619. As a third point, ATA contended that several participating States (not including Michigan) were attempting to modify or had disregarded their reciprocity agreements and had raised fees beyond the levels that they had charged based on their reciprocity agreements under the previous registration system.

In response to the petition, by notice served September 16, 1993, and published at 58 Fed. Reg. 48,673 (1993), the ICC instituted a declaratory order proceeding and solicited public comment on the issues raised by ATA. Michigan did not file comments or otherwise participate in this proceeding because none of the issues raised in the ATA petition involved Michigan's implementation of the SSRS. In fact, ATA's proposal to freeze State reciprocity rules in effect as of November 15, 1991, was fully consistent with the changes to Michigan's reciprocity rules effectuated in September of 1991. Unbeknownst to Michigan, however, Yellow Freight filed comments which went beyond the issues identified in the ICC notice and raised in its comments the issue of whether the phrase "fees charged or collected as of November 15, 1991" was intended to include only fees related to the 1991

registration year and not the 1992 registration year. 9 ICC2d at 1192.[7]

Michigan was not served with Yellow Freight's comments nor did it otherwise have any actual or constructive notice that this issue had been raised. Notwithstanding the absence of any comments from parties on the other side of the issue, and without any discussion or analysis, the ICC concluded as follows:

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[7] Specifically, Yellow Freight's comments stated:

> In the case of Michigan, Yellow Freight received reciprocity on the 1991 Michigan fees because of its Illinois base plate. As a result, Yellow paid zero fees to Michigan for 1991. *In 1992 Michigan changed the agreement* to reflect principal place of business and *the fee increased to $10.00 per vehicle.* Because of the size of Yellow's fleet *it purchased 1992 bingo stamps well in advance of display deadlines* to complete the administrative process. Now *Michigan advises* Yellow that its *fee under SSRS is $10.00 per vehicle solely* because Yellow *purchased its 1992 stamps under the new agreement prior to November 15, 1991.* Yellow Freight Comment, September 24, 1993, pg. 3. (Emphasis added.) Res. App., p. 22b.

Michigan, however, changed its reciprocity rules effective September 1991, not in 1992 as Yellow Freight alleged. Contrary to Yellow Freight's comments, Michigan did not advise Yellow Freight that its fee under the SSRS was $10.00 "solely because Yellow purchased its 1992 stamps prior to November 15, 1991." Yellow Freight's $10.00 per vehicle fee was due and owing, because of the change in the method of establishing reciprocity effective September of 1991. Moreover, the 1992 fee renewal applications setting forth the $10.00 charges under these revised reciprocity rules were mailed to all interstate carriers in September 1991 and were payable no later than December 31, 1991. Accordingly, the $10.00 registration fee was charged prior to November 15, 1991. Thus, Michigan charged Yellow Freight the $10.00 fee per vehicle under the SSRS because that is the fee that Michigan was charging prior to November 15, 1991 not because Yellow Freight purchased its stamps early. Notably, Michigan never changed the $10.00 per vehicle fee that was charged and collected prior to and after November 15, 1991. The sole change was to the basis of determining reciprocity.

> Yellow Freight has raised the issue of whether the statutory language concerning the "fee charged or collected as of November 15, 1991" relates to fees charged for the 1991 registration year or for the 1992 registration year. We think it clear that the statutory language concerns only fees charged or collected for the 1991 registration year, and we so find. 9 ICC2d at 1195.

The ICC's finding is contrary to the unambiguous language of the statute because it adds an unwritten qualification to the statute. That is, under the ICC's interpretation not only must the fees be collected and charged as of November 15, 1991, but they must also be for fees for the 1991 registration year. However, there is no language in the statute that limits the fees charged or collected to the 1991 registration year. In short, the ICC has rewritten the statute.

B. The interpretation of 49 USC 14504(c)(2)(B)(iv)(III) in *American Trucking* renders meaningless Congress's decision to use a day-specific date, November 15, 1991, as the cut-off deadline.

It is an elementary rule of construction that effect must be given, if possible, to every word, clause, and sentence of a statute. *Plaut v Spendthrift Farm, Inc.*, 514 US 211; 115 S Ct 1447; 131 L Ed 2d 328 (1995); *Sutherland Stat Construction*, §§ 46.06 (6th ed. 2000). No clause, sentence, or word shall be construed as superfluous, void, or insignificant if the construction can be found that will give force to and preserve all words of the statute. The importance of respecting the words chosen by Congress is evidenced by numerous decisions by this Court and various United States Circuit Courts. *Bridger Coal Co v Director Office of Workers Compensation*, 927 F2d 1150 (CA 10 1991); *Lake Cumberland Trust, Inc v United States Environmental Protection Agency*, 954 F2d 1218 (CA 6 1992); *United Technologies Corp v O.S.H.A.*, 836 F2d 52 (CA 2 1987).

