No. 01-270

In the Supreme Court of the United States

YELLOW TRANSPORTATION, INC.,
Petitioner,

v.

STATE OF MICHIGAN, MICHIGAN DEPARTMENT OF TREASURY AND ITS STATE TREASURER, MICHIGAN DEPARTMENT OF COMMERCE AND ITS DIRECTOR, AND MICHIGAN PUBLIC SERVICE COMMISSION AND ITS COMMISSIONERS, JOHN G. STRAND, RONALD E. RUSSELL, AND JOHN L. O'DONNELL,
Respondents.

On Writ of Certiorari to the Michigan Supreme Court

BRIEF OF THE AMERICAN TRUCKING ASSOCIATIONS, INC., SCHNEIDER NATIONAL, INC., AND ABF FREIGHT SYSTEM, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*[1]

The American Trucking Associations, Inc. ("ATA"), is a trade association of motor carriers, state trucking associations, and national trucking conferences, created to promote and protect the interests of the trucking industry. ATA's membership includes more than 2,300 trucking companies and industry suppliers of equipment and services. Directly and through its affiliated organizations, ATA represents more than 30,000 companies and every type and class of motor carrier operation in the United States. ATA regularly advocates the trucking industry's common interests before this Court and other courts. ATA has a strong interest in the question presented in this case, and it actively participated in the administrative rulemaking process before the Interstate Commerce Commission ("ICC"). See Pet. App. 46a (ICC's statement that ATA "submitted extensive comments voicing motor carrier concerns"). ATA also brought the petition for declaratory order before the ICC that resulted in the decision in *American Trucking Associations — Petition for Declaratory Order — Single State Insurance Registration,* 9 I.C.C.2d 1184 (1993) (*ATA*). That declaratory order decision rejected the main argument on which the State relied in its brief in opposition to the certiorari petition in this case, see Br. in Opp. 16-26, and the state trial and intermediate appellate courts deferred to the ICC's decision in the proceeding brought by ATA, as well as the ICC's earlier rulemaking. See Pet. App. 26a-29a, 41a.

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[1] Pursuant to Rule 37.3, the parties have consented to the filing of this brief. The parties' letters of consent have been lodged with the Clerk of the Court. Pursuant to Rule 37.6, *amici curiae* state that no counsel for a party wrote this brief in whole or in part, and that no person or entity, other than the *amici curiae*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

Schneider National, Inc., and ABF Freight System, Inc. are interstate motor carriers of general commodities operating in interstate commerce in Michigan. Schneider National is the parent company of five subsidiary carriers that pay the Michigan SSRS fee implicated in this case. ABF Freight System also pays the Michigan fees. Between them, Schneider National and ABF Freight System have been forced to pay hundreds of thousands of dollars every year as a result of Michigan's interpretation of the statute at issue. Like petitioner Yellow Transportation (formerly known as Yellow Freight System), Schneider National has been forced to bring an action in Michigan state court to recover registration fees that Michigan has imposed over the contrary determination of the ICC. See *Schneider Nat'l Carriers, Inc.* v. *Michigan*, No. 208346 (Mich. Ct. App. May 14, 1999) (unpublished).

STATEMENT

The Intermodal Surface Transportation Efficiency Act ("ISTEA"), enacted by Congress in 1991, specifically directed the Interstate Commerce Commission ("ICC") to prescribe amendments to the existing standards concerning state registration of motor carriers operating in interstate commerce. 49 U.S.C. § 11506(c)(1).[2] One of the substantive provisions Congress ordered the ICC to enforce was a restriction on the imposition by any State of a registration fee higher than the fee the State had "collected or charged" as of November 15, 1991. 49 U.S.C. § 11506(c)(2)(B)(iv)(III).

