

UNITED STATES DEPARTMENT OF TRANSPORTATION V. PUBLIC CITIZEN*

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In 2001, President Bush announced his intention to lift a longstanding moratorium on grants of new operating licenses to Mexican motor carriers, in response to a NAFTA arbitration-panel ruling declaring the moratorium illegal. His decision provoked heated response, as various labor, consumer safety and environmental groups expressed concerns regarding the safety and cleanliness of the Mexican trucking fleet.¹ The controversy ultimately found its way into the courts, where it has since simmered for three full years. Last Term, in *United States Department of Transportation v. Public Citizen* (to be argued April 21, 2004), the Supreme Court was asked to determine whether the promulgation of application forms and safety regulations for these Mexican trucks requires the Federal Motor Carrier Safety Administration (“FMCSA”) to include the environmental effects of lifting this moratorium within its regular National Environmental Policy Act (“NEPA”)² and Clean Air Act (“CAA”)³ reviews. Yet, despite the hand-wringing that has accompanied each stage of this litigation,⁴ little practical weight should ultimately attach to the Supreme Court’s decision. While the decision to lift the moratorium against Mexico-domiciled trucks may ultimately have significant environmental consequences, the outcome of *Public Citizen* will not determine their magnitude.

BACKGROUND

In 1982, Congress imposed a moratorium on new grants of United States operating authority to motor carriers from Canada and Mexico,⁵ in response to concerns that U.S. motor carriers were being denied full access in those countries.⁶ The United States reached a bilateral agreement with

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¹ See, e.g., Diane Lindquist, *Driving Controversy; NAFTA Rule Opening Border to Trucks from Mexico Hotly Debated*, SAN DIEGO UNION-TRIB., Feb. 8, 2001, at C1.

² 42 U.S.C. §§ 4321–4370(f) (2000).

³ 42 U.S.C. §§ 7401–7671(q) (2000).

⁴ See, e.g., Al Meyerhoff, *Opinion*, L.A. TIMES, Aug. 25, 2002, at M2 (asking “[m]ust increased free trade come at the expense of American environmental standards and the public health?”).

⁵ See Bus Regulatory Reform Act of 1982, Pub. L. No. 97-261, 1982 H.R. 3663 (1982). Under this Act, Mexican carriers with pre-existing authorization to operate in the United States were entitled to continue trans-border operations. See 67 Fed. Reg. 12,702 (Mar. 19, 2002). The moratorium also allowed all Mexican carriers to operate within a twenty-mile designated “border zone.” *Id.*

⁶ See FMCSA, Environmental Assessment, in JOINT APP. VOL. I, Dep’t of Transp. v. Pub. Citizen, No. 03-358, 2004 WL 349778 at *36, *49 (2004) [hereinafter Environmental Assessment].

Canada two months later, and the President lifted the moratorium against Canadian motor carriers.⁷ In contrast, a series of presidential orders extended the moratorium against new Mexican motor carriers through 1995,⁸ when Congress revised the moratorium statute to make permanent then-existing presidential restrictions.⁹ This 1995 revision authorized the President to remove or modify the restrictions if he determined that doing so would be “consistent with the obligations of the United States under a trade agreement or with United States transportation policy.”¹⁰

Mexico, Canada, and the United States signed the North American Free Trade Agreement (“NAFTA”) in 1994.¹¹ Although NAFTA called for an end to the U.S. moratorium on Mexican trucks,¹² President Clinton did not phase out the ban according to schedule, due to ongoing concern about the safety of the Mexican trucking fleet.¹³ Mexico complained that this continuing moratorium violated NAFTA, and in February 2001 a specially convened treaty arbitration panel agreed.¹⁴ Shortly thereafter, President Bush voiced his intent to comply with the panel’s ruling, making clear that he would lift the prohibition as soon as FMCSA had sufficient time to prepare new regulations governing Mexican trucks that sought operating authority in the United States.¹⁵

The President’s decision met virulent domestic opposition, as various interest groups expressed renewed concerns about the safety and cleanliness of the Mexican trucking fleet.¹⁶ In December 2001 Congress responded to these concerns by passing an appropriations rider (“Section 350”) preventing FMCSA from allowing Mexican trucks into the United States unless and until FMCSA promulgated regulations satisfying certain stated safety criteria.¹⁷ Section 350 required FMCSA modification of the appli-

⁷ See Determination Under the Bus Regulatory Reform Act of 1982, 47 Fed. Reg. 54,053 (Nov. 29, 1982).

⁸ See, e.g., 49 Fed. Reg. 35,001 (Aug. 30, 1984).

