NO ORAL ARGUMENT SET

No. 12-1264

In the
United States Court of Appeals
For The District of Columbia Circuit

OWNER-OPERATOR INDEPENDENT DRIVERS ASSOCIATION, INC.,

***Petitioner*,**

v.

UNITED STATES DEPARTMENT OF TRANSPORTATION; FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION; RAYMOND H. LAHOOD, Secretary of the U.S. Department of Transportation; ANNE S. FERRO, Administrator of the Federal Motor Carrier Safety Administration; and THE UNITED STATES OF AMERICA,

***Respondents*.**

PETITION FOR REVIEW OF AN ORDER
OF THE FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION

PETITIONER'S REPLY BRIEF

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GLOSSARY

MOU	Memorandum of Understanding
CDL	Commercial Driver's License
DOT	Department of Transportation
FMCSA	Federal Motor Carrier Safety Administration
NAFTA	North American Free Trade Agreement
OOIDA	Owner-Operator Independent Drivers Association
SAFETEA-LU	Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users Pub. L. 109-59, 119 Stat. 1726 (August 10, 2005)
Secretary	U.S Secretary of Transportation
Section 350	Department Of Transportation and Related Agencies Appropriations Act, 2002.
Section 6901	U.S. Troop Readiness, Veteran's Care, Katrina Recovery and Iraq Accountability Appropriations Act.

SUMMARY OF THE ARGUMENT

Respondents' opposition brief ("Resp. Br.") tends to blur two different rules: first, rules related to the minimal medical and physical qualification standards required of commercial motor vehicle operators (49 C.F.R. § 391.41); and, second, rules governing the process by which a medical examiner certifies a driver's satisfaction of these physical qualification standards (49 C.F.R.§ 391.43). The Respondents' arguments ask the Court to focus on the rules for the physical qualifications – the rules that were the focus of the 1991 MOU; not on the Final Rule Petitioner OOIDA challenges in this litigation – the new medical certification process. OOIDA does not, in this challenge, raise the issue of whether Mexico's driver physical qualification standards were equivalent in 1991 or remain equivalent today. OOIDA raised this issue in separate, pending litigation focused on Respondents' ongoing Mexican truck pilot program. D.C. Cir. No 11-1251.

Failing to recognize the distinction between these two sets of rules, Respondents do not deal directly with OOIDA's analysis of the 1991 MOU with Mexico which shows conclusively that the agreement did not address the medical certification process. Their only retort to OOIDA's analysis was to point to Article 2 of the MOU requiring drivers to "meet established medical standards." Article 2 says nothing about how one certifies that an individual driver has in fact satisfied "established medical standards." The 1991 MOU creates no obligations with

respect to certification, but defers on this issue until a later time. The effect of the 2005 statutory provisions is to create a new certification obligation applicable to all drivers, including those from Mexico. It does not abrogate the 1991 MOU which established no certification standards.

This Court's opinions in *Roeder v. Islamic Republic of Iran,* 333 F.3d 228 (D.C. Cir. 2003)(*Roeder I*) and *Roeder v. Islamic Republic of Iran,* 646 F.3d. 56 (D.C. Cir. 2011)(*Roeder II*) specifically hold that there is no requirement that an international agreement be identified in subsequent legislation as a prerequisite to abrogation. Respondents make no attempt to deal with the Court's treatment of this issue. It is clear, moreover, that the question of abrogation turns on whether the provisions of the later enacted statute are clear and unambiguous. If so, courts will apply the statute according to its terms even if these terms conflict with a prior treaty. *Fund for Animals, Inc. v. Kempthorne*, 472 F.3d 872, 879 (D.C. Cir. 2006). Respondents do not contend that either 49 U.S.C § 31149(c)(1)(B) or (d)(3) is ambiguous. Absent ambiguity, those provisions abrograte any undertakings in the pre-existing international agreements found to be in conflict.