Following an extensive period of notice and comment, the ICC issued regulations and other interpretations of the statute. *Single State Insurance Registration*, 9 I.C.C.2d 610 (1993). One of those interpretations concerned the effect of reciprocity

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[2] For consistency with the opinions below and most of the briefs filed in this Court, we cite the statute's former codification at 49 U.S.C. § 11506, rather than its current recodification at 49 U.S.C. § 14504.

agreements between the States. Agreeing with comments submitted by *amicus* ATA and other motor carrier interests, the ICC determined that States are not permitted to circumvent the congressional freeze on registration fees, or the congressional intent to reduce the burden on motor carriers, by rescinding or otherwise altering reciprocity agreements that had been in effect as of November 15, 1991. Pet. App. 52a-54a. The ICC understood that this result was "required by § 11506(c)(2)(B)(iv)." Pet. App. 54a.

Several States challenged the ICC's conclusions regarding reciprocity agreements, but a unanimous panel of the D.C. Circuit sustained the ICC's interpretation of the statute. *National Ass'n of Reg. Util. Comm'rs* v. *ICC*, 41 F.3d 721 (D.C. Cir. 1994) (*NARUC*). The D.C. Circuit concluded that "the Commission was correct" in basing its interpretation on "the plain language of the statute." *Id.* at 729.

In 1990 and 1991, Michigan used a "base-plated" reciprocity system, under which Michigan did not assess fees on any vehicle registered or license-plated in a State that "did not charge Michigan-based carriers a fee." Br. in Opp. App. 3b. In 1991, Michigan changed from base-plated reciprocity to principal-place-of-business reciprocity. Br. in Opp. 3. This shift "was scheduled to become effective in February 1992." Pet. App. 5a. Because of the change in method of determining reciprocity, a particular set of carriers, including *amici* Schneider National and ABF Freight System, no longer qualified for reciprocal fee waivers effective February 1992. Br. in Opp. 5-6. In September 1991, Michigan mailed renewal applications and fee assessments to motor carriers for the 1992 registration year. *Id.* at 5. The 1992 fee assessments were "payable no later than December 31, 1991." *Id.* at 17 n.7.[3]

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[3] The assertion in respondents' brief in opposition that payment was due December 31, 1991, is a concession that payment was *not* due before November 15, 1991, the only date to which the statute attaches significance. Therefore, *amici* accept the Decem-

Petitioner returned its application form on October 3, 1991, along with full payment. *Id.* at 6.

In response to a petition by *amicus* ATA, the ICC "instituted a declaratory order proceeding and solicited public comment" on whether certain actions by the States were consistent with the ISTEA. *American Trucking Associations – Petition for Declaratory Order – Single State Insurance Registration*, 9 I.C.C.2d 1184, 1185 (1993). In that proceeding, the ICC addressed "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," and determined that "the statutory language concerns only fees charged or collected for the 1991 registration year." *Id.* at 1195.

Michigan notified certain companies that it would charge a registration fee for the 1994 registration year (after the ISTEA became effective) to companies that had not paid a registration fee for the 1991 registration year because of reciprocity agreements. One of those companies, petitioner Yellow, brought suit in state court. The state trial and intermediate appellate courts both ruled for Yellow and against Michigan. Both deferred to the views of the ICC, as expressed not only in its rulemaking proceeding, but also in its *ATA* declaratory order proceeding.

The Michigan Supreme Court reversed by a divided vote. According to the majority, "in determining the 'fee * * * collected or charged' under 49 U.S.C. 11506(c)(2)(B)(iv)(III), Michigan's reciprocity agreements are irrelevant" (Pet. App. 3a)

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ber 31 date for purposes of this brief. It appears to *amici*, however, that the date is not in fact correct. "Cab card stamps are issued effective February 1 of the year for which they are issued and expire on January 31 in the succeeding calendar year." Br. in Opp. App. 28b-29b. *Amici* are aware of nothing that required payment by December 31 for a stamp that was not to become effective until more than a month later on February 1.

because "the clear focus of [that provision] is on the generic 'fee' that Michigan charged or collected as of November 15, 1991" (*id*. at 10a).

In opposing the petition for a writ of certiorari, respondents made little effort to defend the rationale of the Michigan Supreme Court. Instead they noted that they billed and Yellow voluntarily paid – before November 15, 1991 – fees that were assessable under a new Michigan policy "scheduled to become effective in February 1992." Pet. App. 5a. Although the ICC had rejected this exact contention in the *ATA* declaratory judgment proceeding, the two lower courts in Michigan had rejected it also, and the Michigan Supreme Court had not reached it, respondents maintained that prepayment before November 15, 1991, of fees due after November 15, 1991, should allow Michigan to charge those fees in perpetuity.

