No. 13-1126

In the Supreme Court of the United States

OWNER-OPERATOR INDEPENDENT DRIVERS ASSOCIATION, INC., PETITIONER

v.

DEPARTMENT OF TRANSPORTATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly concluded that Congress did not intend Section 4116(b) of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, Pub. L. No. 109-59, 119 Stat. 1728, which directs the Secretary of Transportation to implement certain requirements for the medical certification of commercial-vehicle operators, to repudiate longstanding operator-license reciprocity agreements with Mexico and Canada, when neither the text nor the legislative history of Section 4116(b) mentions those agreements.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes and regulations:

Miscellaneous—Continued: Page

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-27) is reported at 724 F.3d 230.

JURISDICTION

The judgment of the court of appeals was entered on July 26, 2013. A petition for rehearing en banc was denied on December 17, 2013 (Pet. App. 186-187). The petition for a writ of certiorari was filed on March 17, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Secretary of Transportation has long promulgated regulations concerning the certification of truck drivers and other commercial-vehicle operators.

In the Motor Carrier Safety Act of 1984, Pub. L. No. 98-554, Tit. II, 98 Stat. 2832, Congress required the Secretary to prescribe "minimum Federal safety standards" relating to "the physical condition" of commercial-vehicle operators, § 206(a)(3), 98 Stat. 2834. Pursuant to that requirement, regulations codified at 49 C.F.R. Part 391 set forth federal physical-fitness requirements for commercial-vehicle operators and require those operators to be periodically examined in order to obtain a medical examiner's certificate. See 49 C.F.R. 391.41-391.49. In the Commercial Motor Vehicle Safety Act of 1986, Pub. L. No. 99-570, Tit. XII, 100 Stat. 3207-170, Congress required the Secretary to prescribe qualifications for commercial-vehicle operators, §§ 12005-12006, 100 Stat. 3207-171 to 3207-175. Pursuant to that requirement, regulations codified at 49 C.F.R. Part 383 set forth federal standards for the issuance of commercial-vehicle operators' licenses by the States. See 49 C.F.R. 383.1-383.155.

In 1988, the Secretary determined that commercial-vehicle-operator licensing standards imposed by Canada satisfied the requirements of Part 383. Department of Transportation (DOT), *Commercial Driver's License Reciprocity With Canada*, 54 Fed. Reg. 22,392 (May 23, 1989). The Federal Highway Administrator memorialized that determination in a letter to Canada, which explained that "commercial driver's licenses issued by Canadian jurisdictions in conformance with the licensing standards established in the Canadian National Safety Code will be honored in the United States." *Id.* at 22,392-22,393. In return, Canada agreed by letter that "Canadian jurisdictions will extend full reciprocity to commercial

drivers' licences issued by the states in conformity with U.S. standards." *Id.* at 22,393.

In 1991, the Secretary determined "that the testing and licensing standards in Mexico for the Licencia Federal de Conductor meet the standards contained in 49 CFR part 383," and the United States and Mexico executed a Memorandum of Understanding in which each country extended driver's license reciprocity to the other. DOT, *Commercial Driver's License Reciprocity With Mexico*, 57 Fed. Reg. 31,454-31,455 (July 16, 1992); see *International Bhd. of Teamsters* v. *Peña*, 17 F.3d 1478, 1484-1486 (D.C. Cir. 1994) (rejecting challenge to Secretary's equivalence determination). The United States' agreement with Mexico affects the implementation not only of the licensing regulations in Part 383, but also of the medical-certificate regulations in Part 391. In the initial rulemaking implementing the agreement, the Secretary observed that the holder of a Mexican commercial-vehicle license must biennially undergo a "stringent physical exam[]." 57 Fed. Reg. at 31,455. The Secretary consequently determined that such a license "itself is evidence that the driver has met medical standards as required by the United States" and that holders of such a license therefore need not obtain a separate medical certificate. *Ibid.*

In 1998, the United States and Canada supplemented their own previous licensing-reciprocity agreement with an additional agreement that "provides for a valid Canadian commercial driver's license issued by a Canadian Province or Territory to be proof of medical fitness to drive commercial motor vehicles * * * in the United States, except in certain limited circumstances." DOT, *Motor Carrier*

Safety Regulations; Technical Amendments, 67 Fed. Reg. 61,818-61,819 (Oct. 2, 2002); see Pet. App. 4. In the exchange of letters effecting that agreement, the Federal Highway Administration recognized that "the medical provisions of the Canadian National Safety Code for Motor Carriers . . . are equivalent to the medical fitness regulations" in Part 391. Pet. App. 4. The Secretary amended Part 391 of the regulations to reflect the new agreement. 67 Fed. Reg. at 61,819, 61,824.

