

1 IN THE SUPREME COURT OF THE UNITED STATES
2 - - - - -X
3 YELLOW TRANSPORTATION, INC. , :
4 Petitioner :
5 v. : No. 01-270
6 MICHIGAN, ET AL. :
7 - - - - -X
8 Washington, D. C.
9 Monday, October 7, 2002
10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States at
12 10:07 a.m.
13 APPEARANCES:
14 CHARLES A. ROTHFELD, ESQ., Washington, D. C. ; on behalf of
15 the Petitioner.
16 AUSTIN C. SCHLICK, ESQ., Assistant to the Solicitor
17 General, Department of Justice, Washington, D. C. ; on
18 behalf of the United States, as amicus curiae,
19 supporting the Petitioner.
20 THOMAS L. CASEY, ESQ., Solicitor General of Michigan;
21 Lansing, Michigan; on behalf of the Respondents.
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P R O C E E D I N G S

(10:07 a.m.)

CHIEF JUSTICE REHNQUIST: The first case this morning in which we'll hear argument is No. 01-270, Yellow Transportation, Inc. v. Michigan.

Mr. Rothfeld.
ORAL ARGUMENT OF CHARLES A. ROTHFELD
ON BEHALF OF THE PETITIONER

MR. ROTHFELD: Thank you, Mr. Chief Justice, and may it please the Court:

The issue in this case is a narrow one, but it has considerable practical importance for the continuing flow of interstate commerce.

In 1991, Congress enacted a statute that was designed to ease the burdens that State registration fees impose on trucks that travel interstate. To help accomplish that purpose, the statute provides that a State's registration fee may not exceed the fee that the State collected or charged as of November 15th, 1991.

The question here before the Court is whether that Federal standard precludes a State from now imposing a fee on a category of trucks when the State waived the fee as to that category of trucks and therefore did not actually collect or charge it as of the controlling date.

QUESTION: May I ask, did it waive the fee for

1 all carriers or just the carriers involved in this case?

2 MR. ROTHFELD: It -- it waived the fee for all
3 carriers in the category that are involved in this case.
4 The State had in place a reciprocity policy.

5 QUESTION: But did it waive the fee for all
6 carriers in the State?

7 MR. ROTHFELD: I do not believe. There is
8 actually nothing in the record, Justice Stevens, that
9 indicates how many States paid fees -- how many trucks
10 paid fees and how many did not. It's my -- our
11 understanding that there were trucks that were not
12 benefitting from the reciprocity policy and therefore they
13 would have paid fees. So I think -- I think that the
14 answer, although not reflected in the record, is that some
15 trucks paid fees and some did not.

16 QUESTION: Thank you.

17 MR. ROTHFELD: As I say, the question is whether
18 if there is a fee that is waived as to a category of
19 trucks in 1991, whether or not that waiver must continue
20 to remain in place currently because of the --

21 QUESTION: You -- you say as to a category of
22 trucks. Why do you add that qualification? Why shouldn't
23 it be true, if you're right, that if a truck -- if a fee
24 was waived as to any truck, it should remain in place?

25 MR. ROTHFELD: Well, we think that the inquiry

1 that's posed by the statute is how were trucks of a
2 particular type treated. And for example, imagine if a
3 State had in place a sliding scale of fees as to different
4 types of trucks at \$10 for red trucks, \$5 for white
5 trucks, and nothing for blue trucks. The statute refers
6 to in -- in terms -- it says that the State's fee must
7 equal the fee not to exceed \$10 per vehicle that the State
8 collected or charged as of November 15th, 1991. Well,
9 what in that -- in that circumstance, what is the fee that
10 the State charged when there are these different
11 categories of trucks?

12 We think it has to be understood to mean the fee
13 that the State charged to trucks of that type, and so, as
14 I say, in 1991 in Michigan trucks of a particular type,
15 trucks that were base-plated in the State of Illinois,
16 were not subject to fees. We, therefore, think that under
17 the plain language of the statute, the same policy has to
18 apply to trucks in that category now.

19 QUESTION: Now, was there some change as of 1992
20 in connection with the fee applicable here?

21 MR. ROTHFELD: There was a change that was
22 announced for the 1992 registration.

23 QUESTION: Yes, and I guess that isn't before
24 us --

25 MR. ROTHFELD: Well, that -- that --

1 QUESTION: -- in this case.

2 MR. ROTHFELD: To elaborate on -- on Justice
3 O'Connor's question, in 1991, the 1991 registration year,
4 there is no question, and it is undisputed, that for the
5 entitlement to operate in the State in 1991, on November
6 15th, 1991, the date identified as -- as crucial in the
7 statute, trucks that were base-plated in States that had
8 reciprocity understandings with -- with Illinois did not
9 have to pay fees. And therefore, Yellow Transportation,
10 the petitioner here, whose trucks were base-plated in --
11 in Illinois did not pay fees.

12 It is true, Justice O'Connor, that in -- towards
13 the end of 1991, prior to November 15th, the State
14 announced a change for the 1992 registration year, and
15 Yellow, being a diligent taxpayer, actually paid for 1992
16 prior to November 15th.

17 QUESTION: What does the term base-plated mean?

18 MR. ROTHFELD: Base-plated means that plates,
19 license plates, were issued by that State. So the State
20 -- the title for the vehicles were in those States.
21 Those --

22 QUESTION: When you say base-plated in Illinois,
23 then that means the title was issued in Illinois --

24 MR. ROTHFELD: The title --

25 QUESTION: -- and it had Illinois license plates

1 on its truck?

2 MR. ROTHFELD: Either Illinois license plates or
3 plates that were issued through Illinois. There -- this
4 goes beyond any issue that's presented here, but there is
5 a understanding between the States, the International
6 Registration Plan, and there are international
7 registration plates that can be provided by -- by any
8 State, but it's provided through a single State. And so
9 the license plates here for Yellow trucks, it is sort of
10 undisputed, were provided by Illinois. So there is no
11 question that within the understanding of -- of the
12 Michigan scheme in 1991, the Yellow trucks were based in
13 Illinois and therefore benefitted from the reciprocity
14 policy in place in -- in Michigan.

15 QUESTION: Your -- your test that you propose is
16 that it's the type of truck. It -- I take it there's
17 nothing in -- in the statute or in regulatory
18 pronouncements that talk about types of trucks unless it's
19 the number of axles or something. But type of truck, it
20 seems to me, can be applied in the generic way that
21 Michigan argues. It's a type of truck because it was
22 within the exemption or without the exemption.

23 MR. ROTHFELD: Well, let me be clear what I --
24 what I mean by that, Justice Kennedy. I don't mean type
25 of truck in terms of the number of axles or -- or the

1 weight of the truck. I -- I mean the category -- the rule
2 that the State applied in 1991 -- the State had in place a
3 system of rules that applied, different -- as we know,
4 different fees to different types of trucks. Let me give
5 you an example.