SUMMARY OF ARGUMENT

The ISTEA requires a fee set at the level actually charged as of November 15, 1991, not the level that a State *could have* charged in the absence of a reciprocity agreement. The statute makes no direct reference to reciprocity agreements, but neither does it refer to "generic" fees. Under standard principles of deference to administrative agencies' contemporaneous interpretations reached through formal rulemaking, the ICC's decision not to ignore reciprocity agreements should have prevailed as the authoritative interpretation of the statute, either because that decision comports with the plain language or because the statute is – at worst – silent on the point. Moreover, the ICC's interpretation, unlike the Michigan Supreme Court's, furthers the congressional intent to benefit interstate carriers (and ultimately consumers) by eliminating unnecessary compliance burdens.

Michigan cannot defend the judgment on the ground – not addressed by the Michigan Supreme Court, and rejected by both lower Michigan courts – that respondents billed for and Yellow prepaid an amount not yet due on November 15, 1991. Again,

the language of the statute does not support Michigan's position. Furthermore, neither a State's prebilling of fees not yet due nor the fortuitous circumstances of prepayment should control application of the statute. Rather, Congress intended to freeze "the fees [States] charged *under the former program* as of November 15, 1991." H.R. Conf. Rep. No. 102-404, at 438 (emphasis added). Prebilling or prepayment of fees under a program that was to come into effect on February 1, 1992, should not affect application of the statute. The ICC so determined, and again its interpretation is entitled to deference. A contrary ruling would result in windfall revenue gains to the States, contrary to the purpose of the ISTEA.

ARGUMENT

I. THE TEXT OF THE STATUTE AND THE ICC'S INTERPRETATION OF THE STATUTE REQUIRE THE CONSIDERATION OF RECIPROCAL AGREEMENTS IN DETERMINING THE FEE THAT WAS "COLLECTED OR CHARGED AS OF NOVEMBER 15, 1991"

The text of the ISTEA requires each participating State 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." 49 U.S.C. § 11506(c)(2)(B)(iv)(III). With that language, the statute requires a fee set at the level actually charged as of November 15, 1991, not the level that a State *could have* charged in the absence of a reciprocity agreement. In parallel circumstances, this Court has interpreted a statute whose operative verb form was indicative, rather than subjunctive or conditional, to require an inquiry into actual rather than hypothetical circumstances. *Sutton* v. *United Air Lines, Inc.*, 527 U.S. 471, 482 (1999) ("Because the phrase 'substantially limits' appears in the Act in the present indicative verb form, we think the language is properly read as requiring that a person be presently – not potentially or hypothetically – substantially limited in order to demonstrate a disability. A 'disability' exists

only where an impairment 'substantially limits' a major life activity, not where it 'might,' 'could,' or 'would' be substantially limiting if mitigating measures were not taken."). So too here, what fee Michigan "might," "could," or "would" have collected or charged is simply not what the statute's words make important.

The Michigan Supreme Court admitted that a vehicle registration fee "may be waived, and thus not 'charged or collected,' for a particular carrier under a reciprocity agreement." Pet. App. 10a. Having admitted that the statutory language required recognition that reciprocity agreements *do* affect the fees "charged or collected," however, the court proceeded in the same sentence and the next one to announce – *ipse dixit* – that "such voluntary agreements to waive the fee that happen to benefit a particular carrier do not affect the *generic* per vehicle fee in place on November 15, 1991. As stated, the clear focus of 49 U.S.C. § 11506(c)(2)(B)(iv)(III) is on the generic 'fee' that Michigan charged or collected as of November 15, 1991, and not on whether that fee was charged to or collected from a particular carrier." Pet. App. 10a. Although "generic" is not a term that appears in the statute, the court perceived the ICC – not itself – to have "added a concept not within the express language of the statute" because the ICC had "consider[ed] * * * voluntary agreements between the states to waive or reduce the fees imposed." *Id*. at 10a-11a.