⁹ Interstate Commerce Commission Termination Act of 1995, Pub. L. No. 104-88, Tit. I, § 103, 109 Stat. 880 (codified at 49 U.S.C. 13902(c)(4) (2000)).

¹⁰ 49 U.S.C. § 13902(c)(3) (2000).

¹¹ 32 I.L.M. 605 (chs. 10–22) (1993); codified at 19 U.S.C. §§ 3301–3473 (2000).

¹² NAFTA required the U.S. to authorize Mexican trucking service to border states by December 17, 1995, and to the entire U.S. by January 1, 2000. See North American Free Trade Agreement, 1992 WL 812403 at *53. See also 66 Fed. Reg. 223,771 (May 3, 2001) (reviewing phase-out requirements).

¹³ See Environmental Assessment, *supra* note 6, at *53.

¹⁴ See GAO Report to Congressional Requesters, in JOINT APP. VOL. II, Dep’t of Transp. v. Pub. Citizen, No. 03-358, 2004 WL 349778 at *249, *254 (2004).

¹⁵ The NAFTA arbitration panel contemplated FMCSA’s promulgation of special regulations for Mexican carriers. Noting the U.S. safety concerns regarding the Mexican trucking fleet, the panel noted that “it may not be unreasonable for a NAFTA party to conclude that to ensure compliance with its own local standards by service providers from another NAFTA country, it may be necessary to implement different procedures with respect to such service providers.” NAFTA ARBITRAL PANEL FINAL REPORT, No. USA-Mex-98-2008-01 (Feb. 6, 2001), in JOINT APP. VOL. II, *supra* note 14, at *258, *281.

¹⁶ See Lindquist, *supra* note 1.

¹⁷ Department of Transportation and Related Agencies Appropriations Act, 2002, Pub.

cation rules¹⁸ and safety regulations¹⁹ governing Mexican carriers.²⁰ In order to comply with NEPA, the agency also prepared an Environmental Assessment (“EA”)²¹ examining the environmental effects of these proposed safety and application rules.²² Because the EA assessed only the environmental impacts of FMCSA’s own regulations, rather than the overall impacts relating to the lifting of the ban on Mexican trucks,²³ FMCSA determined that the rules would not significantly affect the environment and issued a “Finding of No Significant Impact” (“FONSI”).²⁴ On this basis, the agency also determined that the CAA did not require a “conformity analysis” to ensure that its action would not violate any state implementation plans (“SIPs”).²⁵ In March 2002, the agency published the revised regulations,²⁶ and on November 27 of that year President Bush fulfilled his pledge and lifted the moratorium against Mexico-domiciled trucks.²⁷ Section 350, the congressional appropriations rider preventing FMCSA from processing new Mexican carrier applications until the revised safety and application rules take effect, became the only remaining barrier to the trucks’ entry into the country.

L. No. 107-87, § 350(a), 115 Stat. 864 (2001).

¹⁸ FMCSA’s updated application rules require strict pre-authorization safety audits, proof of valid insurance, and vehicle inspections every three months. *See* 49 C.F.R. § 365.507(c) (2003); 49 C.F.R. § 365.507(e)(1) (2003); 49 C.F.R. § 365.511 (2003).

¹⁹ FMCSA’s safety regulations establish a special safety-monitoring system for Mexican carriers that have satisfied the requirements of the application rule for eighteen months. *See* 49 C.F.R. § 385.103 (2003); 49 C.F.R. § 365.507(f) (2003).

²⁰ *See* Section 350, *supra* note 17. Section 350 also required FMCSA modification of their auditor-certification rules. *See* 49 C.F.R. § 358.203. These certification rules are no longer under challenge. *See* Brief for the Petitioners at 15 n.7, *Dep’t of Transp. v. Pub. Citizen*, 2004 WL 250237 (2004) (No. 03-358).

²¹ NEPA requires that an Environmental Impact Statement (“EIS”) be prepared for all “major federal actions significantly affecting the . . . human environment.” 42 U.S.C. § 4332(2)(C) (2000). Agencies typically prepare a more limited EA to determine whether preparation of a complete EIS is necessary. *See* 40 C.F.R. § 1501.4 (2003); 40 C.F.R. § 1508.9 (2003).

²² *See* Environmental Assessment, *supra* note 6.

²³ *See id.* at 56–60.

²⁴ *See* FMCSA, Finding of No Significant Impact, in *JOINT APP. VOL. I*, *supra* note 6, at *34. A FONSI is an agency declaration that no EIS is required. *See* 40 C.F.R. § 1502.4(e) (2003); 40 C.F.R. § 1508.13 (2003).