6 Imagine that the State had a scheme in place in
7 which it charged \$10 for red trucks, \$5 for white trucks,
8 nothing for blue trucks, as I suggested before. What is
9 the -- what is the fee that the State applied? You have
10 to say the fee the State applied to who and look at the
11 rule that the State would have applied in 1991. And that
12 means identifying the type of truck in the sense of how
13 would the rule categorize it. And Congress has frozen in
14 place, we believe, the rules that governed fee levels at
15 the time.

16 If that were not the approach one took and there
17 were these different --

18 QUESTION: May I ask, under your hypothetical,
19 would that rule have prevented the company from repainting
20 its trucks, paint the blue trucks white or the white
21 trucks red, to get in a different category, which is what
22 happened here? They moved from one place of registration
23 -- one rule where the trucks were licensed to a place of
24 the home office or something like that. So could they
25 have later repainted their trucks? Or in this case, could

1 they 2 years later have moved -- changed the -- the rule
2 on -- on which -- whether it's a place of licensing or the
3 home office?

4 MR. ROTHFELD: Well, if -- if the question,
5 Justice Stevens, is whether the -- the fee payer could
6 avoid the fee by somehow modifying its trucks --

7 QUESTION: No, no, no. Whether the State could
8 change its -- its -- as it did here. It did it in one
9 year. Could it have done the same thing, say, 3 years
10 later?

11 MR. ROTHFELD: Our -- our understanding, Your
12 Honor, is that that -- the State could not do that. We
13 think that Congress has frozen in place expressly by the
14 terms of the statute --

15 QUESTION: Locked in permanently to 1991. So
16 even if -- let's say, the reciprocity agreement persists
17 in 1991, but Michigan wants to change it in 1993 and '94.
18 It cannot. It's locked in forever to a reciprocity
19 agreement that it made with its sister State only for the
20 year 1991. Is that your reading?

21 MR. ROTHFELD: Yes, and let me explain how we
22 think that applies.

23 First, the statute went into effect in 1994,
24 although it was enacted in 1991. So in the intervening
25 years, the State could have done whatever -- whatever it

1 wished.

2 We think that Congress has frozen the fee levels
3 in place. Now, whether those fee levels were established
4 by reciprocity rule or by unilateral State law or by
5 administrative fiat, it wouldn't matter. The State had in
6 place in 1991 a policy that said trucks of a certain
7 character, trucks in this instance license plated in a --
8 in Illinois, were not subject to fees. Fees were not
9 demanded from those trucks. They weren't collected. They
10 weren't charged. Those trucks did not have to pay a fee
11 to entitle them to operate on the State's roads as of the
12 relevant period. And that being the case, we think
13 Congress, which said the State's fee must equal the fee,
14 not to exceed \$10 per vehicle --

15 QUESTION: Well, Mr. Rothfeld, the problem I
16 have with -- with your -- your argument is how does one go
17 about identifying the category? Is the category Michigan
18 trucks, or is the category trucks subject to a reciprocity
19 agreement so that if a reciprocity agreement that used to
20 exist with Michigan were canceled, or if -- if a -- for
21 that matter, a reciprocity agreement that did -- that used
22 to not exist with New York were adopted, you come into the
23 category or go out of the category, depending upon whether
24 you have a reciprocity agreement? What category are --
25 are you urging, and why do you pick that category instead

1 of -- instead of another one?

2 MR. ROTHFELD: Well, we are picking the category
3 that we think is -- was selected by Congress because
4 Congress said the fee in place in 1991 is frozen. And so
5 if that --

6 QUESTION: For -- for the particular truck, or
7 for the particular State as to which there is a
8 reciprocity agreement, or with respect to any State as to
9 which there is a reciprocity agreement? It's hard to
10 figure out which category they -- they were talking about.

11 MR. ROTHFELD: Well, I think that it's not
12 complex in practice. I think that what Congress was
13 asking the State to do is look at how it would have
14 treated a truck of this type in 1991.

15 QUESTION: That's -- that's the key word, of
16 this type.

17 MR. ROTHFELD: Well --

18 QUESTION: But what type?

19 MR. ROTHFELD: Well, of whatever --

20 QUESTION: Owned by this company?

21 MR. ROTHFELD: No, no.

22 QUESTION: Or from this State, or subject -- or
23 from a State that has -- that currently has a reciprocity
24 agreement?

25 MR. ROTHFELD: I think one would consider the

1 rule that was in place in the State just as it did in 1991
2 and say here's a truck, this truck is base-plated in
3 Illinois. That is a characteristic this truck has, which
4 is relevant under our rule, because our rule says under
5 our existing reciprocity policy, we will not impose a fee
6 on a truck that has its license plate issued by Illinois.
7 Therefore, this truck is not subject to a fee.

8 If such a truck comes along in 1995, after the
9 statute goes into effect -- and I should say the statute
10 here is the refreshing acronym, ISTEA, the Intermodal
11 Surface Transportation Efficiency Act. When the ISTEA
12 statute went into effect, this same -- same truck goes
13 into the State of Michigan. It has characteristics which
14 waive the fee to -- as to it, had this truck been there in
15 1991, those same characteristics make the State waive the
16 fee as to it now, because Congress has -- has used the
17 term the State may not charge fees that it was not
18 charging in 1991. Again, the precise language is the
19 State's fee must equal the fee that the State collected or
20 charged.

21 QUESTION: Well, Mr. --

22 QUESTION: What about new vehicles? What about
23 a vehicle purchased, say, in 1995 base-plated in Illinois?

24 MR. ROTHFELD: If such a vehicle is base-plated
25 in Illinois, that is the characteristic that is made

1 relevant by the State's rule in place in 1991.

2 QUESTION: So it's not only vehicles that
3 existed in 1991, it's any vehicle thereafter acquired.

4 So one -- one element of this is that Michigan
5 could not, on your reading, go over to the principal place
6 of business, which in this case is -- I take it, is Kansas
7 with no -- no reciprocity with Michigan -- could not
8 change that. Everything is frozen forever under ISTEPA.
9 Is that your view?

10 MR. ROTHFELD: That -- that is our view, and we
11 think --

12 QUESTION: Well that's one of your views.

13 And may -- may I ask you about the -- the answer
14 you didn't give to Justice Scalia? Let's assume the
15 statute isn't as clear as -- as you are arguing that it
16 is. Isn't this the point at which you say, if it's not
17 that clear, Chevron controls the answer?