Of course, it was the ICC that paid attention to the language of the statute, freezing fee levels at those "collected or charged as of November 15, 1991," without regard to whether non-collection or waiver of charges resulted from "generic" fee setting or reciprocity agreements. It was the Michigan Supreme Court that, in its own words, "added a concept" – "generic" fees – "not within the express language of the statute." Purely as a matter of statutory language, it is hard not to agree with the D.C. Circuit that "the plain language of the statute precludes [the Michigan Supreme Court's] interpretation." *NARUC*, 41 F.3d at 729.

But there are other things besides statutory language that make the Michigan Supreme Court's conclusion utterly indefensible. Under the rules of judicial deference to administrative determinations set out in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984), the fact that Congress has directed the ICC to promulgate rules implementing the relevant portion of the ISTEA is a particularly weighty reason to defer to the agency. In this situation, agency interpretations are to be "given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 844.

In *United States* v. *Mead Corp.*, this Court reaffirmed the *Chevron* framework. 533 U.S. 218, 227-28 (2001). This Court stated that one "very good indicator" of congressional delegation is an "express congressional authorization[] to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed." *Id.* at 229. The Court continued, "It is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force." *Id.* at 230.

In this case, Congress explicitly entrusted interpretation of the statute to the ICC. Congress specifically directed the ICC to prescribe standards under which motor carriers would be required to register annually with only one State and such single state registration would be deemed to satisfy the registration standards of all other States. 49 U.S.C. § 11506(c)(1). It further specified that the ICC's standards "shall establish a fee system for the filing of proof of insurance [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 charged as of November 15, 1991." 49 U.S.C. § 11506(c)(2)(B)(iv)(III).

The ICC arrived at its interpretation of the ISTEA only after completing an extensive notice-and-comment period. See

Pet. App. 83a-84a (listing commentors). The ICC concluded that both "the letter of the law" and "the intent of the law" compel the conclusion that "participating States must consider fees charged or collected under reciprocity agreements when determining the fees charged or collected as of November 15, 1991." *Id.* at 53a, 54a.

The ICC's interpretation of the ISTEA was subject to even further administrative consideration. After certain States ignored the ICC's final ruling, *amicus* ATA was forced to bring a petition for a declaratory order before the ICC. See *American Trucking Associations – Petition for Declaratory Order – Single State Insurance Registration*, 9 I.C.C.2d 1184 (1993). In that proceeding, the ICC once again reviewed its determination, and it decided to "reaffirm" its "prior conclusion" that "[t]he language of the statute is clear": it is inconsistent with the statute for a State to renounce or modify a reciprocity agreement so as to alter any fee charged or collected as of November 15, 1991, under the predecessor registration system. *Id.* at 1194.

The most charitable possible reading of the statute is that it refers to *neither* "generic fees" (a term the Michigan Supreme Court would read into the statute) *nor* voluntary agreements between the States to waive or reduce the fees imposed (a term the Michigan Supreme Court believes the ICC read into the statute). Read in such a charitable fashion, the statute could be deemed silent on the question presented in this case. But that, too, would be fatal to the position of the Michigan Supreme Court. For "such silence, after all, normally creates ambiguity. It does not resolve it." *Barnhart* v. *Walton*, No. 00-1937, 2002 WL 459209, at *5 (U.S. Mar. 27, 2002) (slip op. 5). And in such circumstances of ambiguity the courts may not substitute their interpretations for permissible agency interpretations. *Ibid.*; *Edelman* v. *Lynchburg College*, 70 U.S.L.W. 4198, 4203 (U.S. Mar. 19, 2002) (O'Connor, J., concurring in the judgment) (slip op. 3).