It is undisputed in this case that the exchanges of letters with Canada and the memorandum of understanding with Mexico constitute valid executive agreements between the United States and those countries. Pet. App. 3-4; see *American Ins. Ass'n* v. *Garamendi*, 539 U.S. 396, 415 (2003) ("[T]he President has authority to make 'executive agreements' with other countries, requiring no ratification by the Senate or approval by Congress, this power having been exercised since the early years of the Republic."). Those agreements have long governed the approximately 10 million annual truck and bus crossings of the northern and southern borders of the United States. See Federal Motor Carrier Safety Administration, *Analysis & Information Online*, http://ai.fmcsa.dot.gov/International/border.asp?redirect=Compare.asp (last visited Apr. 16, 2014) (sortable border crossing and trade statistics). Congress, which has repeatedly legislated on the issue of cross-border trucking, has never stated any disapproval of the agreements governing licensing and medical-certificate reciprocity. See, *e.g.*, *Department of Transp.* v. *Public Citizen*, 541 U.S. 752, 760-761, 766-767 (2004) (discussing Department of Transportation and Related Agencies Appro-

priations Act, 2002, Pub. L. No. 107-87, § 350, 115 Stat. 864); Consolidated Appropriations Act, 2010, Pub. L. No. 111-117, § 135, 123 Stat. 3053; Department of Defense and Full-Year Continuing Appropriations Act, 2011, Pub. L. No. 112-10, § 1101(a)(6), 125 Stat. 102-103.

2. In 2005, Congress enacted the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (2005 Act or Act), Pub. L. No. 109-59, 119 Stat. 1144. The Act, among other things, directed the Secretary to establish a "national registry of medical examiners." § 4116(a), 119 Stat. 1727-1728 (49 U.S.C. 31149(d)). It further required the Secretary's physical-examination regulations to ensure that "periodic physical examinations required of [commercial-vehicle] operators are performed by medical examiners who have received training in physical and medical examination standards and * * * are listed on such registry." § 4116(b), 119 Stat. 1728 (49 U.S.C. 31136(a)(3)). In contrast to a separate provision of the Act concerning the transportation of hazardous materials—which expressly subjected Mexican and Canadian commercial-vehicle operators to background-check requirements analogous to those imposed on domestic operators, § 7105, 119 Stat. 1896 (49 U.S.C. 5103a(h))—the physical-examination provisions did not directly address Canadian and Mexican commercial-vehicle operators. More generally, nothing in the Act, and nothing in the Act's legislative history, mentions the preexisting reciprocity agreements with Mexico and Canada or expresses any disapproval of the adequacy of those countries' procedures for physically qualifying commercial-vehicle operators.

Following the passage of the 2005 Act, the Secretary engaged in a rulemaking to implement its requirements. Pet. App. 5-6. In the course of the rulemaking, the Secretary undertook an updated review of "the Canadian and Mexican physical qualification processes." DOT, *National Registry of Certified Medical Examiners*, 77 Fed. Reg. 24,111 (Apr. 20, 2012). The Secretary found that "examinations in Canada are performed only by MDs"; that most Canadian jurisdictions require doctors "to report any medical condition that may affect driving functions"; that examinations in Mexico are conducted by government or government-approved doctors; and that a comparison of U.S. and Mexican physical-qualifications standards reaffirmed the appropriateness of treating a Mexican license as the functional equivalent of a U.S. medical certificate. *Ibid.* The updated rules continue to comply with the executive agreements by considering a Canadian or Mexican commercial-vehicle license as establishing that the license-holder is physically qualified to operate a commercial vehicle in the United States. 49 C.F.R. 391.41(a)(1)(i).