ARGUMENT

I. RESPONDENTS' STATUTORY RESPONSIBILITY IS NOT CIRCUMSCRIBED BY PRIOR INTERNATIONAL AGREEMENTS

A. The Agreement with Mexico Does Not Create Obligations Regarding Certification of Driver Medical Qualifications

Under SAFETEA-LU, enacted in 2005, no individual may operate a commercial motor vehicle without a valid medical certificate (49 U.S.C. § 31149(c)(1)(B)) issued by a person listed on the National Registry of Medical Examiners. 49 U.S.C. § 31149(d)(3). Respondents do not contest the proposition that they have no statutory authority to permit drivers to operate without such a valid medical certificate unless their duties are somehow circumscribed by pre-existing international agreements with the governments of Canada and Mexico.

In its opening brief, Petitioner OOIDA argued that there was nothing in the record establishing that pre-existing international agreements with Canada and Mexico were in conflict with the 2005 SAFETEA-LU statute.[1] If there is no conflict, there would be no need to address the implications of the later-enacted statutes on the earlier agreements.

OOIDA's opening brief set forth a detailed analysis of the 1991 MOU. That analysis showed that the agreement did not go beyond the mutual recognition of each country's commercial driver's license. Pet. Br. at 15-18. Respondents do not

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[1] Respondents have supplemented the records with respect to Canada. Resp. Br. at A-9, A-12.

challenge that analysis directly. Rather, they argue that an obligation with respect to medical certification was covered in Article II (sic) of the 1991 MOU which they point out was "nowhere discussed in petitioner's brief…." Resp. Br. at 34. Article 2 of the MOU was not addressed by OOIDA because it has nothing whatsoever to do with *certification* of medical fitness.

Respondents present the Court with a fragmented recitation of portions of Article 2 which tends to obscure the meaning of that Article. Resp. Br. at 34. Articles 2(1) and (2) of the MOU provide as follows:

> ***Article 2***
>
> **Mutual Recognition and Grant of Rights**
>
> (1) No later then April 1, 1992, each party shall require drivers, licensed pursuant to its authority, to: (1) Successfully complete a knowledge exam meeting the standards set forth in Article I(A) of the Annex, which forms an integral part of this MOU; (2) successfully complete a skills exam meeting the standards set forth in Article I(B) of the Annex; and (3) meet its *established medical standards*. Drivers fulfilling these requirements, if otherwise qualified to operate the appropriate class of vehicle, shall be issued a Commercial Driver's License or a Licencia Federal de Conductor, as appropriate, consistent with Article I(b)(3) of the Annex.
>
> (2) On April 1, 1992, all Commercial Driver's Licenses and Licencias Federales de Conductor issued pursuant to Paragraph 1 shall be given complete recognition and validity by Federal and State authorities in both countries.
>
> (A) A resident U.S. driver operating a motor vehicle who possesses a valid Commercial Driver's License issued pursuant to Paragraph 1 shall not be required to obtain a Licencia Federal

> de Conductor to operate in the United Mexican States.
>
> (B) A resident Mexican driver operating a motor vehicle who possesses a valid Licencia Federal de Conductor issued pursuant to Paragraph 1 shall not be required to obtain a non-resident Commercial Driver's License to operate in the United States of America;
>
> (C) Drivers possessing a Commercial Driver's License or a Licencia Federal de Conductor may drive only those classes of vehicles for which they have been tested and licensed to drive. (Emphasis added)

Note that the language in paragraph (1) requires that drivers from each party "meet its established medical standards." This provision does not deal at all with the very separate question of *certification* that an individual driver meet those medical standards. Certification that an individual driver has satisfied applicable medical standards is not covered in Article 2, but is discussed elsewhere in the MOU. Pet. Br. at 15-18.

Respondents argue that "the Secretary has always understood this agreement to require acceptance of the Mexican LFC as proof of medical fitness to drive in the United States," citing 57 Fed. Reg. 31455. Resp. Br. at 34. The first problem with this argument is that the type of deference which Respondents seek must be predicated upon ambiguity in the provision subject to interpretation. "The interpretation of a treaty, like the interpretation of a statute begins with its text." *Medellin v. Texas*, 552 U.S. 491 (2008). There is no ambiguity in the 1991 MOU on this issue. As OOIDA showed in its opening brief, the decision to accept the

LFC as *proof* of medical fitness was made unilaterally by the Federal Highway Administration in subsequently adopted regulations and was not based upon any obligation set forth in the MOU itself. The agreement itself identified *certification* of medical fitness as a subject for further study (Article 3), and it looked to the possibility that the United States might someday adopt the approach used in Mexico. *See* the Annex to the MOU discussed in Pet. Br. at 16. The United States never moved its certification requirement in the direction of the approach favored in Mexico. On the contrary, it adopted by statute stringent certification requirements including requirements for the training, testing, and continued supervision of medical examiners by the Secretary together with requirements for access to certification records by enforcement authorities. Under these circumstances, the provision contained in Article 4 of the MOU controls:

> ***Article 4***
>
> **Application of Law**
> U.S. and Mexican drivers of motor vehicles referred to in Article 2(2) shall be subject to the applicable laws and regulations of the country in which they operate such motor vehicles.