18 MR. ROTHFELD: That -- that is absolutely
19 correct, Justice Souter. And if -- it is our view that
20 the -- that the statutory language is -- is unambiguous,
21 but if we are wrong about that and if there is any
22 opportunity to find any sort of -- any wiggle room for the
23 State in the statute, there is no doubt that the statute
24 does not unambiguously require that reciprocity --
25 requires States to -- to change their reciprocity rules

1 because the State -- the -- the statute refers, as I say,
2 only to the fee that was charged. It certainly doesn't
3 say that States may change rules, particular types of
4 rules. And that being the case, Chevron deference is
5 mandatory.

6 Here, in fact, agency deference should be at its
7 height. The agency here was expressly delegated by
8 Congress the responsibility for promulgating
9 interpretations of the ISTEA legislation. It conducted
10 notice and comment rulemaking. It received dozens of
11 comments from all interested parties, including the State
12 of Michigan. It issued regulations. It issued formal
13 interpretations of the statute. It published a closely
14 reasoned explanation for its conclusion. And in those
15 circumstances, I think every member of the Court has
16 recognized that deference under Chevron principles is at
17 its height, and because I think it -- it simply cannot be
18 said that the statutory language is clearly inconsistent
19 with the approach taken by the agency, the agency's
20 approach must be dispositive.

21 And here, what the agency found, unambiguously
22 and expressly, dealing precisely with the question at
23 issue before the Court now, is that if States had
24 reciprocity policies in place in 1991, they may not amend,
25 change, rescind, modify those policies in such a way --

1 QUESTION: Well, but did they change their
2 reciprocity policy? They just changed the way of
3 identifying the State that's relevant for determining
4 whether a particular truck has to pay or not.

5 MR. ROTHFELD: Well, I -- I think that is, in
6 our view, a change in the reciprocity policy. The
7 reciprocity policy is determined by what -- by certain
8 factors. The State -- it could be a principal place of
9 business. It could be a different rule, place of license
10 plating.

11 QUESTION: Where in the regulations does it say
12 that the State may not do what it did here?

13 MR. ROTHFELD: The agency issued their
14 interpretations of its regulations, which were published
15 actually at two points. There -- there was a rulemaking
16 proceeding, and along with rulemaking proceeding, it
17 issued, as I said, formal interpretations of the statute
18 and its rules. There it indicated expressly that in its
19 view reciprocity agreements must be frozen and cannot be
20 modified.

21 A number of States indicated that they wanted to
22 change their reciprocity rules, and the commission then
23 held a second administrative proceeding --

24 QUESTION: Well, but did they change their
25 reciprocity -- did Michigan change its reciprocity

1 agreement with either Illinois or Arkansas in this case?

2 MR. ROTHFELD: Well, there is actually some
3 question as to whether there were formal reciprocity
4 agreements in place. There is no question Michigan had a
5 policy of providing fee waivers to trucks that were based
6 in States that in Michigan view provided equivalent
7 waivers to trucks that were based in Michigan. Applying
8 that policy in 1991, Michigan was of the view that
9 Illinois provided such a waiver for Michigan trucks, and
10 therefore, Michigan, under its policy announced by its
11 public service commission, provided equivalent waiver for
12 trucks that were based in Illinois. That was
13 unquestionably the rule that was in place in Michigan at
14 the relevant time, and because of that, we think, that was
15 the fee that was collected or charged.

16 To identify the fee that was collected or
17 charged or can now be collected or charged from a
18 particular truck that comes from the State, one has to
19 look at the rule that was in place then and say, what was
20 the fee that would have been applied then to this truck?
21 Under that approach, Michigan cannot now change its -- its
22 way of implementing reciprocity policies and therefore
23 charge trucks that would not have been charged at that
24 time.

25 If there are no further questions now, Your

1 Honor, I'll reserve the balance of my time.

2 QUESTION: Very well, Mr. Rothfeld.

3 Mr. Schlick, we'll hear from you.

4 ORAL ARGUMENT OF AUSTIN C. SCHLICK

5 ON BEHALF OF UNITED STATES,

6 AS AMICUS CURIAE, SUPPORTING THE PETITIONER

7 MR. SCHLICK: Mr. Chief Justice, and may it
8 please the Court:

9 Congress assigned responsibility for
10 implementing the single State registration system to the
11 Interstate Commerce Commission. The ICC determined that
12 when States apply the statutory fee cap, they must
13 consider the reciprocal fee reductions and reciprocal fee
14 waivers that were in place as of November 15th, 1991.
15 That interpretation serves the central purpose of the fee
16 cap provision, which was to grandfather the fees that were
17 in place as of 1991, but only those fees.

18 The Michigan Supreme Court's generic fee rule,
19 on the other hand, would convert Congress's grandfather
20 provision into a provision that would allow new fees.

21 The ICC's interpretation ensures that the capped
22 registration fee is equal to the fee that the State
23 actually collected or charged as of November 15th, 1991.
24 Congress did not set the cap at the amount that the States
25 could have charged. If Congress had wanted to do that,

1 the obvious thing to have done would have been to set the
2 cap at \$10, which is the amount that the ICC allowed all
3 carriers to charge as of November 15th, 1991.

4 QUESTION: Well, isn't there at least an
5 argument that Congress could have had that in mind by the
6 distinction between charged and collected? I mean, if
7 there is presumably a difference between them, then the --
8 then the reference to charge would be to a fee that was
9 not collected, which would get you to the point which you
10 said Congress could have but did not provide for by the --
11 by the flat \$10.

12 So, I mean, I -- I'm not -- I guess what I'm
13 saying is, unless I'm missing something, I don't think
14 your statutory argument compels the conclusion, but your
15 Chevron argument is -- is -- perhaps takes care of your
16 position.

17 MR. SCHLICK: Certainly the Chevron argument is
18 -- is essential to this case. We think that the most
19 natural reading of charge or -- of collected or charged,
20 though, is charged, demanded, collected, received.

21 QUESTION: Even though that was not the
22 commission's first view. The commission's first view of
23 this case is that the States would not be bound by the
24 reciprocity agreements and could charge -- whatever they
25 charged anyone, they could charge everyone.

1 MR. SCHLICK: That's right, Justice Ginsburg.
2 The ICC did, during the rulemaking proceeding, change its
3 interpretation. As the D.C. Circuit said in NARUC v. ICC,
4 that's what comment periods are for. And the -- the
5 commission ultimately relied not only on the plain
6 language of the statute, but also on the purposes
7 underlying the statute.

8 The conference report on ISTEA makes clear that
9 there were two purposes in -- in Congress's mind when it
10 drafted the statute. One was ensuring that -- ensuring
11 benefit to carriers, ensuring that the overall costs of
12 the -- of the State registration requirements were
13 minimized. The second was preserving existing State
14 revenues.