²⁵ *See* FMCSA, Finding of No Significant Impact, in *JOINT APP. VOL. I*, *supra* note 6, at *34–*35. The CAA requires states to adopt SIPs to comply with national air quality standards. *See* 42 U.S.C. § 7401(a)(1) (2000). The CAA conformity requirement forbids federal agencies from engaging in actions violative of any state SIP. *See* 42 U.S.C. § 7506(c)(1) (2000). Generally, federal agencies engaging in actions which might increase air pollution are required to conduct a “conformity analysis” to ensure compliance with this requirement. *See* 40 C.F.R. § 93.150–93.160 (2003).

²⁶ Application by Certain Mexico-Domiciled Motor Carriers to Operate Beyond United States Municipalities and Commercial Zones on the United States-Mexico Border, 67 Fed. Reg. 12,702 (Mar. 19, 2002); Safety Monitoring System and Compliance Initiative for Mexico-Domiciled Motor Carriers Operating in the United States, 67 Fed. Reg. 12,758 (Mar. 19, 2002).

²⁷ *See* Determination Under the Interstate Commerce Commission Termination Act of 1995, 67 Fed. Reg. 71,795 (Nov. 27, 2002).

Shortly after the agency published its interim final rules, consumer advocacy group Public Citizen petitioned for review in the Ninth Circuit Court of Appeals, alleging violations of NEPA and the CAA.²⁸ Public Citizen argued that FMCSA's EA should have considered the total increase in emissions that could result from lifting the moratorium against Mexican trucks. It argued that the opening of the border to Mexican carriers was a "reasonably foreseeable" effect of FMCSA's rulemaking, given that the President had openly expressed his intention to lift the moratorium.²⁹ Moreover, Public Citizen argued that, due to Section 350, the opening of the border was actually *dependent* on FMCSA's issuance of the new safety and permitting regulations.³⁰ On this basis, Public Citizen contended that FMCSA's promulgation of the revised rules established a "but for" relationship with the actual entrance of new Mexican carriers into the United States—"but for" FMCSA's rulemaking, the carriers could not enter the country.³¹ An EA that ignored the potential effects of this entrance was therefore inadequate.³²

The Department of Transportation ("DOT") did not dispute the applicability of NEPA to FMCSA's issuance of the safety regulations,³³ nor did it maintain that the EA prepared by FMCSA fully accounted for the increase in emissions that could result from lifting the moratorium against Mexican trucks.³⁴ It disputed only whether FMCSA's EA should have considered these potential effects. DOT argued that FMCSA had no decision-making authority regarding the lifting of the ban against Mexican trucks, so its completion of an EIS analyzing the effects of this decision would be superfluous.³⁵ DOT further argued that FMCSA's actions were exempt from CAA conformity review, based in part on the categorical exemption for "rulemaking."³⁶

The Ninth Circuit accepted Public Citizen's reasoning *in toto*.³⁷ Writing for the panel, Judge Wardlaw ruled that FMCSA's failure to prepare an EIS

²⁸ Pub. Citizen v. Dep't of Transp., 316 F.3d 1002 (9th Cir. 2003). Several prominent labor unions and environmental organizations joined Public Citizen's petition. *See id.*

²⁹ *See* Petitioners' Consolidated Opening Brief at 18–19, Pub. Citizen v. Dep't of Transp., 316 F.3d 1002 (9th Cir. 2003) (Nos. 02-70986, 02-71249). NEPA requires agencies to consider the "cumulative impacts" of their actions, *see* 40 C.F.R. § 1508.25(a)(2) (2003), which are those impacts that "result[] from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions." 40 C.F.R. § 1508.7 (2003).

³⁰ *See* Petitioners' Consolidated Opening Brief, *supra* note 29, at 8.

³¹ *Id.* at 47.

³² *See id.* at 11, 51–52.

³³ *See* Appellate Brief for the Respondents at 50–51, Pub. Citizen v. Dep't of Transp., 316 F.3d 1002 (9th Cir. 2003) (Nos. 02-70986, 02-71249).

³⁴ *See id.* at 49–50. Despite this concession, DOT suggested that the lifting of the ban itself might not have significant environmental consequences. *See id.* at 26–30.

³⁵ *See* Appellate Brief for the Respondents, *supra* note 33, at 50–55.

³⁶ *See id.* at 66–69.

