No. 13-1126

In The Supreme Court of the United States

OWNER-OPERATOR INDEPENDENT DRIVERS ASSOCIATION, INC.,

Petitioner,

v.

UNITED STATES DEPARTMENT OF TRANSPORTATION, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

STATEMENT

The Petition for Certiorari and the dissenting opinion below (App. 19-27) argue that the D.C. Circuit's presumption against treaty abrogation and its application of a clear statement rule in this case cannot be reconciled with the parity mandated by the Supremacy Clause between treaties and acts of Congress. Historically, a conflict between a treaty and an act of Congress has been resolved by a last-in-time rule, except in situations where a later-enacted statute is ambiguous. In such cases, the ambiguity is resolved, if possible, to avoid abrogation of a treaty. Pet. at 4-5. Despite the *undisputed* lack of ambiguity in the statute at issue (App. 7), the D.C. Circuit brushed aside the last-in-time rule by creating a presumption against treaty abrogation and imposing upon Congress a clear statement rule to overcome that presumption. Significantly, the Solicitor General's Opposition Brief does not once mention the Supremacy Clause nor does it attempt to address this core constitutional issue. A writ of certiorari should issue to address the conflict between the lower court's opinion and this Court's long-standing Supremacy Clause jurisprudence.

ARGUMENT

I. THE SUPREMACY CLAUSE DOES NOT SUPPORT A PRESUMPTION AGAINST TREATY ABROGATION

A. Respondents' Position

The Supremacy Clause establishes parity between acts of Congress and treaties. A presumption against abrogation favors treaties over acts of Congress and ignores the parity mandated by the Constitution. It is one thing to create a presumption disfavoring extraterritorial or retroactive application of statutes where there are no implications under the Supremacy Clause. Cases involving such presumptions have limited value, however, when applied to clashing statutes and treaties under the Supremacy Clause.

The Circuit Court's opinion is unclear with respect to the nature and scope of the presumption it raised against abrogation. On the one hand the Circuit Court recognized that "the last-in-time rule tells courts how to resolve clashes between statutes and treaties. . . ." App. 6. On the other hand the Circuit Court observed that "courts prefer to avoid such conflicts altogether. Thus, we presume that newly enacted statutes do not automatically abrogate existing treaties." App. 6-7. The problem presented here is how to deal with statutes where Congress speaks in "textually unambiguous terms." App. 7. Respondents argue that the presumption addresses the "antecedent question of how a court should determine whether the language of a particular statute is

actually inconsistent with a prior executive agreement." Resp. Br. at 13. According to Respondents, resolution of that so-called antecedent question is governed by a clear statement rule. *Id*. at 13-14. It is unclear, however, whether the Circuit Court's novel presumption address only the question of whether there is a clash, or whether it goes further by weighting the judicial scales in favor of treaties through its clear statement rule.

B. Legislative Context Establishes A Clash Between The 2005 Statute And The Earlier International Agreements

Respondents rely on *TransWorld Airlines, Inc. v. Franklin Mint Corporation*, 466 U.S. 243 (1984) (*TWA*), which involved the question of whether the repeal of the Par Value Act (the gold standard) resulted in the abrogation of the Warsaw Convention's gold-based liability limit. The Court noted that the repeal of the Par Value Act was not related to the Convention, but was intended to give formal effect to a new international monetary system that had in fact evolved almost a decade earlier. 466 U.S. at 252. Repeal of the Par Value Act undoubtedly produced a broad range of economic consequences both domestic and international. Because of the uncertain interactions between numerous consequences that followed abandonment of the gold standard and obligations under various statutes and treaties, the Court favored a higher standard for demonstrating congressional intent before abrogation of a specific treaty would be

found. "In these circumstances we are unwilling to impute to the political branches intent to abrogate a treaty without following appropriate procedures set out in the Convention itself." 466 U.S. at 253.