In promulgating the updated rules, the Secretary responded to comments from petitioner, a trade association, expressing the view that the 2005 Act obligated the Secretary to require Canadian and Mexican commercial-vehicle operators to be examined by someone on the U.S. national registry. 77 Fed. Reg. at 24,110-24,111. The Secretary explained that petitioner's view was "incorrect because two separate executive agreements with Canada and Mexico," which preclude the need for those countries' license-holders to obtain a separate U.S. medical certificate, "remain in effect." *Id.* at 24,110 (footnote omitted). The Sec-

retary reasoned that "'neither a treaty nor an executive agreement will be considered abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed,'" *id.* at 24,111 (quoting *Roeder* v. *Islamic Republic of Iran*, 333 F.3d 228, 237 (D.C. Cir. 2003), cert. denied, 542 U.S. 915 (2004)), and that the relevant statutes here contained "no such clear expression of purpose," *ibid.*

3. Petitioner subsequently filed a petition for review in the D.C. Circuit. Pet. App. 6. The court of appeals upheld the agency's regulations, rejecting petitioner's argument that the 2005 Act repudiated the preexisting executive agreements with Canada and Mexico. *Id.* at 1-19.

The court of appeals observed that both its own precedents and the precedents of this Court recognize a "presumption against implicit abrogation of international agreements." Pet. App. 8. The court of appeals additionally observed that those precedents "routinely characterize" that presumption "as a clear statement rule." *Ibid.*; see *id.* at 8-10 (citing, *inter alia*, *Trans World Airlines, Inc.* v. *Franklin Mint Corp.*, 466 U.S. 243, 252 (1984); *Weinberger* v. *Rossi*, 456 U.S. 25, 32 (1982); *Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 690 (1979); *Cook* v. *United States*, 288 U.S. 102, 120 (1933)). The court acknowledged the existence of some statements, primarily from its own case law, supporting a "weaker version of the presumption," under which the presumption would merely aid a court in interpreting otherwise-ambiguous text. *Id.* at 10; see *id.* at 7-8. But the court reasoned that the "statements endorsed by the Supreme Court * * * better resemble" a clear-statement rule. *Id.* at 12.

The court of appeals also reasoned that "[r]epudiating an executive agreement raises concerns similar to those that justify other clear statement rules." Pet. App. 12. The court found, for example, that requiring a clear statement before interpreting the 2005 Act to "impinge[] on the President's foreign policy-making domain" was akin to its insistence upon a clear statement for "'statutes that significantly alter the balance between Congress and the President.'" *Ibid.* (citation omitted). The court also observed that "much like the presumption against extraterritorial effect, requiring a clear statement rule with respect to implicit abrogation of international agreements 'serves to protect against unintended clashes between our laws and those of other nations which could result in international discord.'" *Ibid.* (quoting *Kiobel* v. *Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664 (2013)). And such a clear-statement rule "injects clarity into the policymaking process" by "permit[ting] Congress, the President, the courts, and the public alike to better comprehend the actual implications of legislation." *Id.* at 16.

Applying that framework in this case, the count of appeals declined to "presume the Act repudiates the executive agreements with Mexico and Canada *sub silentio*." Pet. App. 13. The court found no indication in the text or history of the 2005 Act that Congress intended to abrogate those agreements. *Id.* at 14-15; see *id.* at 9 n.1, 11 n.2. The court also noted that "[i]t stands to reason that if Congress or the President understood the Act to be a repudiation of the federal government's obligations to Mexico and Canada, someone would have said something." *Id.* at 14. In response to the dissent's view that the 2005 Act's text

unequivocally applied the physical-examination requirements to all commercial-vehicle operators, the court of appeals explained that in this context, "part of the textual analysis involves drawing insight from what Congress chose *not* to say along with what it did." *Id.* at 15. "After all," the court observed, "any clear statement rule involves an unwillingness to give full effect to a statute's unambiguous text. That is how they work." *Ibid.* (citing *Morrison* v. *National Australian Bank Ltd.*, 561 U.S. 247, 255 (2010); *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 237 (1995); *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 241-246 (1985)).

Judge Sentelle dissented. Pet. App. 19-27. In his view, the text of the 2005 Act is "clearly inconsistent with the earlier international agreements," *id.* at 21, and must be applied to supersede those agreements, *id.* at 19-27.

ARGUMENT

The court of appeals correctly determined that the 2005 Act did not repudiate the longstanding agreements with Canada and Mexico granting reciprocity to those countries' licensing of commercial-vehicle operators. The decision below does not conflict with any decision of this Court or any other court of appeals, and it does not warrant further review.