³⁷ Pub. Citizen v. Dep't of Transp., 316 F.3d. 1002, 1032 (9th Cir. 2003).

or conformity analysis was impermissible.³⁸ She noted that NEPA requires federal agencies to include in an EA any “reasonably foreseeable” effects of their actions, even if those effects are dependent upon the actions of third parties not bound by NEPA.³⁹ Though she left the basis for her ruling unclear, she remanded with instructions to the agency to prepare an EIS and a conformity analysis for its proposed rules, taking into consideration any anticipated environmental effects of lifting the moratorium.⁴⁰ In doing so, Judge Wardlaw was careful to declare that her opinion “draw[s] no conclusions about the actions of the President . . . nor the validity of NAFTA, neither of which is before [the court].”⁴¹

The Supreme Court granted DOT’s petition for certiorari on the question of whether FMCSA’s NEPA and CAA responsibilities included examination of the effects of the expected increase in cross-border Mexican carrier traffic.⁴² Argument was scheduled for April 21, 2004, with a decision expected after this journal goes to print. In its brief, DOT argues that presidential actions are exempt from NEPA and CAA review, and that the circuit court opinion improperly subjects the presidential lifting of the moratorium to such review, thereby infringing on presidential discretion to conduct foreign relations and “speak for the nation with one voice.”⁴³ DOT notes that Public Citizen challenges the EA prepared by FMCSA only insofar as it excludes the presidential lifting of the moratorium from its purview.⁴⁴ DOT further argues that, as a matter of statutory interpretation, the President’s decision to lift the moratorium cannot be considered an “effect” of FMCSA’s rulemaking, and therefore is not a proper subject of NEPA or CAA review for the agency.⁴⁵ Lastly, DOT argues that Congress’s enactment of Section 350 did not change any of these conclusions, since Congress did not explicitly express an intent to bring the President’s actions under review, and congressional actions are interpreted not to interfere with presidential discretion implicitly.⁴⁶

Public Citizen responds that the President and FMCSA had joint responsibility over the entrance of new Mexican trucks into the country.⁴⁷ In so arguing, Public Citizen places great legal significance on Section 350, alleging that Congress used this rider as a tool to give FMCSA independent discretionary authority to determine whether and to what extent Mexican

³⁸ *Id.*

³⁹ *Id.* at 1022.

⁴⁰ *Id.* at 1032.

⁴¹ *Id.*

⁴² Dep’t of Transp. v. Pub. Citizen, No. 03-358, 124 S. Ct. 957 (2004).

⁴³ Brief for the Petitioners, *supra* note 20, at 26.

⁴⁴ *Id.* at 27–30.

⁴⁵ *Id.* at 30–32.

⁴⁶ *Id.* at 32–40.

⁴⁷ See Brief for the Respondents at 18–21, Dep’t of Transp. v. Pub. Citizen, 2003 WL 22720967 (2004) (No. 03-358).

trucks should be allowed freely to travel the country.⁴⁸ Public Citizen highlights Congress's affirmative reenactment of Section 350 in each of the two fiscal years since the Ninth Circuit issued its ruling as evidence of this congressional intent.⁴⁹ Furthermore, respondents note that Section 350 granted FMCSA substantial discretion in promulgating its safety and application rules.⁵⁰ Given this grant of discretionary authority, Public Citizen argues that even if Congress did not intend to entrust FMCSA with this responsibility, the enactment of Section 350 created a "but for" causal relationship between the agency's promulgation of its revised rules and the opening of the border, a "reasonably foreseeable" event which FMCSA should therefore have included in its EA.⁵¹ Lastly, Public Citizen argues that FMCSA's EA was deficient because it did not adequately evaluate the potential impacts of the agency's own safety rules: stricter safety rules are likely correlated with lower ultimate emissions.⁵²

ANALYSIS

Although the Court must ultimately determine whether FMCSA will complete an EIS and conformity analysis,⁵³ this determination should have little long-term significance. If the Court places this burden on FMCSA, Congress can easily remove it; if the Court instead decides that NEPA and the CAA do not stretch this far, the unique facts of this case ensure that the ruling will have narrow long-term environmental applicability. Whichever legal path the Court chooses, therefore, the consequences are mild: a ruling in favor of Public Citizen will neither hamper U.S. compliance with NAFTA nor indefinitely prevent Mexican trucks from entering the coun-

⁴⁸ See *id.* Congress has the power to grant such discretionary authority based on its constitutional authority to regulate commerce with foreign nations. U.S. CONST. art. I, § 8, cl. 3.

⁴⁹ See Brief for the Respondents, *supra* note 47, at 26–30. See also *Lorillard v. Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of . . . [the] judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change"). Congress certainly knew of the judicial interpretation of this statute: both the House and Senate Reports on the reenactment of Section 350 cited the Ninth Circuit decision. See H.R. REP. NO. 108-243 at 81; S. REP. NO. 108-146 at 69–70.