The proposition that domestic legislation containing broad general language (like in the Par Value Act) should not be seen to abrogate narrowly focused treaty obligations has no application here. The context here of both the prior executive agreements and the 2005 statute demands a different approach. In the case before the Court today, the domestic legislation is specifically related to activity that is the subject of the international agreements – the qualifications of commercial truck drivers to operate on U.S. highways. Unlike the situation in *TWA* where the Par Value Act was not directly related to the Warsaw Convention, the domestic legislation and the international agreements at issue here are directly related. There is no need to guess what Congress intended when it determined that no person may operate a commercial motor vehicle without holding a current and valid medical certificate (49 U.S.C. § 31149(c)(i)(B)) issued by a person listed on the National Registry of Medical Examiners. 49 U.S.C. § 31149(d)(3). The suggestion that this case involves Congressional silence is misleading. Congress was not silent. It spoke clearly and in unambiguous terms on a narrow subject that was the specific focus of the earlier international agreements. Here there is complete overlap between the subject matter of the international agreements and the later-enacted legislation. Once the context is

consulted, as Justice Scalia approved in *Morrison v. National Australian Bank, Ltd.*, 561 U.S. 247, 265, 130 S. Ct. 2869, 2883 (2010), the so-called antecedent question answers itself without the need for a clear statement rule.

Respondents cite other cases where lack of clarity in the later-enacted statute foreclosed abrogation of an earlier negotiated treaty. Respondents' cases follow a pattern which is simply not replicated in the facts relevant here. These cases each involved a clear international agreement juxtaposed with later-enacted statutes that were either ambiguous or open to a wide range of applications – some broad, others narrow. Where the later-enacted statutes were general, further evidence of an intent to abrogate was deemed necessary.

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. Schooner Charming Betsy*, 6 U.S. 64, 2 Cranch 64, 2 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. True enough, but the Court found no abrogation because the domestic legislation was worded broadly enough to accommodate the provisions of any international agreement including those not subject to Senate ratification. Its ambiguity was resolved in favor of preserving the treaty.

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 1922 statute. The language of the 1922 statute was later reenacted and *recodified* 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's holding that it did not says nothing more than that the 1930 *recodification* of the exact language of the 1922 statute did not trigger application of the last-in-time rule. *Id.* at 119-20.

The language relied upon by Respondents from *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 690 (1979), Resp. Br. at 10 ("Absent specific statutory language, we have been extremely reluctant to find congressional abrogation of treaty rights") is unobjectionable, but certainly does not support a clear statement rule. The later-enacted statute examined by the Court in *Washington* was not enacted by Congress at all, but was enacted by the State of Washington. For that reason it was deemed "without effect . . . and must give way to the federal treaties." 443 U.S. at 691-92. The case simply does not advance any contention of importance here.

II. AUTHORITIES CITED BY RESPONDENTS DO NOT SUPPORT APPLICATION OF A CLEAR STATEMENT RULE

Morrison v. National Australian Bank, Ltd., *supra*, involved the question of what evidence of congressional intent would be necessary to overcome the presumption against the extraterritorial application of the act of Congress. Respondents argue incorrectly that the Court, in determining "whether a statute satisfies a clear statement rule," has "insisted upon an affirmative indication that Congress directly decided the specific issue involved." Resp. Br. at 10-11, citing *Morrison*, 561 U.S. at 262, 130 S. Ct. at 2881. Justice Scalia's opinion for the Court in *Morrison* discloses, however, that the Court decided no such thing:

> The concurrence [opinion] claims we have impermissibly narrowed the inquiry in evaluating whether a statute applies abroad. . . . But we do not say, as the concurrence seems to think, that the presumption against extraterritoriality is a "clear statement rule," *ibid.*, if by that is meant a requirement that a statute say "this law applies abroad." *Assuredly context can be consulted as well*.

561 U.S. at 265, 130 S. Ct. at 2883 (emphasis added). The concurring opinion by Justices Stevens and Ginsburg in *Morrison* points to similar uncertainty as to whether Chief Justice Rehnquist's opinion in *EEOC v. Arabian American Oil Co.*, 449 U.S. 244 (1991) (*Aramco*) created a clear statement rule. *Morrison*, 561 U.S. at 278-79, 130 S. Ct. at 2891. The concurring

opinion in *Morrison* points out that this Court continues to give effect to all available evidence when considering a statute's extraterritorial application:

> Yet even *Aramco* – surely the most extreme application of the presumption against extraterritoriality in my time on the Court – contained numerous passages suggesting that the presumption may be overcome without a clear directive. See *id.*, at 248-255, 111 S. Ct. 1227 (majority opinion) (repeatedly identifying congressional "intent" as the touchstone of the presumption). And our cases both before and after *Aramco* make perfectly clear that the Court continues to give effect to "*all available evidence* about the meaning" of a provision when considering its extraterritorial application, lest we defy Congress' will. *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 177, 113 S. Ct. 2549, 125 L.Ed.2d 128 (1993) (emphasis added).