15 Michigan's approach, on the other hand, would
16 allow dramatic increases in the fee amounts, in this case
17 an increase from 0 to \$10 per truck, that would overwhelm
18 the administrative savings that Congress intended to
19 ensure through the single State approach.

20 That -- that also would be a very odd policy to
21 allow those increases since Congress would, in fact, have
22 been authorizing increases that the States themselves
23 chose not to implement as of 1991.

24 QUESTION: Let me just be sure you agree with
25 your colleague. You take the position that they could not

1 have changed the -- the State to which they give
2 reciprocity by changing from licensing State to State of
3 principal place of business, even if they had done it 2 or
4 3 years later.

5 MR. SCHLICK: As a general matter, that's
6 correct, but let me explain, Justice Stevens, the
7 particular problem presented here, which has not been
8 addressed by the ICC or the Department of Transportation
9 and that we think is preserved on -- on remand.

10 As of November 15th, 1991, Michigan arguably had
11 two different fee systems in place. The first was the fee
12 system for 1991. If Yellow Transportation had come to the
13 State of Michigan and said, we'd like to add an additional
14 truck to -- to our registration for this year, effective
15 immediately, Michigan would have -- it would have charged
16 and Yellow would have paid under the old reciprocity
17 arrangement, under which the fact that the truck was base-
18 plated, had a license plate for Illinois would have been
19 dispositive.

20 However, simultaneously, Michigan -- Michigan
21 was -- was demanding and Yellow paid fees under the 1992
22 reciprocity approach where the fact that the -- the truck
23 had a license plate from Illinois would not be relevant
24 and the fact that Yellow was headquartered in Kansas would
25 be relevant. The ICC did not determine in its American

1 Trucking Associations proceeding, which -- which is the
2 relevant one on this question, whether the -- whether that
3 sort of -- of conflict would be resolved in favor of the
4 old rule or the new rule. And that's the question that we
5 think should remain open on remand. As a matter of fact,
6 right now the --

7 QUESTION: I -- I don't understand. I thought
8 -- I thought '91 is the -- is the -- is the base period
9 that -- that's consulted. Why -- why would you use the
10 new rule?

11 MR. SCHLICK: The new rule would -- would be
12 implemented as -- as a result of this unusual situation,
13 unique in our -- in our experience, where there were two
14 -- where there two fee systems in place at the same time.

15 QUESTION: There was only one in '91. The
16 second one came in after '91. If you allow a new fee
17 system to -- to change things, you should -- you should
18 allow a new reciprocity agreement to change things. I --
19 I just don't see why this is a problem

20 MR. SCHLICK: Well, the unique feature here is
21 that both were in place and operational as of November
22 15th, 1991. And the -- that -- there's also a question of
23 whether the move to the new fee system --

24 QUESTION: They -- they were both operating in
25 '91?

1 MR. SCHLICK: That's right. As of November
2 15th, 1991, both were in place.

3 QUESTION: Okay. I -- I --

4 MR. SCHLICK: And operational. Yellow might --

5 QUESTION: I thought the change occurred in
6 January 1, 1992, but that's okay.

7 MR. SCHLICK: To answer your question, Justice
8 Scalia, the -- the change -- the new system became
9 effective for the 1992 registration year commencing
10 January 1st, 1992, but the charges were assessed in the
11 fall of 1991.

12 QUESTION: So if Yellow Freight hadn't paid
13 early, would this argument be off the board? In other
14 words, this -- this fee was paid. The 1992 paid -- fee
15 was paid before November 15th, '91. Suppose Yellow
16 Freight had waited till after January 1.

17 MR. SCHLICK: The significance of that, Justice
18 Ginsburg, would be something for the Department of
19 Transportation in a pending proceeding that's -- that is
20 open now to consider. That -- that's -- that question has
21 not been answered, the significance of -- of the date of
22 payment.

23 QUESTION: But you're suggesting there's a
24 possibility that somebody would be penalized for early
25 payment, for prompt payment.

1 MR. SCHLICK: No. I think there would be much
2 more to it than that. And again, this is -- this is a --
3 a unique situation. There have not been problems with
4 implementing this system, and the Department of
5 Transportation has before it a request for declaratory
6 ruling filed by Michigan, that was mooted by the Michigan
7 Supreme Court's decision which adopted this generic view
8 rule that moots out all these questions. And that
9 proceeding could be reopened if this Court were to remand
10 to the Michigan Supreme Court.

11 But the -- the specific significance of the date
12 on which Yellow made payment has not been addressed by the
13 ICC or by the Department of Transportation.

14 The -- the fee system here -- the actual fee
15 rule of the ICC has been in place for almost 9 years now.
16 There have not been serious problems of administration.
17 It's a mechanical process where States simply fill out the
18 -- carriers fill out a chart which has the applicable
19 State, the number of trucks in the State. It's a matter
20 of multiplication and then adding some -- the fee for --
21 for each State.

22 As I was explaining, the Michigan situation is
23 unique and should be left to be resolved by the Michigan
24 courts and by the Department of Transportation.

25 The ICC --

1 QUESTION: Do you say the same thing for the
2 argument that there in fact was no reciprocity in place
3 with Illinois in 1991?

4 MR. SCHLICK: We do, Justice Ginsburg. That's a
5 -- a subpart of -- of this State-specific question. The
6 facts surrounding that have -- have really not been
7 developed before the Michigan courts or even before the
8 Department of Transportation at this point.

9 The ICC's interpretation of the fee cap is a
10 reasonable implementation of Congress's provision. It's
11 consistent with the language of the statute and its
12 purposes and we submit that it should be upheld. The
13 decision of the Michigan Supreme Court should be reversed,
14 and the case should be remanded.

15 QUESTION: Thank you, Mr. Schlick.

16 Mr. Casey, we'll hear from you.

17 ORAL ARGUMENT OF THOMAS L. CASEY

18 ON BEHALF OF THE RESPONDENTS

19 MR. CASEY: Mr. Chief Justice, and may it please
20 the Court:

21 Before I begin my principal argument, I would
22 like to spend just a moment on this -- this point of the
23 changeover in Michigan from base-plating to principal
24 place of business. We believe it is not present in the --
25 in this case at this point.

1 This case was litigated on that point throughout
2 the Michigan courts up until the Michigan Supreme Court
3 decision.

4 Michigan had in place a system called base-
5 plating where we imposed fees based on the State in which
6 the vehicle was licensed. In early 1991, the system
7 changed from that base-plating system to a system that all
8 the other States used based on the principal place of
9 business of the truck carrier.