57 Fed. Reg. at 31456. Article 4 unquestionably makes Mexico-domiciled drivers subject to the medical certification requirements subsequently adopted in SAFETEA-LU. Because the 1991 MOU deferred on the issue of medical certification and required all drivers to comply with statutory obligations imposed

by the country where they may be operating, there is simply no conflict between any obligation established in the 1991 MOU and the legislation passed by Congress in 2005 dealing with certification. But, even if there were such a conflict, the unambiguous language of the later-enacted statutes would abrogate any such conflicting provisions.

B. Applicable Statutes Clearly and Unambiguously Abrogate Any Pre-Existing International Agreements

1. A Statute May Abrogate a Pre-Existing International Agreement Without Identifying It

Respondents' Statement of the Issue seems to suggest that a later-enacted statute may not abrogate a pre-existing international agreement *sub silentio* – that is without a specific reference to the agreement being abrogated. Resp. Br. at 1. Indeed, the entire thrust of Respondents' argument is that neither of the statutory provisions in question nor their legislative history makes reference to the international agreements which OOIDA contends were abrogated.

This Court has made it completely clear in *Roeder I* and *II* that a subsequently enacted statute need not mention or otherwise identify the international agreement whose provisions may be abrogated. Indeed, the *Roeder I* decision identified specific language that would have been effective in abrogating the Algiers Accords without ever mentioning that international agreement by name. *Roeder I*, 333 F. 3d at 237; *Roeder II*, 646 F.3d at 59. This Court held that

the Algiers Accords were not abrogated by Congress because the subsequently enacted legislation was ambiguous, not because the legislation failed to identify that international agreement by name.

2. Respondents Do Not Argue that the Language of the Applicable Statutory Provision Is Ambiguous or Open to Alternative Interpretations

In *Roeder I* and *II*, this Court's focus was on the question of determining Congressional intent when the later-enacted statute was open to conflicting interpretations -- one of which would result in abrogation and the other of which would not. The Court held that the existence of such ambiguity precluded a finding that Congress intended to abrogate the pre-existing international agreement. This was so even where the arguments favoring the interpretation resulting in abrogation were significantly stronger than the arguments favoring an interpretation that would not result in abrogation. *Roeder II*, 646 F. 3d at 61 ("an ambiguous statute cannot supersede an international agreement if an alternative reading is fairly possible"). Respondents ignore the statutory language at issue and make no argument that the statutory language is ambiguous. Unlike the statutory labyrinth before the Court in *Roeder I* and *II*, the statutes at issue here are clear, direct and to the point.

49 U.S.C. § 31149 Medical Program

(c) Medical standards and requirements.—

(1) In general. – The Secretary, with the advice of the Medical Review Board and the chief medical examiner, shall—

* * * *

(B) require each such operator to have a current valid medical certificate;

* * * *

(d) National registry of medical examiners. -- The Secretary, acting through the Federal Motor Carrier Safety Administration—

* * * *

(3) shall accept as valid only medical certificates issued by persons on the national registry of medical examiners….

Add. 4-5.

These provisions apply without exception to all drivers who would operate a commercial motor vehicle on our nation's highways. Respondents do not contend that the statutory requirements at issue here are ambiguous. Under such circumstances, the straight-forward rule articulated by this Court in *Fund for Animals, Inc. v. Kempthorne*, 472 F.3d 872 (2006) applies:

> In the second part of their argument, plaintiffs cite the canon of construction that ambiguous statutes should not be construed to abrogate treaties. That argument lacks merit. The canon applies only to ambiguous statutes (and as we have just explained, this statute is not ambiguous).