⁵⁰ Brief for the Respondents, *supra* note 47, at 39.

⁵¹ *Id.*

⁵² *Id.* at 39–42. While potentially forceful, this argument is unlikely to attract significant attention from the Supreme Court, which granted certiorari in order to consider "[w]hether a *presidential foreign-affairs* action that is otherwise exempt from [NEPA and the CAA] became subject to those requirements because an executive agency promulgated administrative rules concerning implementation of the President's action." Question Presented, *United States Department of Transportation v. Public Citizen*, No. 03-358, available at: <http://www.supremecourtus.gov/qp/03-00358qp.pdf> (accessed Apr. 3, 2004) (emphasis added) (on file with the Harvard Environmental Law Review).

⁵³ The Court could avoid even this determination with a remand to the Ninth Circuit. For example, the Court might remand upon finding that the determinative issue is whether FMCSA's EA adequately evaluated the potential environmental effects of its own rules. See Question Presented, *supra* note 52.

try, and a ruling in favor of DOT will not damage the *corpus* of U.S. environmental law.

Despite DOT's efforts to inject issues of presidential discretion into the case, a ruling in favor of Public Citizen should neither hinder presidential decision-making nor interfere with presidential authority to conduct foreign affairs. If the Court finds that Congress intended Section 350 to condition the lifting of the moratorium on environmental review, then Congress, not the Court, is impeding NAFTA compliance. The antidote is simple: Congress need not renew Section 350 in fiscal year 2005. This would extract congressional power to regulate foreign commerce from the legal equation, and allow FMCSA to begin processing new applications from Mexican carriers. This same remedy is available to Congress if the Court bases a ruling for Public Citizen on the simple "but for" relationship created by Section 350: removal of the rider ends the relationship, and U.S. compliance with NAFTA may proceed unhindered.

Nor would a decision for Public Citizen hinder Congress's practical ability to control administrative agencies' actions through the enactment of appropriations riders. Congress's ability to achieve its goals (such as ensuring adequate safety inspections for Mexican carriers entering the United States) through the enactment of appropriations riders is a valuable tool for controlling administrative agencies.⁵⁴ If the Court ruled that Congress's mere enactment of Section 350 automatically brought the moratorium-lifting under NEPA/CAA review, one might legitimately fear that this would discourage congressional use of these tools. This fear is unwarranted, however, since Congress could exercise sufficient control even without the ability to replicate Section 350 in the future: all Congress need do is remove the agency's discretion to act from its appropriations rider, and clarify its intent not to have the rider subject any otherwise unreviewable non-agency actions to NEPA/CAA review.⁵⁵ In such a situation, no arguments over congressional intent are tenable, and no "but for" relationship is created between an agency's compliance with the rider and an independent unreviewable action. Congress can direct agencies however it pleases, therefore, without fearing an unintended expansion of NEPA or the CAA.

Congress could choose, of course, to reenact Section 350 despite a Court ruling favoring Public Citizen.⁵⁶ This very possibly would halt U.S.

⁵⁴ *But cf.* Sandra Beth Zellmer, *Sacrificing Legislative Integrity at the Alter of Appropriations Riders: A Constitutional Crisis*, 21 HARV. ENVTL. L. REV. 457 (1997) (characterizing appropriations riders as abusive and harmful, since they are commonly used to circumvent national environmental protections).

⁵⁵ Congress knows how to do this; it periodically uses riders to exempt agency actions from NEPA review. *See, e.g.*, 2002 Supplemental Appropriations Act for Further Recovery from and Response to Terrorist Attacks on the United States, Pub. L. No. 107-206, Tit. I, Chap. 7, §§ 706(a)(3), (j), 116 Stat. 820, 864, 868 (2002) ("[A]ctions authorized by this section shall proceed immediately and to completion notwithstanding any other provision of law including, but not limited to, NEPA.").

⁵⁶ Congress did exactly this in fiscal years 2003 and 2004. *See* Consolidated Appro-

compliance with NAFTA, since it seems probable that the increased emissions expected to result from the lifting of the moratorium will fail to comply with the CAA implementation plans of some western states.⁵⁷ This would be a simple failure of political will, however, not an invalid infringement of presidential authority. The Constitution gives Congress the power to regulate commerce with foreign nations, and subjecting this piece of foreign commerce to environmental review is almost certainly a valid exercise of that power.⁵⁸ If enough legislators are prepared affirmatively to reenact the appropriations rider, even when faced with a Supreme Court decision declaring this to be a serious obstacle to the implementation of NAFTA, this evidences a clear congressional intent to cease compliance with the treaty.⁵⁹ Since this decision is within Congress's purview, those very same representatives could just as easily block NAFTA's implementation through alternative affirmative legislation, even if the Court were to rule for DOT. Presidential discretion is not threatened in either case.