Two decisions from the D.C. Circuit are particularly instructive in demonstrating that the statutory language chosen by Congress must be respected. First, in *Wisconsin Electric Power Co v Department of Energy*, 250 US App DC 128; 778 F2d 1 (1985), the D.C. Circuit held that an ongoing fee levied on the nuclear generation of electricity applied only to electricity generated and sold, but did not apply to the electricity that the generating plant itself consumed. In holding so, the Court rejected a Department of Energy interpretation that nullified certain language in Section 302 of the Nuclear Waste Policy Act of 1982, 42 USC 10222, stating:

> The utilities' reading of the statute comports with the plain language of the measure. In contrast, by the agency's interpretation, the two words "and sold" could just as readily have been left out of the statute in the first instance; indeed, the practical effect of DOE's interpretation is to blue pencil out two words in an already brief one-sentence provision.
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> *The Secretary's interpretation would thus have the unhappy result of obliterating express language from the subsection (a)(2)* provision, in contravention of long-settled principles of statutory construction. *** *Where the language Congress chose to employ is clear, the duty of the judiciary is likewise clear. We must follow that language and give it effect.* (citations omitted). 778 F2d at 3-4. (Emphasis added.)

Second, in *Indiana Michigan Power Co v Dep't of Energy and United States*, 319 US App DC 209; 88 F3d 1272 (1996), the D.C. Circuit reviewed an agency interpretation of 42 USC 10222(a)(5)(B) that provided that in return for the payment of fees, the Department of Energy "beginning not

later than January 31, 1998, will dispose of the high level radioactive waste or spent nuclear fuel" from commercial nuclear power plants. The Department of Energy had argued that its obligation to take nuclear waste by the January 31, 1998 deadline was conditioned upon the existence of an operational repository. The D.C. Circuit disagreed, stating:

> Congress imposed no such condition, but rather directed the beginning of the Secretary's duty as "not later than January 31, 1998," without qualification or condition. The only limitation placed on the Secretary's duties under (B) is that that duty is "in return for the payment of fees established by this section." The Department's treatment of this statute is not an interpretation but a rewrite. It not only blue-pencils out the phrase "not later than January 31, 1998," but destroys the quid pro quo created by Congress. 88 F3d at 1276.

Likewise, the ICC interpretation in *American Trucking* is not an interpretation but a rewrite. Such a reading of the SSRS similarly blue pencils out and obliterates the express language of the SSRS in establishing the November 15, 1991 deadline and blue pencils in the words "for the 1991 calendar year." Michigan's fee, as applied to Petitioner, both before and after the change in the methodology for determining reciprocity, never exceeded $10 per vehicle. Moreover, Michigan actually collected $10 per vehicle from Yellow Freight before November 15, 1991, and without protest.

C. The interpretation of 49 USC 14504(c)(2)(B)(iv)(III) in *American Trucking* is erroneous since it effectively moves the cut-off deadline of November 15, 1991 back to the fall of 1990.

The ICC's interpretation in *American Trucking* countermands the intent and specific directive of Congress by effectively moving the Congressional imposed cut-off date of November 15, 1991 back to the fall of 1990 when the fees for

the registration year 1991 were collected by the States. The ICC's *American Trucking* interpretation is contrary to the general principle that legislation is prospective only, and does not have retroactive effect unless that intent is stated in the clearest terms.[8] Retroactive effect should be strictly construed, and Congress's express retroactive date of November 15, 1991 is not subject to agency tinkering and misinterpretation. The ICC's attempt to move the date retroactively further back is not supported by language in the SSRS and it cited no basis for this interpretation.

D. The interpretation of 49 USC 14504(c)(2)(B)(iv)(III) in *American Trucking* is contrary to Congress's intent because it frustrates the goal of achieving uniformity in fee payment and collection and is inconsistent with the long-term practice of the states to collect registration fees in the fall.