> The Constitution establishes that statutes enacted by Congress with the concurrence of the President (or over his veto) have no less weight than treaties made by the President with the advice and consent of two-thirds of the Senate. *See* U.S. CONST. art. II, * * * * Consistent with this doctrine, the Supreme Court has long recognized that a later-enacted statute trumps an earlier-enacted treaty to the extent the two conflict. This is known as the last-in-time rule. * * * *At the same time, the Supreme Court also has stated that an ambiguous statute should be construed where fairly possible not to abrogate a treaty. * * * The combination of the last-in-time rule and the canon against abrogation has produced a straightforward practice: Courts apply a statute according to its terms even if the statute conflicts with a prior treaty (the last-in-time rule), but where fairly possible, courts tend to construe an *ambiguous* statute not to conflict with a prior treaty (the canon against abrogation).
>
> The canon against construing ambiguous statutes to abrogate prior treaties does not help plaintiffs here, however, because the amended Migratory Bird Treaty Act is unambiguous, as we concluded above.

472 F.3d at 879 (citations omitted). None of the cases relied upon by Respondents warrant a departure from this test.

Respondents misread *Chew Heong v. United States*, 112 U.S. 536 (1884), suggesting that it stands for the proposition that broad language in a statute cannot be read to abrogate provisions in an earlier treaty unless Congress declares its intent to do so in "unmistakable terms." Resp. Br. at 26. The actual holding in *Chew Heong* is more closely aligned with the Court's holding in *Roeder II* where conflicting, but plausible, interpretations of the later-enacted statute create

circumstances that do not favor abrogation of an earlier treaty. The later-enacted statute in *Chew Heong* is more properly characterized as ambiguous.

Chew Heong, a citizen of China, resided in California on November 17, 1880, the day on which China and the United States concluded a treaty giving citizens of each country who resided in the other country the rights to exit from and return to that country. In June of 1881 Chew Heong departed the United States for the Kingdom of Hawaii and remained there until September, 1884 when he attempted to return to California. In 1882 and 1884, while he was away, Congress enacted two statutes that required Chinese laborers who were departing from the United States to obtain an exit document upon leaving the country and then present that document to port authorities as a condition of reentry. Since Chew Heong had departed from the United States prior to the adoption of this new exit procedure, he held no exit document to present upon his return. Denying him the ability to return would have deprived him of the right to return granted in the 1880 Treaty. The question presented then was whether the intervening legislation establishing the exit document procedure abrogated the right to return granted under the treaty of November 17, 1880. The opinion of the Court was devoted to the task of resolving an ambiguity in the later-enacted statutes in a way that would be consistent with obligations under the pre-existing treaty. Justice Bradley's dissent points out that the exemption clause, the meaning of which was at the core of the dispute, "by

some inadvertence was expressed in the disjunctive…. The whole tenor of the act shows that this was an inadvertent expression…" 112 U.S. at 579. Justice Field, at the conclusion of his dissent, expressed the hope "that Congress will, at an early day, speak on the subject in terms that will admit of no doubt as to their meaning." 112 U.S. at 578. The statutes at issue were poorly drafted and of doubtful meaning. Justice Harlan's majority opinion was designed to produce a result that would harmonize pre-existing treaty obligations with poorly drafted and ambiguous statutory provisions:

> Statutory provisions which declare that a certificate shall be evidence, or the only evidence, of the right of the person 'to whom it is issued' to re-enter the United States, cannot, upon any sound rule of interpretation, be held to apply to one to whom it could not have been issued. A Chinese laborer, to whom a certificate was issued * * * * under the act of 1884, is entitled to re-enter only upon producing such certificate; while the plaintiff in error, having left before any certificate was permitted to be issued, cannot be required to produce one before re-entering, because, having resided here on the seventeenth day of November, 1880, he was clearly entitled, under the express words of the treaty, to go from and return to the United States of his own free will,-a privilege that would be destroyed if its enjoyment depended upon a condition impossible to be performed. *The recognition of that privilege is entirely consistent with existing legislation*; for, by construing the original and amendatory acts, so far as they require the production of a collector's certificate by Chinese laborers who were in the United States on the seventeenth of November, 1880, as applicable only to those of that class who were here at the dates when those acts, respectively, took effect, no previously acquired rights are violated, and full effect is given to the expressed intention of congress to faithfully meet our treaty obligations. Thus, the legislation of congress and the stipulations of the treaty may stand together.