10 QUESTION: That was what determined reciprocity.

11 MR. CASEY: That's what determined reciprocity.
12 That's correct.

13 And Yellow Freight Company, at that time Yellow
14 Transportation -- their trucks were licensed in Illinois,
15 a State with which Michigan has reciprocity, but its
16 principal place of business of the parent company is
17 Kansas, a State with which Michigan does not have
18 reciprocity. And so when Michigan made this change during
19 1991, we then switched over and imposed fees for Yellow
20 Freight for the registration year of 1992. But those
21 fees, as normal industry and State practice, were sent out
22 in September of 1991 for the next registration year. And
23 Yellow Freight paid them in October of 1991. Again,
24 that's typical industry practice. They're assessed and
25 paid in advance of the registration year.

1 The statute took effect here in December of
2 1991. The statutory language that we're dealing with
3 talks about a fee that such State collected or charged as
4 of November 15th, 1991. Our argument on the -- the way it
5 was litigated through the State courts is that Michigan
6 charged Yellow Freight before November 15th, 1991 and we
7 collected from Yellow Freight prior to 19 -- prior to
8 November 15th, 1991.

9 QUESTION: Albeit on a system that didn't go
10 into effect until --

11 MR. CASEY: For the registration year 1992, we
12 charged and collected. Yellow Freight disputed that.
13 That's the way it was litigated up to the Michigan Supreme
14 Court. It didn't involve this question of whether
15 reciprocity was relevant or irrelevant.

16 The Michigan -- pardon me. The Michigan Supreme
17 Court decided it on a -- a different basis than the other
18 State court opinions had. And that raised the question
19 which this Court granted certiorari.

20 In its briefs, Yellow Transportation has implied
21 that we've somehow waived that issue. We have not. We
22 did not brief it in this Court because this Court limited
23 the grant of certiorari to the issue that the supreme
24 court did decide. So we -- we believe that the case
25 should be affirmed on the basis that the Supreme Court of

1 Michigan decided it. If it is not affirmed, however, we
2 agree with the United States that the case should be
3 remanded to the Michigan Supreme Court for consideration
4 of this other issue which is still viable.

5 So turning now to our principal argument in
6 defense of the Michigan Supreme Court's decision, the
7 statute required the ICC to implement a fee system, to
8 adopt a fee for the States, a fee system for a fee not to
9 exceed \$10 per vehicle, that such State collected or
10 charged as of November 15th, 1991.

11 Beginning with the statutory language, under
12 Chevron, if the intent of Congress is clear, that's the
13 end of the matter.

14 The precise question that needs to be addressed
15 here is what did Congress intend. How do you determine
16 the fee? We believe that Congress's intent is clear.
17 Under the language of this statute --

18 QUESTION: Well, if we think it isn't altogether
19 clear and in fact could be read the other way, don't we
20 have to consider Chevron deference? Because that's how
21 the agency has interpreted it.

22 MR. CASEY: If it -- yes, if -- if the statute
23 is not clear, then you proceed to the second step of
24 Chevron, which is whether the agency's interpretation is a
25 permissible one. We believe we don't need to get to the

1 second step of Chevron because the text of the statute is
2 unambiguous.

3 QUESTION: But if you're wrong about the text
4 being unambiguous -- and you do have an uphill argument
5 there because didn't the two lower courts in Michigan
6 reason the other way? Didn't they reject the argument
7 that the Michigan Supreme Court embraced?

8 MR. CASEY: The -- I agree the second step of
9 Chevron is always an uphill argument, to overcome an
10 agency interpretation. It's -- but on -- on the facts of
11 this case, on the text of this statute, we believe that
12 the agency interpretation is impermissible. What the --
13 what the agency did here was not just interpret the
14 statute; they have, in fact, rewritten it. They have
15 imposed conditions in the statute which are simply not
16 there.

17 QUESTION: But didn't the lower courts in
18 Michigan say that was a proper reading, that the ICC's
19 reading --

20 MR. CASEY: Yes.

21 QUESTION: -- was a proper --

22 MR. CASEY: Yes, they did.

23 QUESTION: Which makes it harder for you to
24 argue that there is a plain meaning the other way.

25 MR. CASEY: Yes, it does make it harder. I

1 agree. But it -- it is still a burden that we believe we
2 can overcome because we believe that, as this Court did in
3 the *Whitman v. ATA*, it is possible to look at a statute,
4 say a statute is ambiguous, and still say that an agency
5 interpretation is unreasonable. We believe what the
6 agency has done here is unreasonable.

7 What the agency has done here is add language to
8 the statute. They have imposed the requirement in the
9 statute that you look at reciprocity agreements. There is
10 nothing in the statute about looking at reciprocity
11 agreements. There's nothing in the statute about looking
12 at particular carriers or how particular carriers are
13 treated. All this statute -- this subsection of the
14 statute requires and permits is to look at what the State
15 collected or charged as of 1991, November 15th.

16 QUESTION: Is there anything in the record that
17 indicates what percentage of revenue a State like Michigan
18 gets on the basis of these reciprocity agreements or how
19 much -- how much of its revenue from this kind of tax is
20 not affected by reciprocity agreements?

21 MR. CASEY: The record in this case is very
22 scant. It was decided on summary disposition right after
23 filing of the complaint. I do know that in the year 2000,
24 which is 9 years after the enactment of the statute, total
25 Michigan revenue from registration fees was \$2.7 million.

1 There are 38 States participating in the single State
2 registration system. We have reciprocity agreements with
3 21 of those States.

4 QUESTION: Thank you.

5 MR. CASEY: But I don't know how those
6 individually break down. Michigan registers approximately
7 5,000 trucking carriers each year. About half of them are
8 from Canada. But I don't know. That's intra- and
9 interstate carriers. The fees for intrastate carriers are
10 different. They're \$100 instead of \$10. But the record
11 is very scant in this case because of the way it
12 developed.

13 QUESTION: Would you tell me again why you think
14 the statute is -- is clear and unambiguous in your favor?

15 MR. CASEY: There --

16 QUESTION: I see -- I see the sense of a generic
17 approach because of the trucks being painted a different
18 color or reincorporation and so forth.

19 MR. CASEY: There -- there --

20 QUESTION: But I'm not sure that I can find that
21 under the clear language of the statute. There's a common
22 sense aspect to it.

23 MR. CASEY: There are very few words which are
24 at issue here. The fee that such State collected or
25 charged as of November 15th, 1991. We believe that means

1 you look only to what the State collected or charged under
2 its fee system. That is, what -- if -- if a State
3 collected or charged its fee -- it's \$10 in Michigan --
4 from any carrier as of November 15th, that ends the
5 matter.

6 QUESTION: So you're reading in -- you're
7 reading in from any carrier. And -- and, yes, that's
8 reasonable to read that in, I suppose. But it's also
9 reasonable to read in from a carrier of -- of this sort.
10 Or you could read in from this particular truck. You
11 could read in a lot of -- you have to read in something,
12 it seems to me.