There are additional reasons to defer to the ICC's reasonable interpretation of the statutory language rather than accept the Michigan Supreme Court's *ipse dixit* that the *only* way to read the statute is that court's. For one thing, the ICC's interpretation was adopted in the statutorily mandated rulemaking *immediately* after the statute was passed, and thus is – within the context of this statutory scheme – a longstanding interpretation. The longstanding nature of the agency's interpretation in this case entitles it to particular deference. *Walton*, 2002 WL 459209, at *5 (slip op. 7); *Aluminum Co. of America* v. *Central Lincoln Peoples' Utility District*, 467 U.S. 380, 390 (1984) (*Alcoa*); *North Haven Board of Education* v. *Bell*, 456 U.S. 512, 522 n.12 (1982).[4]

Furthermore, the ICC's interpretation of the statute is consistent with the congressional statement that the single state registration system "is intended to benefit the interstate carriers by eliminating unnecessary compliance burdens" and "ultimately, consumers will also benefit from the cost savings associated with the elimination of the [prior] program." H.R. Conf. Rep. No. 102-404, at 437 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1679, 1817. Congress wished to protect against

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[4] This Court gave "particular force" to a longstanding administrative interpretation in *Alcoa*, 467 U.S. at 390, the very same month it decided *Chevron*. The most often cited pages of *Chevron*, 467 U.S. at 842-44, are full of footnotes (*id*. at 842-44 nn.9 & 11-14) citing some 27 prior decisions of the Court, dating back as far as 1827, in support of the deference principles the Court announced in *Chevron*. Among the decisions the Court cited as an unbroken string of precedent requiring the principles announced in *Chevron* was *Alcoa*. See 467 U.S. at 844 n.14. The Court concluded the relevant part of its opinion by declaring that the court of appeals had erred "[i]n light of these well-settled principles." 467 U.S. at 845. The principle of particular deference to longstanding agency interpretations is supported by *Chevron*'s predecessors, its contemporaries, and its descendants.

a *diminution* in state revenues,[5] but it understood that allowing States to *increase* revenues over prior levels would result in a burden on interstate commerce. The ISTEA contains a declaration to that exact effect. See 49 U.S.C. § 11506(c)(2)(C) (Pet. App. 101a); see also Pet. App. 53a-54a (ICC's determination that Congress's intent was "that the flow of revenue for the States be maintained while the burden of the system for carriers be reduced").

As *amicus* ATA argued before the ICC, see Pet. App. 53a, rescission of reciprocity agreements would allow States to increase per-vehicle fees quite substantially. If all 39 States eligible to participate in the Single State Registration System had adopted the "generic fee" rule of the Michigan Supreme Court, then even back in 1993 State revenues could have increased fourfold, from $50 million to $200 million. *Ibid.* And, as the Solicitor General pointed out at the petition stage, "[t]he number of vehicles potentially subject to fees under the Single State Registration System has more than doubled since the ICC's rulemaking, and the potential aggregate fee increase therefore has increased proportionately." U.S. Amicus Br. 11 (filed Jan. 2, 2002).

Such a rescission of reciprocity agreements would mean windfall gains to States. Pet. App. 54. Contrary to congressional intent, it would result in added burdens on motor carriers and prevent a corresponding benefit to consumers from the pass-through of cost savings. For this reason, the ICC's "interpretation makes considerable sense in terms of the statute's basic objectives," *Walton*, 2002 WL 459209, at *5 (slip op. 6), and thus is to be preferred over the Michigan Supreme Court's contrary interpretation.

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[5] For a description of the legislative compromise that protected States' revenues while also reducing carriers' costs through a streamlined registration system, see *NARUC*, 41 F.3d at 724; U.S. Amicus Br. 10 n.1 (filed Jan. 2, 2002).

II. EARLY PAYMENT, UNDER A FEE SYSTEM NOT IN EFFECT, SHOULD NOT BE CONSIDERED "COLLECTED OR CHARGED AS OF NOVEMBER 15, 1991"

Arguing against a writ of certiorari, respondents took the position that the State of Michigan's "actions are lawful" because the State "charged and collected the challenged $10 per vehicle fee from Petitioner prior to November 15, 1991." Br. in Opp. 8; see also *id*. at 12. Because respondents billed for and Yellow paid an amount not yet due on November 15, 1991, the State argues, "the result in this case would be the same regardless of how the [reciprocity] conflict is decided." *Id.* at 7.