Id. at 560.

The Supreme Court's disposition of the issues raised in *Chew Heong* is entirely consistent with this Courts' holding in *Roeder II*. The majority opinion of Justice Harlan presented one plausible interpretation of the statutes at issue that was in harmony with the pre-existing treaty, while the two dissenting justices presented another plausible interpretation of those statutes that would have abrogated rights granted under the earlier treaty. Under *Roeder I* and *II,* the existence of two plausible interpretations of the later-enacted statutes would preclude abrogation. That is the result achieved by the *Chew Heong* Court.

In *TransWorld Airlines, Inc. v. Franklin Mint Corporation,* 466 U.S 243 (1984), the court made reference to "a firm and obviously sound canon of construction against finding implicit repeal of treaty in ambiguous congressional action." *Id.* at 252. There, Congress repealed the Par Valuation Act. Fairly read, the Court's holding stands for the proposition that the repeal was essentially ambiguous, and that did not render the Warsaw Convention's gold-based liability limit unenforceable.

Weinberger v. Rossi, 456 U.S. 25 (1982) involved a very narrow holding that use of the term "treaty" in an antidiscrimination statute should not be limited to formal Article II treaties ratified by the Senate. *Id.* at 32. The Court cited *Murray v. The Charming Betsy*, 2 Cranch 64, 118 L. Ed. 208 (1804) for the

proposition that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains possible…" *Id*. at 1516. Of course, if other constructions are possible it is because the statute is open to different interpretations, *i.e.*, it is ambiguous.

Cook v. United States, 288 U.S. 102 (1933) involved a Coast Guard search of a British vessel suspected of smuggling liquor. The Tariff Act of 1922 authorized the boarding of any vessel by the Coast Guard within 12 miles of the coast. By formal treaty adopted in 1924, British vessels were exempted from boarding outside of a three mile limit. The formal 1924 treaty superseded the earlier enacted statute. The language of the 1922 statute was later reenacted by Congress in the Tariff Act of 1930. The issue raised was whether the 12 mile limit readopted in 1930 abrogated the 3 mile limit established in the 1924 treaty. *Id.* at 104. The Court found that the 1930 reenactment of the exact language of the 1922 statute did not abrogate the 1924 statute. *Id.* at 119-120. This very fact-specific holding does not establish any immutable principles of universal application as Respondents urge upon the Court.

Respondents' cases follow a pattern which is simply not replicated in the facts of this case. These cases each involved a clear international agreement juxtaposed with later-enacted statutes that were ambiguous or open to a wide range of interpretations – some broad, others narrow. Not so the case at bar. Here we

are dealing with an international agreement with Mexico that establishes no obligations with respect to certification of driver qualifications. This Mexican MOU is juxtaposed against later-enacted statutes as to which Respondents make no claim of ambiguity. A ruling in favor of Respondents would permit a very dubious reading of an international agreement to trump a clear and unambiguous safety statute. Such a reading establishes a two-tier safety regime -- one tier imposing a high standard for U.S - domiciled drivers, and a second tier creating a lesser standard for Mexico-domiciled drivers. No case cited by Respondents supports such a result.

II. THERE IS NO SUPPORT FOR THE PROPOSITION THAT CONGRESS INTENDED TO EXEMPT FOREIGN DRIVERS FROM THE UNAMBIGUOUS LANGUAGE OF SECTION 31149

A. SAFETEA-LU Was Not a Simple Recodification of an Earlier Certification Rule

Respondents incorrectly suggest that SAFETEA-LU simply codified a long-standing medical certification rule. Resp. Br. at 21. If that were true, there would be no reason for Respondents to promulgate the challenged Final Rule. The new Final Rule addresses a determination by Congress that the interest of highway safety demands a new process to ensure that drivers do not obtain a medical certificate without satisfying the separate physical qualification rules. The NPRM identified the evidence that Congress relied upon in passing the statutory mandate and that FMCSA relied upon to guide the rulemaking. *See* Petitioner's Brief at 25-

28 and the NPRM 73 Fed. Reg. at 73129 - 73131. J.App. at 1 - 3.