1. This Court has repeatedly instructed that a "treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed." *Trans World Airlines, Inc.* v. *Franklin Mint Corp.*, 466 U.S. 243, 252 (1984) (quoting *Cook* v. *United States,* 288 U.S. 102, 120 (1933)); see *Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n*,

443 U.S. 658, 690 (1979) ("Absent explicit statutory language, we have been extremely reluctant to find congressional abrogation of treaty rights."); *Menominee Tribe of Indians* v. *United States*, 391 U.S. 404, 413 (1968) ("[T]he intention to abrogate or modify a treaty is not to be lightly imputed to the Congress.") (quoting *Pigeon River Improvement, Slide & Boom Co.* v. *Charles W. Cox, Ltd.*, 291 U.S. 138, 160 (1934)). The Court has recognized an analogous principle in the context of executive agreements. See *Weinberger* v. *Rossi*, 456 U.S. 25, 32 (1982) (requiring "some affirmative expression of congressional intent to abrogate the United States' international obligations"). Because abrogation of a treaty or an executive agreement is likely to place the United States in violation of its international obligations, a clear-statement rule is appropriate to ensure that "the legislature has in fact faced, and intended to bring into issue, the critical matters involved." *Gregory* v. *Ashcroft*, 501 U.S. 452, 461 (1991) (citations omitted); see, *e.g.*, *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21-22 (1963) (requiring a "clear expression" in the "delicate field of international relations" involving the potential application of domestic law to the internal affairs of a foreign-flagged ship).

In determining whether a statute satisfies a clear-statement rule, this Court has required more than the existence of broad general language, and has insisted upon an affirmative indication that Congress directly decided the specific issue involved. In *Morrison* v. *National Australian Bank Ltd.*, 561 U.S. 247 (2010), for example, the Court held that a statute broadly prohibiting "any person" from committing certain securities fraud "by the use of any means or instrumentality

of interstate commerce" did not contain a clear statement of congressional intent to apply extraterritorially, even though the definition of "interstate commerce" included a reference to foreign commerce. *Id.* at 262 (quoting 15 U.S.C. 78j(b)); see *id.* at 264-265. Similarly, in the foreign-affairs context, the Court in *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, *supra*, concluded that a statute regulating certain labor matters "affecting commerce," including commerce with "any foreign country," did not contain a clear statement of congressional intent to apply to the internal affairs of a foreign-flagged ship in United States waters. 372 U.S. at 15 nn.3-4 (quoting 29 U.S.C. 152(6) and (7)); see *id.* at 21-22. And in the international-agreement context, the Court held in *Cook* v. *United States*, *supra*, that the reenactment of a statute authorizing the Coast Guard to stop and board any vessel within 12 miles of the United States coast did not abrogate a preexisting treaty with Britain that allowed boarding only within one hour of shore. 288 U.S. at 107, 111, 121-122; see *id.* at 120 (citing *Chew Heong* v. *United States*, 112 U.S. 536 (1884)).

The court of appeals properly applied the foregoing principles and correctly determined that the 2005 Act did not abrogate the United States' preexisting executive agreements with Canada and Mexico. Although the Act includes broad and general language requiring commercial-vehicle operators to be physically examined by medical examiners on the national registry, § 4116(b), 119 Stat. 1728, it is undisputed that nothing in the Act's text or legislative history shows any specific congressional intent to abrogate (or even specific congressional consideration of abrograting) the preex-

isting international agreements. Indeed, while a separate portion of the Act specifically imposes certain requirements on Canadian and Mexican commercial-vehicle operators, § 7105, 119 Stat. 1896, the physical-examination provisions at issue here make no mention of such operators. Congress, which has also repeatedly legislated on the subject of cross-border trucking in other statutes, see pp. 4-5, *supra*, cannot lightly be taken to have nullified important and longstanding international-trade commitments. See Pet. App. 14 ("It stands to reason that if Congress or the President understood the Act to be a repudiation of the federal government's obligations to Mexico and Canada, someone would have said something."). That is particularly true when such nullification would likely create a significant impediment to the operation of Canadian and Mexican trucks in the United States (and, potentially, vice versa) and thus to the flow of trade between the United States and two of its largest trading partners.