The ICC's interpretation in *American Trucking* is contrary to the overall intent and purpose of the SSRS which was to promote uniformity and administrative efficiency with respect to fee payments and their collection. As a relevant Congressional Report states:

> Fee revenues under this system must be collected through a streamlined administrative process established by Section 406 known as the "single state" or "base state" registration system. Under the single state registration system, a carrier will pay its annual fees to a single state (its base state) and that state will distribute the collections to other participating states in which the carrier's vehicles operate. *This system is to be instituted* by the Interstate Commerce Commission, in consultation with the participating states and the trucking industry, *in such a manner as to eliminate as*

[8] *Kaiser Aluminum & Chemical Corp v Bonjorne, et al,* 494 US 827; 110 S Ct 1570 at 1576; 102 L Ed 2d 842 (1990).

> *much of the paperwork and other compliance burdens as possible.* Section 405 specifies that the only evidence of payment or other identification a vehicle must carry under this system is a copy of the receipt given the carrier by the base state. H.R. Conf. Rep. No. 102-104, 102nd Congress, 1st Sess 437-438 (November 26, 1991). Reprinted in 1991 USCCAN 1679, 1817-1818. (Emphasis added.)

As the D.C. Circuit noted in *Wisconsin Electric, supra:* "[l]ike the judiciary, the agency is bound to follow the law as Congress passed it and the President signed it." 778 F2d at 8. The ICC is not at liberty to override the clearly expressed intent of Congress that the cut-off date for fee changes is November 15, 1991. The ICC moved the deadline back nearly a year when it ignored the statutory November 15, 1991 deadline.

The ICC's interpretation in *American Trucking* is inconsistent with the long-term practice of the states, on a nationwide basis, to collect state annual application or renewal fees for the next registration year in the fall of the preceding year. Additionally, the multi-state practice under the SSRS follows the same pattern, i.e. the collection of fees for the next year occurs in the fall of the preceding year.[9] If Congress had intended to countermand a nationwide practice in this portion of the SSRS statute, surely it would have explicitly so stated. Michigan has always collected and continues to collect these state SSRS fees each fall for the next registration year.

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[9] The practice of collecting fees for renewals in the fall of each year for the next calendar year is consistent with Michigan law concerning all other state motor carrier fees (e.g., Art VI, MMCA, MCL 478.6, *et seq*). Further, that same procedure is expressly mandated under the present multi-state manual used to administer the collection of SSRS fees.

E. The interpretation of 49 USC 14504(c)(2)(B)(iv)(III) in *American Trucking* is contradicted by its interpretation of the day-specific deadline of January 1, 1991 in 49 USC 14504(c)(2)(D) and inconsistent with its regulations implementing the SSRS.

After Respondents implemented the change from base-plating to principal place of business for determining reciprocity with respect to registration fees, Congress continued its work on proposed legislation that was later to become the SSRS. The history of this legislation helps explain why Congress chose November 15, 1991 as the cut-off date for fees. The House Bill, which passed on October 23, 1991, would have eliminated the state registration system and the related fees. In their place, the bill would have provided for a one-time $50 million grant to "bingo" program States, including Michigan, to offset unexpected revenue losses. The Senate Bill, passed on October 31, 1991, did not deal with the subject at all. The provisions creating a single state registration system emerged from the Conference Committee convened during November of 1991. See, H.R. Conf. Rep. No. 404, 102nd Cong., 1st Sess. 437 (1991), *reprinted in* 1991 USCCAN, 1526, 1679, 1817. The ISTEA, which included the SSRS, was enacted on November 26, 1991.

There are three statutory provisions pertinent to this issue. First, 49 USC 14504(c)(2)(D)[10] provides that:

> Only a State which, as of January 1, 1991, charged or collected a fee for a vehicle identification stamp or number under Part 1023 of title 49, Code of Federal Regulations, shall be eligible to participate as a registration State under this subsection or to receive any fee revenue under this subsection.

[10] Originally codified as 49 USC 11506(c)(2)(D).

The foregoing section like 14504(c)(2)(B)(iv)(III) contains a day-specific deadline. Significantly, when the ICC "interpreted" the foregoing section, it found the January 1, 1991 deadline to be clear:

> We conclude that Kentucky is not eligible to participate in the Single State Registration System. The statute is clear that only states which, as of January 1, 1991, charged or collected a fee for a vehicle identification stamp or number under the predecessor system at 49 C.F.R. Part 1023 are eligible to participate.
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> Significantly, while every participating state required carriers to use the Form D "bingo" card described in Subpart D, Kentucky did not. *As of January 1, 1991*, if a Kentucky enforcement officer were to ask a driver to present a cab card evidencing vehicle registration and the driver presented only a "bingo" card, the driver would have been subject to a fine.