SAFETEA-LU unequivocally mandated that all drivers must possess a medical certificate that is the product of a new and more reliable certification process. That statutory mandate and the new Final Rule being challenged did not exist in 1991 when the MOU was created. Therefore, it is impossible for the United States and Mexico to have considered or to have formed an agreement concerning these requirements in the 1991 MOU.

By statute, and now regulation, Congress and FMCSA mandate that all drivers have a valid medical certificate issued by a medical examiner who is listed on a new national registry. 49 U.S.C. § 31149(c)(1)(B). The Final Rule requires medical examiners to be listed on the national registry (49 C.F.R. § 390.101) following completion of a specific training program (49 C.F.R. § 390.105) and testing that must be renewed after 10 years to demonstrate knowledge of ongoing changes to the rules (49 C.F.R. § 390.107). The driver examination records created by medical examiners are subject to the oversight of federal, state, and local enforcement officials (49 U.S.C. § 31149(c)(2)) and medical examiners are subject to ongoing oversight and potential removal from the registry for failing to comply with various medical certification requirements (49 C.F.R. § 390.113). The rules also require medical examiners to transmit to the government and retain specific information concerning the driver medical exams they perform (49 C.F.R.

§ 391.43).

For the purpose of this action, Petitioner is concerned that even if Mexico's and the United States' driver physical qualification rules were equivalent on paper in 1991, or even now, Mexico does not now have a medical certification process in place that is comparable to the one incorporated in the Final Rule that ensures that an individual satisfies the separate standards of physical qualification. Mexico does not have the same medical certification record storage requirements permitting U.S. federal, state, and local enforcement officials the same oversight ability to review a Mexican driver's, or Mexican examiner's, certification records. The focus of this case is OOIDA's position that it is unsafe and unfair for FMCSA to permit drivers from Mexico to operate on U.S. highways under Mexico's far less strict medical certification and oversight procedures.

B. Congress Has Always Identified Highway Safety as Its Highest Priority

Respondents mischaracterize congressional action in this area, contending that Congress has "repeatedly required the Secretary to carry out cross-border trucking programs to implement NAFTA." Resp. Br. at 32. The record of Congressional activity in this area shows unquestionably that Congress has consistently identified highway safety as its highest priority and has placed obstacles and restrictive conditions on any action by the Executive Branch that did not put safety first.

On November 20, 1993, Congress officially approved the NAFTA agreement. H.R. 3450, Vote No. 395, passed 61-38-1, November 20, 1993. The legislation implementing NAFTA specifically provides: "nothing in this Act shall be construed – (A) to amend or modify any law of the United States, including any law regarding… (iii) motor carriers or workers safety…" North American Free Trade Implementation Act, Title I, Section 102 (a)(2)(A)(iii), Pub. L. 103-1082, 107 Stat. 2057 (December 8, 1993). Notably, these provisions became law after the 1991 MOU was created.

On February 6, 2001, after an International Arbitration Panel (IAP) determined that a blanket refusal by the United States to process applications for operating authority by Mexico-domiciled motor carriers violated its national treatment obligation under NAFTA, Congress reacted by prohibiting FMCSA from expending funds to process applications for operating authority until additional safety measures were adopted. Dep't of Transp. and Related Agencies Appropriations Act, 2002, Pub. L. No. 107-87, §350, 115 Stat. 833, 864 (December 18, 2001) ("Section 350"). Section 350, Safety of Cross-Border Trucking Between United States and Mexico, has been reenacted in each subsequent Department of Transportation appropriations act since 2002.

Efforts to open the border further to Mexican trucks were interrupted by environmental litigation dealing with FMCSA's obligations under the National

Environmental Policy Act ("NEPA") when implementing the President's decision to lift the moratorium on entertaining applications for operating authority. *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004).

After resolving that matter, on May 1, 2007, FMCSA proposed a so-called "Demonstration Project" similar to the pilot program at issue in D.C. Cir. No. 11-1251 that would allow up to 100 Mexico-domiciled motor carriers to operate beyond the commercial zones at the border. Notice and Request for Comment, FMCSA-2007-20855-0001, Demonstration Project on NAFTA Trucking Provisions, 72 Fed. Reg. 23883 (May 1, 2007). Three weeks later, Congress reacted again by placing further obstacles in front of the Demonstration Project in its *U.S. Troop Readiness, Veteran's Care, Katrina Recovery and Iraq Accountability Appropriations Act*, Pub. L. 110-28, 121 Stat. 183 (May 25, 2007), 49 U.S.C. § 13902 (Historical and Statutory Notes) (hereafter "Section 6901").