561 U.S. at 279, 130 S. Ct. at 2891. *See also* Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 Berkeley J. Int'l L. 85, 110 (1998) (explaining that lower courts "have been unanimous in concluding that the presumption against extraterritoriality is not a clear statement rule").

As discussed more fully in Petitioner's opening brief, congressional silence should never be used to create a loophole in national safety regulations covering highway safety. Pet. Br. at 15-20. Likewise, the same congressional silence should not be allowed to create the same loophole by dodging abrogation in

the face of unambiguous statutory language. *Ibid*. The context of the 2005 legislation argues strongly against any conclusion that Congress intended to approve separate safety standards for Mexican and Canadian drivers. As Respondents are fond of saying, if a proposal was actually made to exempt foreign drivers from domestic safety standards, "someone would have said something!"

Congress, in clear and unmistakable terms, mandated that the physical qualifications of persons to operate commercial motor vehicles safely be determined only by individuals who are trained and certified to perform that task and supervised when they do so. Pet. Br. at 16-19. Respondents assert only that standards for medical qualifications are similar in both Mexico and Canada and are comparable to U.S. standards. Resp. Br. at 15. This case is not concerned, however, with medical standards. It is concerned with how medical standards are applied on a driver by driver basis. Respondents do not make a serious case that the loophole identified in the Petition for Review does not exist.

III. THE CLEAR STATEMENT RULE APPROVED BY THE CIRCUIT COURT VIOLATES THE SUPREMACY CLAUSE

Respondents make no attempt to reconcile the Circuit Court's clear statement rule with the Supremacy Clause. Respondents do not dispute the fact that, under the Supremacy Clause, statutes and treaties

stand on equal footing and that, historically, conflicts have been resolved under a last-in-time rule. Pet. Br. at 4-5. Respondents, quoting the Circuit Court's opinion, concede that "any clear statement rule involves an unwillingness to give full effect to a statute's unambiguous text. That is how they work." Resp. Br. at 9, quoting App. 15. It is perfectly obvious, however, that a court's "unwillingness to give full effect to a statute's unambiguous text" tilts the playing field in favor of the treaty and against the statute thereby running afoul of the Supremacy Clause. Dissenting Opinion at App. 22-24.

Justice Marshall's dissent in *Aramco* catalogues additional features found in the application of clear statement rules that have no place in a dispute arising under the Supremacy Clause:

> Clear-statement rules operate less to reveal *actual* congressional intent than to shield important values from an *insufficiently strong* legislative intent to displace them. See, *e.g.*, *Webster v. Doe*, 486 U.S. 592, 601, 603, 108 S.Ct. 2047, 2052, 2053, 100 L.Ed.2d 632 (1988); *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242-243, 105 S.Ct. 3142, 3147-3148, 87 L.Ed.2d 171 (1985); *Kent v. Dulles*, 357 ***263** U.S. 116, 130, 78 S.Ct. 1113, 1120, 2 L.Ed.2d 1204 (1958). When they apply, such rules foreclose inquiry into extrinsic guides to interpretation, see, *e.g.*, *Dellmuth v. Muth*, 491 U.S. 223, 230, 109 S.Ct. 2397, 2401, 105 L.Ed.2d 181 (1989), and even compel courts to select less plausible candidates

> from within the range of permissible constructions, see, *e.g.*, *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575, 108 S.Ct. 1392, 1397, 99 L.Ed.2d 645 (1988).

Aramco, 499 U.S. at 262 (dissenting opinion).

These concepts were addressed in Petitioner's Brief where Professor Manning's reference to the imposition of a "clarity tax" upon legislative proceedings by clear statement rules was discussed. Pet. Br. at 13-14. The Solicitor General's conspicuous silence on the Supremacy Clause reinforces the conclusion that the Petition presents a serious issue that beckons for resolution by this Court.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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