None of this is to say that the Court should not have granted certiorari. Certiorari was necessary not because the appellate court found for the wrong party but because it left the basis of its holding remarkably unclear. In its ruling, the Ninth Circuit discussed both the "but for" causal relationship created by Section 350 and the "reasonable foreseeability" of presidential rescission of the moratorium apart from Section 350, but failed to distinguish adequately the role that these two distinct arguments played in its holding.⁶⁰ Although much of the Ninth Circuit's reasoning only makes sense given the existence of Section 350, its failure clearly to condition its ruling on the existence of this appropriations rider leaves a dangerously ambiguous precedent. Requiring FMCSA and other agencies to prepare EISs reviewing the actions of independent third parties over which they have no control and whose behaviors they neither caused nor made possible would represent an unnecessarily expensive and inefficient expan-

priations Resolution, 2003, Pub. L. No. 108-7, Div. I, Tit. III, § 348, 117 Stat. 11, 419 (2002); Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, Div. F, Tit. I, § 130, 118 Stat. 3, 298 (2003).

⁵⁷ See Amicus Curiae Brief of the States of California, Arizona, Illinois, Massachusetts, New Mexico, Oklahoma, Oregon, Washington, and Wisconsin in Support of Respondents at 13-19, *Dep't of Transp. v. Pub. Citizen*, 2004 WL 542776 (2004) (No. 03-358). DOT contests this conclusion. Brief for the Respondents, *supra* note 47, at 28-30.

⁵⁸ DOT does not suggest that Congress has no power to subject the trade decision to environmental review, only that it did not here do so. The Court could theoretically rule that Congress intended to subject the presidential action to review, but that it had no power to do so—that the enactment of Section 350 was an unconstitutional infringement of presidential discretion. The parties have not argued this, however, see Brief for the Respondents, *supra* note 47, at 22 n.4, and the Court is unlikely to make such a far-reaching ruling that is unnecessary on the facts of this case.

⁵⁹ Congressional non-compliance is not fantasy: the appropriations rider that ultimately became Section 350 originally passed the House as a complete prohibition on the processing of Mexican carrier applications, rather than a prohibition conditioned on the promulgation of adequate safety rules. See 147 Cong. Rec. H. 3582, 3593 (June 26, 2001).

⁶⁰ See *Pub. Citizen v. Dep't of Transp.*, 316 F.3d 1002, 1021-28, 1032 (9th Cir. 2003).

sion of NEPA's scope.⁶¹ Moreover, if FMCSA and other agencies were required to conduct CAA conformity reviews of such acts, many governmental decisions simply could not be accomplished.⁶² Thankfully, such a reading of the CAA is nonsensical;⁶³ the Ninth Circuit's opinion could not have meant to suggest such a result,⁶⁴ as any Supreme Court ruling in favor of Public Citizen hopefully would clarify.

Just as a ruling in favor of Public Citizen would not improperly impair presidential discretion, a ruling in favor of DOT would not represent the environmental disaster suggested by media coverage of the case.⁶⁵ The Supreme Court's grant of certiorari created two environmental concerns: that the Court would overturn the Ninth Circuit and allow highly polluting Mexican trucks to enter the United States, and that, in so doing, the Court would potentially narrow the scope of NEPA and the CAA. Yet neither of these effects is likely to result from a ruling in favor of DOT.

Barring affirmative congressional action, significant numbers of long-prohibited Mexican trucks will soon drive the nation's highways, and a decision either for or against DOT will not change this reality. If the Court rules in favor of DOT, Congress could still halt compliance with NAFTA by passing an appropriations rider forbidding the use of funds to process Mexican-carrier applications.⁶⁶ If the Court sides instead with Public Citizen, Congress need only renew Section 350 in order to maintain the status quo. Only Congress is currently preventing the processing of Mexican-carrier applications, and the Court's decision will not affect Congress's ability to do so. This is not to imply that the mass entry of Mexican trucks will have no significant environmental impacts, or to deny that such potential ef-

⁶¹ Courts have consistently required agencies only to conduct NEPA evaluations for actions over which they have decision-making control, since NEPA's purpose is to "inject environmental considerations into the . . . decision-making process." *Weinberger v. Catholic Action of Hawaii/Peace Educ. Proj.*, 454 U.S. 139, 143 (1981). *See, e.g., Citizens Against Rails-to-Trails v. Surface Transp. Bd.*, 267 F.3d 1144, 1151 (D.C. Cir. 2001) (holding that if "the information that NEPA provides can have no effect on the agency's actions . . . NEPA is inapplicable.").