2. Petitioner's objections to the court of appeals' determination lack merit. First, both petitioner and the dissent below (Pet. 11-12; Pet. App. 27) are mistaken in arguing that the "unambiguous" text of the 2005 Act, which generally requires commercial-vehicle operators to be examined by medical examiners on the national registry, answers the more specific foreign-relations question at issue here. In *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), for example, the Court noted the assertion by the dissent in that case that a particular provision "must be retroactive since 'not a single word in its text suggests that it does not apply to judgments entered prior to its effective date.'" *Id.* at 236 (citation and brackets omitted). The

Court explained, however, that the dissent's view "reverse[d] the traditional rule * * * that statues do *not* apply retroactively *unless* Congress expressly states that they do." *Id.* at 237. Similarly, here, it is irrelevant that the text of the 2005 Act does not contain an exception for the situation governed by the executive agreements. Instead, the critical point is that Congress did not expressly state an intent to abrogate those agreements.[*]

Second, petitioner errs in contending (Pet. 10-11) that the decision below is inconsistent with cases setting out a "last-in-time" rule, under which later law supersedes inconsistent earlier law. The court of appeals expressly acknowleged that in a case where a treaty and statute conflict, "the more recent legal pronouncement controls." Pet. App. 6. But as the court of appeals correctly recognized, *id.* at 6-7, that principle does not answer the antecedent question of how a court should determine whether the language of a particular statute actually is inconsistent with a prior executive agreement. For reasons explained above, that antecedent question is governed here by a

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[*] Petitioner's repeated reliance (Pet. 6, 9, 11-13) on *Pennsylvania Department of Corrections* v. *Yeskey*, 524 U.S. 206 (1998), is misplaced. As petitioner notes (Pet. 11-13), the Court in that case observed that the doctrine of constitutional avoidance is applicable "only where a statute is susceptible of two constructions." 524 U.S. at 212 (internal quotation marks and citation omitted). But that observation about the constitutional-avoidance doctrine does not control the application of the rule requiring a clear statement of Congress's intent to abrogate international agreements. Nor does *Yeskey*'s conclusion that the statute at issue there satisfied a different "plain-statement rule," *id.* at 209-210, compel a particular result in the different circumstances of this case.

clear-statement rule, which the 2005 Act does not satisfy.

Third, petitioner incorrectly characterizes (Pet. 19-21) the Secretary's rulemaking as impermissibly creating a "statutory exemption[]" to the 2005 Act for commercial-vehicle operators with Canadian or Mexican licenses. The regulations do not create any such exemption, but instead simply recognize that the 2005 Act did not disturb the existing executive agreements, which continue to bind the United States. See 77 Fed. Reg. at 24,110 (explaining that the "contention that 49 U.S.C. 31149 does not allow [the agency] to 'exempt' Canadian and Mexican drivers operating in the United States from being examined by [a medical examiner] is incorrect because two separate executive agreements with Canada and Mexico remain in effect") (footnote omitted). The regulations give effect to those agreements, and to the absence of congressional intent to abrogate them, by providing that possession of a Canadian or Mexican commercial-vehicle operator's license satisfies domestic requirements. *Id.* at 24,110-24,111; see 49 C.F.R. 391.41(a)(1)(i).

3. Petitioner presents no sound reason why this case warrants this Court's review. It does not suggest that any other circuit would have reached a different result in the circumstances of this case. Nor does petitioner demonstrate that the difference between its own "weaker version of the presumption" against abrogating international agreements, Pet. App. 10, and the (correct) approach applied by the court of appeals would be outcome-determinative in many cases.

Furthermore, petitioner is incorrect in asserting (Pet. 7-8) that the court of appeals' decision creates a

"loophole" imperiling highway safety or that drivers based in the United States are held to a "higher standard than their Mexican and Canadian competitors." As the Secretary has explained, Mexican and Canadian truck drivers have been operating in the United States for decades under Mexican and Canadian commercial driver's licenses, and qualification for those licenses requires medical examinations under standards similar to those required for their domestic counterparts. 77 Fed. Reg. at 24,110-24,111. Indeed, the Secretary has concluded that "Mexican physical qualification regulations are more prescriptive, detailed, and stricter than those in the United States." DOT, *Pilot Program on NAFTA Long-Haul Trucking Provisions*, 76 Fed. Reg. 20,814 (Apr. 13, 2011); see *id.* at 20,814-20,815 (listing subjects regulated by Mexico "for which the United States has no regulatory standards"). There is, accordingly, no reason to believe that the Secretary's implementation of the law in this case gives Canadian or Mexican operators an unfair advantage or will negatively affect highway safety.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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