Although this Court has limited the question presented in this case in a way that may be read to exclude this issue from consideration, *amici* are not allowed a reply brief and cannot await respondents' brief on the merits to determine whether respondents will continue to press this defense of the judgment below on alternative grounds. This issue, no less than the issue addressed above, is of vital interest to *amici*, so we will address the State's argument here.

It is not clear which pre-November 15 event drives the State's proposed alternative construction. At times, the State seems to attach significance to the mere mailing of an invoice. *E.g.*, Br. in Opp. 17 n.7 ("[T]he 1992 fee renewal applications * * * 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.") (emphasis added). At other times, the State seems to attach significance to the happenstance of Yellow's early payment of 1992 fees in October 1991. *E.g.*, Br. in Opp. 20 ("Michigan actually collected $10 per vehicle from Yellow Freight before November 15, 1991, and without protest."). Yet a footnote in the brief in opposition reflects evident discomfort at reliance on that happenstance. *Id*. at 17 n.7 ("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."). Whichever of those positions respondents mean to adopt, their position is wrong. Given the statutory language, the statutory purposes, and the ICC's interpretation of the ISTEA, basing the new fee system on a fee assessment mailed *or* an early payment made under a reciprocity system that did not become effective until February 1992 does not comply with the fee system mandated by the ISTEA.

Michigan's improper reading of the statute would allow fortuitous or evasive actions to determine the level of fees under the new fee system. Respondents argue that the State "collected" the higher fee from petitioner as of November 15, 1991. Br. in Opp. 8. That "collection" was purely fortuitous. The fee assessment sent by the State was not due until December 31, 1991 (or January 31, 1992). Pet. App. 17 n.7; note 3, *supra*. If petitioner's accounting department waited until the due date to pay the assessment or if the payment got lost in the mail, then, under respondents' interpretation, the State would not have "collected" the higher fee as of November 15, 1991. Similarly, respondents' reading of "charged" would allow States to engage in evasive behavior merely to raise the level of permissible fees and dodge the congressional intention that the new system result in "cost savings" to the motor carriers. H.R. Conf. Rep. No. 102-404, at 437 (1991), *reprinted in* 1991 U.S.C.C.A.N. at 1817. For example, in anticipation of congressional action, States could have changed their fee schedules prospectively and mailed out fee assessments for anticipated future fees not yet in effect and not scheduled to be in effect for some time. Under respondents' reading (or at least the reading respondents advance at some places in their brief in opposition), the mere mailing of those fee assessments would be sufficient to establish a new fee level.

A better reading of the statute is that this language freezes the fee system *in effect* as of November 15, 1991. This interpretation gives meaning to the November 15, 1991, date

and freezes fees according to the fee system in place, not the random or evasive actions of motor carriers or the States. Moreover, this reading of the statute conforms with congressional intent. Explaining the new fee system, the House Conference Report stated, "States will not be allowed to charge a greater fee * * * than the fee they charged *under the former program* as of November 15, 1991." H.R. Conf. Rep. No. 102-404, at 438, *reprinted in* 1991 U.S.C.C.A.N. at 1818 (emphasis added). The words "under the former program as of November 15, 1991" demonstrate that Congress intended to freeze the fees charged under the program in effect as of November 15, 1991.[6]

Michigan did not require motor carriers operating Illinois-plated vehicles in the State on November 15, 1991, to pay a registration fee in order to operate in the State on that date. See Br. in Opp. App. 3b. An Illinois-plated truck newly put into service on Michigan's roads on November 1, 1991, for example, had absolutely no obligation to pay $10 to Michigan for the privilege of operating through November 15, 1991 (and indeed could obtain without fee a stamp authorizing it to operate in Michigan through January 31, 1992, *id.* at 28b-29b). The disputed fee in this case was charged and collected pursuant to an agreement that was not effective until February 1992. Pet. App. 5a. The Court should not consider fees charged or payments collected pursuant to an agreement not in effect on November 15, 1991. As the Michigan Court of Appeals stated, the "voluntary payment of fees not due and owing does not affect [the] analysis" of this issue. Pet. App. 28a.

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[6] The ICC decision provides additional support for this interpretation. In examining the impact of reciprocity agreements on the fee charged or collected as of November 15, 1991, the ICC agreed with *amicus* ATA that the fee should be set according to "the terms of [reciprocity] agreements *in effect* as of November 15, 1991." Pet. App. 53a (emphasis added).