⁶² Unlike NEPA's procedural protections, with which agencies can always comply (however expensively), the CAA substantively disables the agency from undertaking any acts in violation of a SIP. *See supra* note 25.

⁶³ The CAA disables an agency from acting or supporting any act violative of an SIP. *See supra* note 25. If the agency does not have control over the action under review, this disabling would be meaningless, since the activity would occur regardless of the agency's decision. Regarding the border opening, the action under review (the opening of the border) would *not* have occurred without FMCSA's action, but only *because of the existence of Section 350*. The Ninth Circuit's instruction to FMCSA to prepare a conformity analysis must therefore have been premised on Section 350's existence.

⁶⁴ This is especially true since the President had already lifted the moratorium when the Ninth Circuit issued its ruling, and the court received supplemental briefs analyzing the legal implications of this presidential act. *See Pub. Citizen v. Dep't of Transp.*, 316 F.3d 1002, 1014 n.3 (9th Cir. 2003).

⁶⁵ *See supra* note 4.

⁶⁶ Exactly such a rider was proposed before the adoption of Section 350. *See supra* note 59.

fects are serious, and deserving of attention. But the downside of focusing significant energy on *Public Citizen* is that the case has no possibility of mitigating or eliminating these problems.

Some environmental lawyers are concerned not that a ruling for DOT will result in the entry of Mexican trucks, but that the Court might tear away a significant chunk of established NEPA precedent in the process. They fear that the Court's ruling might portend a shrinking of the scope of NEPA review: if FMCSA need not examine the effects of actions with which they are intimately involved, merely because the President also has a role, how far would this hole in NEPA's protections stretch? Similarly, if FMCSA need not undertake analysis of the independent (but reasonably foreseeable) actions of other actors in these circumstances, will this allow other agencies to escape their statutory responsibilities by artificially limiting the scope of their review?

Pushing very far in either of these directions would make a mockery of NEPA's statutory command that agencies comply with its dictates "to the fullest extent possible."⁶⁷ Thankfully, the chances of the Court so extending any ruling in favor of DOT are virtually non-existent. DOT does not contend that FMCSA's own actions are in any way exempt from NEPA/CAA review, only that FMCSA should not be compelled to review those acts of the President that are neither under FMCSA control nor "effects" of the agency's own actions. This implies that *all* FMCSA actions are unquestionably subject to NEPA/CAA—even those intimately related to presidential decisions. If FMCSA's proposed rules themselves had significant environmental impacts⁶⁸—as do most agency actions about which environmentalists care—an EIS and conformity review would be entirely appropriate.⁶⁹ Furthermore, FMCSA cannot choose whether or not to "permit" the opening of the border in the same way the Forest Service can choose to issue a development permit, for example;⁷⁰ unless one assumes that Congress gave FMCSA this authority with Section 350, the power to end the moratorium rested entirely with the President. A ruling in favor of DOT would therefore not infringe on existing NEPA precedent, nor would it create loopholes for agencies seeking to avoid review.

Given the limited practical environmental importance of the decision, a Supreme Court ruling in DOT's favor actually seems preferable on several levels. Foremost, it would represent a more reasonable and workable interpretation of the relevant legislation: NEPA, the CAA, and Section 350. A NEPA interpretation that forces agencies to review actions over which

⁶⁷ 42 U.S.C. § 4332 (2000).

⁶⁸ Recall that FMCSA prepared an EA precisely to determine the effects of its own regulations, concluding that they would have no significant effects. *See supra* note 24 and accompanying text. Public Citizen has since challenged the validity of this conclusion. *See supra* note 52 and accompanying text.

⁶⁹ *See* 40 C.F.R. 1508.8(b) (2003).

⁷⁰ *See Robertson v. Methow Valley Citizen's Council*, 490 U.S. 332 (1989).

they had no discretionary control would represent an extraordinarily inefficient way of ensuring the disclosure of environmental information. Agencies that prepare EISs are instructed to consider the various environmental effects of the action under consideration, as well as various possibilities for mitigating these effects. An agency preparing an EIS for an activity beyond its control would therefore be forced to speculate as to the various ways in which another actor could mitigate detrimental effects, and information concerning the options available to this other actor could be expensive or impossible for the preparing agency to obtain. Furthermore, agencies are liable to resent using their limited time and resources to complete EISs for projects they cannot modify or halt.