13 MR. CASEY: Well, if -- under our
14 interpretation, under -- under the plain text, we submit
15 you don't have to read in anything. The -- the words,
16 collected or charged, are in the disjunctive. They --
17 they're verbs. They require something. Charged means
18 sent out a bill or an invoice. Collected means we
19 received something.

20 QUESTION: Let me ask you this. Did -- does
21 Michigan -- did Michigan at the relevant time have a
22 scheme in which every truck of every size, weight, class,
23 et cetera was charged the same fee? No.

24 MR. CASEY: These -- these fees deal only
25 with --

1 QUESTION: No, but can you give me a yes or no
2 answer to that? Did Michigan say, we have a law that says
3 if you are a truck, you pay X dollars, no ifs or buts? Is
4 -- was that the Michigan law?

5 MR. CASEY: The statute in Michigan imposes a
6 \$10 fee but permits a waiver, meaning 0.

7 QUESTION: So are you telling me that the answer
8 to my question is yes? There is only one category known
9 in Michigan and that is the category of a truck?

10 MR. CASEY: No. There -- there -- there's a fee
11 of \$10 or 0. Some trucks were charged 10. Some were
12 charged 0.

13 QUESTION: So there are at least two categories.

14 MR. CASEY: Yes.

15 QUESTION: And if there are at least two
16 categories, don't you have to do just what Justice Scalia
17 said you have to do? You have to read something into the
18 statute, or you would be reading it in such a way as to
19 charge against a truck in category A what, under the
20 Michigan law, you would have charged against a truck for
21 category B. That can't be right. So that you've got to
22 -- as Justice Scalia has suggested, you've got to read in
23 some kind of a categorization in addition to the plain
24 meaning of the statute. Isn't that right?

25 MR. CASEY: I -- I disagree. The -- the words,

1 collected or charged, are in the disjunctive. So if the
2 State either collected the fee as of November or charged
3 it as of November --

4 QUESTION: No matter to whom. No matter to what
5 truck.

6 MR. CASEY: No matter to whom. The fact --

7 QUESTION: May I also suggest that the -- when
8 you look at those words in the context of the whole
9 subparagraph (4), which is the part --

10 MR. CASEY: Yes.

11 QUESTION: -- which begins, shall establish a
12 fee system, so you're talking about collected or charged
13 as part of a system

14 MR. CASEY: That's correct, Your Honor. Well,
15 it's -- it's true. And that -- that goes to another part
16 of our argument. This -- this system or this section,
17 subsection (3), is the section in which Congress
18 implemented its goal of preserving State revenues. There
19 -- there are two goals that Congress had in passing the
20 single State registration system. One is to simplify the
21 whole procedure for the trucking industry and for States,
22 and two was to preserve State revenues.

23 This subsection (3) that we're dealing with is a
24 section that preserves State revenues. And when you look
25 at it in that context, the text here deals only with fees

1 that the State collects. There are other sections that
2 talk about payments by trucks to States. There are
3 sections that talk about carriers specifically. Congress
4 didn't use the word carriers in this subsection. They
5 didn't use the words, payments by trucks to -- or by
6 carriers to States. They could have used those words, as
7 they did in other subsections.

8 QUESTION: Carrier in your view signifying the
9 entity that owns the trucks?

10 MR. CASEY: Yes.

11 What -- you -- earlier you mentioned trucks of
12 different weights and things. We're talking only here
13 about the power vehicle. We're not talking about the
14 trailer part of the truck. This is just for proof of
15 insurance. It's a \$10 only. There are other fees that
16 various interstate agreements have for different axle
17 weights, and that kind of thing.

18 QUESTION: I -- I guess our point is that for
19 you to make the statute work, you are reading something
20 into it that isn't there, which is this generic system and
21 -- or this generic theory. And there's a certain amount
22 of common sense to that, but it seems to me that by your
23 having to do that, you in effect concede the statute is
24 ambiguous and then your clear argument case collapses.

25 MR. CASEY: Well, I would -- I respectfully

1 disagree, Your Honor. I --

2 QUESTION: The words, fee system, are in the
3 statute itself. That's -- those are the first words in
4 the subsection to which you're --

5 MR. CASEY: This -- correct. This -- this
6 subsection is part of a fee system, and this -- this
7 subsection of that system is the section that deals with
8 ensuring that States receive their revenue. And when you
9 put it in that context and you look at the specific words
10 of the statute here, when you look at the collected or
11 charged in the disjunctive, the statute --

12 QUESTION: I don't understand what you get out
13 of the disjunctive.

14 MR. CASEY: The statute --

15 QUESTION: How -- how does that help you?

16 MR. CASEY: The statute --

17 QUESTION: It seems to me that for the trucks
18 that were from reciprocity States, the fee was neither
19 charged nor collected. So how does the disjunctive help
20 you?

21 MR. CASEY: That's what the Michigan Supreme
22 Court said, in essence, that if the -- if the State
23 collected or charged the \$10 fee, period, then the statute
24 is satisfied.

25 QUESTION: Did the State sponsor that --

1 MR. CASEY: Everything else is irrelevant.
2 Pardon me.
3 QUESTION: In Michigan you -- you helpfully
4 began your argument by pointing out that the case had been
5 decided on a different ground below.
6 MR. CASEY: Yes.
7 QUESTION: And this question of plain meaning or
8 not surfaced for the first time in the Michigan Supreme
9 Court, and that was the basis for its decision.
10 MR. CASEY: Yes.
11 QUESTION: Did you make that argument? Did the
12 State of Michigan make that argument, or was it something
13 that the Michigan Supreme Court brought up on its own?
14 MR. CASEY: It was made in a few paragraphs as
15 one alternative argument in a long brief, but the
16 principal thrust of the argument -- it was -- it was
17 mentioned in the Michigan Court of Appeals opinion and
18 rejected. It's in the appendix, I believe, on page 29
19 where they rejected it. But, yes, it was presented to the
20 Michigan Court of Appeals. It is still active in the
21 Michigan courts.
22 QUESTION: You presented it but not as your main
23 argument.
24 MR. CASEY: Our argument -- our principal
25 argument, the way the case was framed in the State courts

1 was this timing issue. Did Michigan properly switch over
2 from the base-plating to the principal place of business
3 and could we, therefore, impose the fee and apply the
4 statute to Yellow Freight?

5 We also argued as one of our alternative
6 arguments that it didn't matter or that the -- the statute
7 didn't matter -- didn't apply to specific carriers, that
8 it applied broadly to everyone. The supreme court at oral
9 argument asked -- started asking questions about this
10 theory that they ultimately decided it on. But the -- the
11 theory that the Michigan Supreme Court decided the case on
12 was, by no means, the -- the principal focus of the -- the
13 case that was briefed and argued below.