The Michigan Court of Appeals further stated, "Congress' intent concerning the allowable fee levels is not clear with respect to the pertinent period for fixing the fee levels." *Ibid.* As the court noted, "the statute is silent regarding when the period begins. One could argue a state that had charged or collected fees from a carrier in any year before 1991 was entitled to continue to collect the fees under the SSRS. On the other hand, one could conclude, as the ICC did, that the relevant period was the registration year that included November 15, 1991." *Ibid.* That analysis is, if anything, overly favorable to the State: as petitioner demonstrates, the language of the statute is more naturally read to refer to fees that affected a carrier's right to operate in a State on November 15, 1991, not to prebillings or prepayments. In any event, the statute is at worst ambiguous. Under the *Chevron* framework, courts should defer to the agency's interpretation of ambiguous statutory language.

Again, it is important that Congress in the ISTEA instructed the ICC to implement the statute through rules. *Chevron*, 467 U.S. at 842-45; *Mead*, 533 U.S. at 227-30. "The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Chevron*, 467 U.S. at 843 n.11. In this case, the ICC's construction of the ISTEA, which followed a notice-and-comment period, is entitled to such deference.

In the *ATA* declaratory order proceeding, petitioner Yellow asked the ICC to consider "whether the statutory language concerning the fee charged on November 15, 1991, relates to fees charged for the 1991 registration year or the 1992 registration year." *American Trucking Associations – Petition for Declaratory Order – Single State Insurance Registration*, 9 I.C.C.2d 1184, 1192 (1993). Petitioner argued that "the focus of the statute is on the 1991 registration year and that the fee for 1992 is not germane." *Ibid.* The ICC determined, "We think it clear that the statutory language concerns only fees charged

or collected for the 1991 registration year, and we so find." *Id.* at 1195.

Of course, the statute refers to a specific date – November 15, 1991 – rather than to a whole calendar year, and the specificity of the date should be given some effect. But the ICC's interpretation, though perhaps phrased in shorthand, does exactly that. Fees charged pursuant to an agreement or other law or regulation *in effect* on November 15, 1991, or *allowing vehicles to travel on the taxing State's roads* on November 15, 1991, may be charged under the ISTEA. But fees that had no legal effect on November 15 – and merely were billed but not yet due, or merely happen to have been received before November 15 pursuant to agreements *not* in effect on November 15 – may not be charged under the ISTEA.

Whether or not this is the only possible reading of the statute (which of course does not in terms contemplate demands for or the voluntary prepayment of fees not yet due and owing), it surely is a reasonable, and hence permissible, one. "The statute's complexity, the vast number of [trucks and trucking companies it affects], and the consequent need for agency expertise and experience [should] lead [the Court] to read the statute as delegating to the Agency considerable authority to fill in, through interpretation, matters of detail related to its administration." *Walton*, 2002 WL 459209, at *9 (slip op. 13). If ever there was a "matter[] of detail" suitable for agency decisionmaking, this is it, all the more so because the agency's interpretation is consistent with the statute's purpose to keep in check the burden of fees on interstate commerce.

A ruling for the State on this ground, no less than a ruling for the State on the ground that reciprocity agreements are "irrelevant" (Pet. App. 3a), would have the result that "States could realize windfall revenue gains" (Pet. App. 53a). Indeed, although the ICC used the term "windfall" in connection with ignoring reciprocity agreements, it is even more applicable to respondents' alternative argument, which would make the

application of the statute turn on whether a State demanded, or a particular carrier paid, its 1992 fee more, or less, than 47 days before the claimed due date of December 31, 1991. See also note 3, *supra*. Nothing in the statute so plainly requires that result as to deprive the ICC of the usual deference. As the lower Michigan courts concluded (and the Michigan Supreme Court did not dispute), respondents should lose on this issue as well as on the principal issue on which the Court granted certiorari.

CONCLUSION

The judgment of the Michigan Supreme Court should be reversed.

Respectfully submitted.

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APRIL 2002