More generally, well-established precedent assumes that Congress does not interfere with presidential discretion unless it makes explicit its intent to do so.⁷¹ Whether Congress intended Section 350 to subject the President's lifting of the moratorium to NEPA and CAA review, to ensure adequate safety regulations, or simply to delay compliance with NAFTA is unclear. The Court should not act to restrict the President's discretion in the presence of such ambiguity. Furthermore, although a ruling in favor of Public Citizen would not prevent Congress's use of appropriations riders to control agency behavior,⁷² it would raise the risk that such riders would subject an agency to litigation by dissatisfied parties, potentially tying up agency decisions, and the federal courts, unnecessarily.

There are good reasons for the environmental movement to be skeptical of free trade, as there are still significant uncertainties concerning the feasibility of stringent domestic environmental protection in a liberalized trade regime.⁷³ Given that the volume of global international trade has increased exponentially in recent years,⁷⁴ these problems should be at the forefront of the environmental policy agenda. Those concerned about the harmful emissions that could result from the Mexican trucking fleet's entry into the United States should press Congress to require emission testing alongside the safety inspections performed on Mexican operators seeking U.S. operating authority.⁷⁵ More generally, environmentalists should focus

⁷¹ See, e.g., *Franklin v. Massachusetts*, 505 U.S. 788, 800–01 (1992).

⁷² See *supra* note 55 and accompanying text.

⁷³ See, e.g., Tanyarat Mungkalarungsi, *The Trade and Environment Debate*, 10 TUL. J. INT'L & COMP. L. 361 (2002) (discussing the continuing "trade and environment conflict").

⁷⁴ See World merchandise exports, production and gross domestic product, 1950–02, WTO International Trade Statistics 2003, Table II.b, available at http://www.wto.org/english/res_e/statis_e/its2003_e/section2_e/ii01.xls (accessed Mar. 12, 2004) (on file with the Harvard Environmental Law Review).

⁷⁵ Such testing would arguably not violate NAFTA, even if imposed only on Mexican carriers. Under the ruling of the arbitration panel, "to the extent that the inspection and licensing requirements for Mexican trucks and drivers wishing to operate in the United States may not be 'like' those in place in the United States, different methods of ensuring compliance with the U.S. regulatory regime may be justifiable." NAFTA Arbitration Panel Final Report, *supra* note 15, at 281. Expanding this reasoning to cover environmental as well as safety concerns, since the "U.S. regulatory regime" regarding vehicle emissions is

on highlighting the environmental issues embedded in trade negotiations, and on the harmonization of trade agreements with domestic environmental laws. Politicians fought hard⁷⁶ for NAFTA's explicit affirmation of its subordination to each member state's environmental protections,⁷⁷ but such subordination is ineffectual if the domestic protections are not equipped effectively to handle cross-border economic interactions.⁷⁸ Perhaps most importantly, environmentalists should focus on what United Nations Environment Program executive director Klaus Toepfer refers to as the "globalization of environmental problems,"⁷⁹ and should push for the creation of multilateral environmental agreements to address these transnational threats.

With all these legitimate international issues deserving attention, however, environmentalists should *not* focus on the outcome of *United States Department of Transportation v. Public Citizen*, because, in the end, it just doesn't matter.

primarily a system of new vehicle manufacturing standards (obviously inapplicable to Mexican carriers), emissions testing of carriers seeking U.S. operating authority might be acceptable as a "different method[] of ensuring compliance." See *infra* note 78.

⁷⁶ The signing of NAFTA was delayed for over a year while the parties negotiated the North American Agreement of Environmental Cooperation, a side-agreement to NAFTA. See 32 I.L.M. 1480 (1993).

⁷⁷ See 19 U.S.C. § 3312(a) (2000).

⁷⁸ For example, U.S. federal motor-vehicle emissions regulations are basically manufacturing standards; manufacturing standards are exceptionally poor tools for the regulation of vehicle emissions in a world with significant cross-border traffic. See *generally* 42 U.S.C. §§ 7521-7554 (2000); 40 C.F.R. §§ 86.1848-01 (2000) (establishing a manufacturing-standards-based system of motor vehicle emission controls).

⁷⁹ *Desert Storms Pose Threat to Health, Environment*, TERRADAILY, Mar. 31, 2004, available at <http://www.terradaaily.com/2004/040331074023.5az7upxe.html> (last visited Apr. 1, 2004) (on file with the Harvard Environmental Law Review).