In March of 2009, Congress terminated the Demonstration Project by specifically defunding it in the DOT appropriations bill. Pub. L. No. 111-8, §136, 123 Stat. 524, 932 (2009). At the end of 2009, in response to retaliatory Mexican trade tariffs, Congress declined to reenact the ban on the use of appropriated funds for cross border trucking, but maintained the requirements of previous appropriations acts Sections 350 and 6901. *See* Consolidated Appropriations Act, 2010, Pub. L. No. 111-117, §135, 123 Stat. 3034, 3035 (2009).

Rather than Congress "requiring" the Department of Transportation to carry out the cross-border trucking provisions of NAFTA, as the Respondents suggest (Resp. Br. at 32), Section 6901 permissively provided that funds "may" be obligated or expended for that purpose, but only if done as part of a pilot program and not until a variety of procedures had been followed and disclosures made with an opportunity for public comment. Section 6901 narrowed the circumstances under which operating authority may be issued to Mexico-domiciled motor carriers. *Id.*

Likewise, Respondents misconstrue Section 6901's requirement that they disclose which of Mexico's laws and regulations they will accept compliance with, in lieu of compliance with U.S. rules and regulations. *Id.* § 6901(b)(2)(B). Respondents assert that by this disclosure requirement Congress gave them the authority to accept non-compliance with any and all U.S. motor carrier safety statutes and regulations. Congress does not grant such extraordinary authority through information disclosure requirements. Likewise, in an appropriations rider intended to narrow the conditions under which Mexican trucks were allowed into the country, Congress would not have granted Respondents blanket authority to accept non-compliance with U.S. safety statutes and rules.

There is nothing in this appropriations rider to support a departure from the cardinal rule that repeal of statutes by implication is disfavored. *Tennessee Valley*

Auth. v. Hill, 437 U.S. 153, 189-90 (1978); cited by *Agri Processor Co., Inc., v. N.L.R.B.*, 514 F.3d 1, 4 (D.C. Cir. 2008); and, *Calloway v. District of Columbia*, 216 F.3d 1, 10-11 (D.C. Cir. 2000). This principle "applies with even greater force…when the subsequent legislation is an Appropriations measure." *Calloway*, 216 F.3d at 10; citing *Tennessee Valley Auth*., 437 US at 190. There is a "'very strong presumption' that appropriations acts do not amend substantive law…." *Calloway*, 216 F.3d at 9. When two statutes "are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Agri Processor Co., Inc.,* 514 F.3d at 4, citing *Ruckeshaus v. Monsanto Co.*, 467 U.S. 986, 1018 (1984).

Nor does the use of a pilot program under 49 U.S.C. § 31135(c) grant Respondents any authority to accept non-compliance with U.S. statutory requirements (such as the requirement to have the required medical certificate in 49 U.S.C. § 31149(c)(1)(B) or *any* safety regulation. Under a pilot program, Respondents only have authority to grant exemptions "from a regulation prescribed under this chapter or section 31136" in accord with any governing statute. *Id.* (*i.e.* the rules that the Respondents have the authority to promulgate).

Instead of granting Respondents the authority to accept non-compliance with U.S. laws, there is every indication that Congress intended for the Pilot Program to test Mexican motor carrier and driver compliance with all U.S. safety statutes and

regulations – the only obligation that the U.S. made to Mexico under NAFTA.

CONCLUSION

The provisions of 49 U.S.C. § 31149 are clear and unambiguous. Respondents do not contend otherwise. Those provisions abrogate any conflicting obligations found in earlier international agreements.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(C) and Cir. R. 32 (1) in that the brief contains **5,048** words excluding those parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

Dated: December 3, 2012

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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of December, 2012, an electronic copy of Petitioner's Reply Brief, was served via CM/ECF system to all parties of record. In addition, two copies of the Petitioner's Reply Brief will be mailed via Federal Express upon the individual listed below:

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