14 QUESTION: General Casey, you -- you say that
15 the purpose of this section was to preserve State
16 revenues, but -- but -- the consequence of the -- the
17 theory that you're espousing is -- is not just to preserve
18 State revenues, but to augment them. It -- it allows the
19 States to -- to take in significantly more than they took
20 in before. That is, all of those considerable States that
21 had reciprocity and from whom they collected, from whose
22 trucks they collected nothing, they can now collect \$10.
23 That -- that's -- it goes far beyond preserving State
24 revenues.

25 MR. CASEY: Well, the -- we -- we submit that

1 the fears that have been expressed in our opponents'
2 briefs that these reciprocity agreements will
3 automatically be abrogated is unfounded, for a couple of
4 reasons, principally because those reciprocity agreements
5 were originally entered into by States for economic
6 reasons, totally apart from the -- the statute. It's not
7 as though the -- the State is looking at this as a -- as a
8 giant money-making event --

9 QUESTION: I understand that. I'm -- I'm not
10 worried about the sky falling, but I'm addressing your
11 argument from the purpose of the statute. And you say the
12 purpose is to preserve State revenues, but you come up
13 with a theory that goes far beyond preserving State
14 revenues. It permits the States to augment their -- their
15 revenues considerably. In -- in order to preserve State
16 revenues, you need go no further than -- than your
17 opponents' theory.

18 MR. CASEY: Under their interpretation what has
19 happened, in effect, is that State revenues are at best
20 frozen, but in practical effect, they may really be
21 ratcheted downward because of changing economic
22 circumstances.

23 QUESTION: Would you explain one thing to me
24 that response -- it relates to Justice Scalia's question,
25 too. In this particular case, it clearly augmented State

1 revenues because the place of -- principal place of
2 business of this carrier doesn't have a reciprocity
3 agreement. But it would seem to me that with respect to
4 other carriers, it might diminish the revenue because some
5 of them -- it might be just the reverse. They might have
6 -- that change might go from a State with -- with a --
7 without a reciprocity agreement to one that does have --

8 MR. CASEY: Well, when Michigan changed from a
9 base-plating to principal place of business, it resulted
10 in, on balance, no economic benefit.

11 QUESTION: With respect to some States, it would
12 increase revenues; with respect to others, it would
13 decrease revenues.

14 MR. CASEY: Correct. But --

15 QUESTION: But your -- your argument is you can
16 charge everybody \$10 no matter from what State. Isn't --
17 isn't that your theory?

18 MR. CASEY: Our -- the Michigan Supreme -- under
19 the --

20 QUESTION: That you can, as far as the Federal
21 statute is concerned, charge everybody \$10.

22 MR. CASEY: Or the maximum that they were
23 charging at the time that the statute took effect. It may
24 not have been \$10. Whatever their State maximum that they
25 were charging at the time, and some States don't have \$10.

1 QUESTION: No. I'm -- as far as Michigan is
2 concerned --

3 MR. CASEY: As far as Michigan is concerned.

4 QUESTION: -- your argument is that you can
5 charge everybody the full \$10.

6 MR. CASEY: That's correct.

7 QUESTION: But Michigan has some interest in
8 getting its own trucks -- having lower fees in other
9 States I suppose.

10 MR. CASEY: Of course. As we've indicated in
11 our briefs, Michigan has committed that we are not going
12 to abrogate our reciprocity agreements, but as I -- as
13 I've indicated, there are economic reasons why States are
14 not going to, in a wholesale, abrogate these -- or these
15 reciprocity agreements. They're not going to cut their
16 own throats by -- by doing that. They -- they have to
17 live with these trucking companies. They have to live
18 with these economic benefits that cause them to enter into
19 these reciprocity agreements in the first place.

20 And -- and there's another factor at work here
21 too. The -- the 1994 ICC Termination Act required
22 Congress -- or excuse me -- required the Department of
23 Transportation to replace this entire regulatory scheme as
24 of 1997, but it has not happened yet. Depending on the
25 outcome of this case, it -- this may serve as an impetus

1 to replace this entire system with something that could
2 serve both the States and the trucking industry better
3 than the current system. But the -- as -- as you
4 indicated, the sky is very unlikely to fall regardless of
5 what this Court does if -- if it affirms the supreme court
6 or not.

7 QUESTION: May I ask you a question? What --
8 how would you come out or how would the case come out if
9 we decided that the statute required every State to
10 maintain existing reciprocity agreements? It couldn't --
11 they couldn't charge higher fees and they couldn't cancel
12 reciprocity agreements. Would you win or lose if we
13 interpret it that way?

14 MR. CASEY: Would Michigan win or lose?

15 QUESTION: Yes, in this case. As I understand
16 it, you haven't changed any reciprocity agreement. You've
17 merely changed the method of deciding which State is
18 relevant for the purposes of granting reciprocity to
19 particular truckers.

20 MR. CASEY: Michigan probably would not win or
21 lose in that. It would probably be no change --

22 QUESTION: You assert the right to terminate
23 reciprocity agreements. You -- you --

24 MR. CASEY: That -- under the --

25 QUESTION: Your basic point here --

1 MR. CASEY: Under the theory --

2 QUESTION: -- is that despite this Federal

3 statute, you can terminate your reciprocity agreement with

4 Kansas and charge the full \$10. Right?

5 MR. CASEY: That's the theory of the Michigan

6 Supreme Court opinion. Yes, it is, Your Honor.

7 QUESTION: But you haven't terminated the

8 agreement, have you?

9 MR. CASEY: We -- we have an agreement with

10 Illinois, not Kansas. But we have not. We have --

11 Michigan has not terminated any reciprocity agreements.

12 Michigan will not. Other -- under this rationale, other

13 States could as a --

14 QUESTION: General Casey I have a question about

15 the response you just gave. I thought there was lurking

16 in this case as an issue, if there should be a remand,

17 that there was no viable reciprocity agreement with

18 Illinois, that that terminated in 1989. Are you -- are

19 you --

20 MR. CASEY: Well --

21 QUESTION: -- abandoning that argument?

22 MR. CASEY: No. There -- in the past, back in

23 the early 1980s, there were formal written contracts of

24 reciprocity. When Michigan passed its statute in 1989

25 formalizing the \$10 fee, the public service commission

1 terminated those contracts and contacted every State with
2 which it had reciprocity to verify this.

3 This whole question of reciprocity is somewhat
4 uncertain. Many States are not sure with whom they have
5 reciprocity because various State --

6 QUESTION: Is that a -- is that a live issue in
7 this case?

8 MR. CASEY: Michigan has a reciprocity agreement
9 with Illinois, we believe. We -- we operate our system as
10 though we -- we give reciprocity to trucks licensed in
11 Illinois, and it's our understanding that Illinois gives
12 reciprocity to trucks licensed in Michigan.