American Trucking Associations, supra, 9 ICC2d at 1192-1193. (Emphasis added.) Thus, inexplicably, while the ICC finds the January 1, 1991 deadline in 49 USC 14504(c)(2)(D) to be a clear and day-specific date and enforces it as such, it finds the November 15, 1991 deadline in 49 USC 14504(c)(2)(B)(iv)(III) to mean something other than the November 15, 1991 day-specific date that is plainly stated. The better, more consistent view is that both day-specific deadlines should be given full force and effect.

Second, § 14504(c)(2)(B)(iv)(III)[11] provides that each participating State shall establish a fee system … that … "will result in a fee for each participating State that is equal to the fee, not to exceed $10 per vehicle, that such State collected or

[11] Originally codified as 49 USC 11506(c)(2)(B)(iv)(III).

charged as of November 15, 1991." The statute further provides, at § 14504(c)(2)(C), that "[t]he charging or collection of any fee under this section that is not in accordance with the fee system established under subparagraph (B)(iv) of this paragraph shall be deemed to be a burden on interstate commerce."

The dual purposes of the legislation as made clear by the Conference Committee, were "to benefit the interstate carriers by eliminating unnecessary compliance burdens" and "to preserve revenues for the states which had participated in the bingo program." H.R. Conf. Rep. No. 404, 102nd Cong., 1st Session 437 (1991). To further these ends, Congress directed the ICC to prescribe regulations implementing a single state registration system consistent with the provisions of Section 4005 of the ISTEA. Pursuant to this statutory directive, the ICC issued on May 11, 1992, an Advance Notice of Proposed Rulemaking requesting public participation, 57 Fed. Reg. 20,072 (1992) and on January 22, 1993, the ICC issued a Notice of Proposed Rulemaking requesting public comments. 58 Fed. Reg. 5,951 (1993). The ICC received 52 comments, including comments from the MPSC. Two major issues emerged from the comments: (1) who will be responsible for generating copies of registration receipts; and (2) whether participating States must consider fees charged under reciprocity agreements among the states when determining the fees charged as of November 15, 1991. 9 ICC2d at 612. Regarding the second issue, which is pertinent to the fee collection issue, the American Trucking Associations (ATA) urged the ICC to require fees to be based on "the terms of the [reciprocity] agreement in effect as of November 15, 1991." *Id.* at 618. Notably, no party raised the issue of whether Congress intended the phrase "fees collected as of November 15, 1991" to refer to fees related to the 1991 registration year but not the 1992 registration year.

On May 18, 1993, in *Single State Insurance Registration Ex Parte No. MC-100 (Sub-No. 6),* 9 ICC2d 910 (1993), the ICC adopted final regulations replacing the multi-

State motor vehicle registration system. Under the implementing regulations, carriers were required to: (1) file proof of insurance with a single participating registration State; (2) pay fees to the State to be allocated among all participating States in which the carrier operates; and (3) keep in each of their vehicles a copy of a receipt issued by their registration State. The Commission's new regulations were codified at 49 CFR Part 1023. Several provisions of the regulations are pertinent to the issue in this case. First and foremost, the ICC in *Single State* did not construe the phrase "fees charged or collected as of November 15, 1991" as relating only to fees for the 1991 registration year but excluding fees charged or collected by that date but for the 1992 registration year. Instead, the ICC's implementing regulation mirrored the statutory requirement limiting fees to those that were "charged or collected" as of November 15, 1991. *See*, 49 CFR 1023.4(c)(4)(ii). Second, the ICC adopted regulations requiring carriers to register in the state in which they maintain their principal place of business. 9 ICC2d at 620. Third, the ICC concluded that reciprocity agreements should be frozen as of November 15, 1991. *Id.* at 618-619.

Respondents' actions are entirely consistent with the ICC's foregoing determination with respect to its regulations. Respondents did not raise its fees either before or after November 15, 1991. Michigan's fees were $10.00 at all relevant times, in accordance with MCL 478.7(4). The only change to the Michigan fee system was to replace its base-plating method of determining reciprocity with a principal place of business method. This change was undertaken in early 1991 and put into effect in September 1991 when Michigan mailed applications to motor carriers operating vehicles in Michigan. As such, this change was entirely consistent with the ICC's holding in *Single State Insurance Registration*, 9 ICC2d 610 (1993), 618 that froze "the terms and conditions of [reciprocity] agreements in effect as of November 15, 1991 …"

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted

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Dated: September, 2001