13 QUESTION: So there would be no point in saying
14 that that's an issue open for a possible remand.

15 MR. CASEY: That's -- I believe that's correct.

16 QUESTION: But that's not right. You don't give
17 reciprocity to trucks licensed in Illinois. You give
18 reciprocity to trucks who are owned by companies who have
19 principal place of business in Illinois.

20 MR. CASEY: That's correct. I misspoke myself,
21 Your Honor. Thank you. For purposes of this case, at the
22 time we had the base-plating system, but now it's -- if --
23 if we ultimately lose on that other point and we are stuck
24 with the base-plating method and could not -- and the
25 Michigan court rules against us and we are stuck with the

1 base-plating method, that could cause a problem for
2 Michigan.

3 Let me -- let me just close by saying that we
4 believe that the Michigan Supreme Court's decision is
5 faithful to the text, results in a consistent and a
6 coherent interpretation of the Federal statute, that is
7 consistent with the congressional intent, and we believe
8 it should be affirmed. If it is not affirmed, we urge the
9 Court to remand the case back to the Michigan Supreme
10 Court for consideration of the other issues that were not
11 considered by it.

12 If there are no further questions.

13 QUESTION: Very well, Mr. Casey.

14 Mr. Rothfeld, you have 4 minutes remaining.

15 REBUTTAL ARGUMENT OF CHARLES A. ROTHFELD

16 ON BEHALF OF THE PETITIONER

17 MR. ROTHFELD: Thank you, Mr. Chief Justice. A
18 couple of quick points.

19 First, we think that the key issue in the case
20 has been identified by questions from a number of members
21 of the Court. Something has to be read into the statute.
22 Now, we think what we would read into the statute is
23 clearly the correct thing to read into it, but even if we
24 are not absolutely right about that, petitioner should
25 prevail because given the agency's determination here, the

1 -- the tie goes to this side of the table and we think
2 that that should be dispositive on that issue in the case.

3 Second, there's been some discussion about
4 issues that are other issues in the case and -- and the
5 proper disposition as to them. We think that there is no
6 question about the existence of reciprocity agreements or
7 policies that would require remand, in response to Justice
8 Ginsburg's question. I think Mr. Casey has candidly
9 acknowledged that there was clearly a reciprocity policy
10 in place in Michigan, whether identified reciprocity
11 agreement or simply unilateral policy. There was no
12 question about the nature of that policy. There has been
13 no dispute throughout the entire course of this litigation
14 about whether there was such a policy and whether it was
15 consistently enforced. And therefore, there -- I think
16 there is no subject there to be considered further on
17 remand.

18 The question of whether Michigan's prospective
19 change in its policy for the 1992 registration year and
20 whether Yellow's diligence in paying that early should
21 somehow affect the proper outcome here and require Yellow
22 to pay in the future --

23 QUESTION: I didn't understand the last clause
24 that you just spoke.

25 MR. ROTHFELD: Well, the -- the question whether

1 the fact that Yellow paid in advance of November 15th,
2 1991 for a registration year that was not going to go into
3 effect until sometime in 1992 --

4 QUESTION: Well, the statute says collected or
5 charged.

6 MR. ROTHFELD: Well, as of 1991, and the
7 question is collected or charged, in our view, for what?
8 And we think it's for the entitlement to operate on
9 Michigan's roads at the relevant time.

10 I guess I would take a little bit of issue with
11 what Mr. Schlick said. The -- the ICC we think expressly
12 addressed that point in its declaratory order when States,
13 including Michigan, said --

14 QUESTION: Well, but it really hasn't been fully
15 fleshed out here, that particular angle. I -- I think it
16 would be perfectly consistent to agree with your basic
17 position and still feel that was open on remand, as -- as
18 the Solicitor General said.

19 MR. ROTHFELD: Well, our view is that if that is
20 -- if there's to be further litigation on that point, the
21 proper forum for that is the administrative proceeding
22 that -- that Mr. Schlick also mentioned. There is
23 actually pending before the Department of Transportation a
24 proceeding initiated by Michigan which takes issue with
25 the ATA's -- with the -- the ICC's determination on that

1 point and asks for reconsideration by the agency. We
2 think that that is the appropriate place to consider that
3 where the agency can exercise its expertise. We then
4 appeal to the D.C. Circuit if there's to be some -- some
5 question about it. So that -- that's what we would
6 suggest is the appropriate --

7 QUESTION: But why should we get into an issue
8 that the Michigan Supreme Court didn't resolve? It is an
9 issue. You may be right or wrong on the merits of it, but
10 at least we would not -- we are here reviewing a
11 determination made by the Michigan Supreme Court. You are
12 saying that we should, at the same time, strike at an
13 issue that the Michigan Supreme Court didn't reach.

14 MR. ROTHFELD: Well, it is true the Michigan
15 Supreme Court did not decide it. Our suggestion is that
16 the more appropriate place for it to be subject to further
17 litigation, if there is to be further litigation, is in
18 this agency proceeding with an appeal to the Federal
19 court. But -- but you are correct that it was not
20 expressly addressed by the Michigan Supreme Court in this
21 -- in this case.

22 One final point quickly in response to Justice
23 Stevens' question about whether the State terminated
24 reciprocity agreements or -- or not, or simply changed its
25 policy. We think it doesn't matter how you look at it.

1 Either way, the State clearly changed the rule that it was
2 applying. It had a clearly articulated rule consistently
3 applied that trucks based in certain places would not be
4 subject to fees. It is now changing that rule and it's
5 therefore trying to collect and charge fees as to those
6 trucks that it did not charge before or collect before,
7 and we think that is clearly precluded by the statutory
8 language and is certainly decided by the ICC adversely to
9 Michigan.

10 If there are no further questions, Mr.
11 Justice --

12 QUESTION: Could I ask on that question? The --
13 the point is should not exceed the fee that was charged.
14 If in the aggregate the change from the place of
15 determining which State applies, if the aggregate were to
16 decrease the collections, which theoretically it could be,
17 then there would be no violation of the statute, as I
18 understand it.

19 MR. ROTHFELD: Well, we think it can't be
20 considered in the aggregate. First of all, the statutory
21 language refers to the fee per vehicle.

22 QUESTION: No, a fee system it refers to.

23 MR. ROTHFELD: It does, but if I may, Mr. Chief
24 Justice, just respond briefly. The particular provision
25 which has the fee-freezing provision refers to the fee per

1 vehicle. So I think that would be precluded.

2 QUESTION: Thank you, Mr. Rothfeld.

3 MR. ROTHFELD: Thank you, Mr. Chief Justice.

4 CHIEF JUSTICE REHNQUIST: The case is submitted.

5 (Whereupon, at 11:02 a.m., the case in the
6 above-entitled matter was submitted.)

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