No. 03-358

IN THE

Supreme Court of the United States

UNITED STATES DEPARTMENT OF TRANSPORTATION, *et al.*,
Petitioners,

v.

PUBLIC CITIZEN, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE RESPONDENTS

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QUESTIONS PRESENTED

1. Whether under the National Environmental Policy Act, 42 U.S.C. § 4332, agency action that Congress made a prerequisite to allowing Mexico-domiciled trucks to operate throughout the United States is subject to an Environmental Impact Statement that will disclose and evaluate the serious environmental effects caused by such trucking.

2. Whether under the conformity provision of the Clean Air Act, 42 U.S.C. § 7506(c)(1), that agency action requires an analysis into the extent to which permitting Mexico-domiciled trucks to operate throughout the United States will make it difficult for states to comply with federal air quality standards.

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PROVISIONS INVOLVED

In addition to the statutes and regulations in petitioners' appendix, respondents' appendix includes other relevant statutes and regulations.

STATEMENT

This action challenges the failure of the Federal Motor Carrier Safety Administration ("FMCSA"), in taking action that will allow thousands of Mexico-domiciled trucks to operate throughout the United States, to consider adequately the resulting environmental effects under the National Environmental Policy Act ("NEPA") and the Clean Air Act ("CAA"). Congress enacted legislation that, for fiscal year 2002 (and each year thereafter), required that no appropriated funds be used to process applications from Mexico-domiciled trucks to operate in the interior of the United States until FMCSA implemented standards governing those trucks. FMCSA attempted to establish certain of the standards mandated by Congress by promulgating rules, but did so improperly, without adequate attention to the serious environmental consequences that will flow from the introduction of thousands of Mexico-domiciled trucks into the United States.

The court of appeals agreed with respondents that allowing Mexico-domiciled trucks to travel into the interior of the United States ("cross-border trucking") presents serious environmental and public health problems, and petitioners do not contend otherwise. The court directed FMSCA—which has discretion to ameliorate the environmental effects—both to complete an Environmental Impact Statement under NEPA to assess the environmental effects of cross-border trucking and to perform a conformity analysis under the CAA to evaluate such effects on the ability of states with pollution problems to comply with federal air quality standards.

Nothing in this case interferes with the President's power, obtained via previous authorization from Congress, to lift a congressionally imposed moratorium on cross-border trucking. Despite petitioners' attempts to suggest otherwise, respondents have never challenged the President's action. To the extent the restriction on spending appropriated funds precludes cross-border trucking, even though the moratorium has been lifted, that limitation has been imposed by *Congress*, not the courts. This litigation challenges only FMCSA's failure to consider the environmental effects that will flow from its actions allowing Mexico-domiciled trucks to travel throughout the country. Petitioners do not and could not contest that Congress, with its broad authority under the Commerce Clause, may condition cross-border trucking on FMCSA's compliance with environmental and safety laws. This action simply seeks compliance with those laws.

Most strained is petitioners' suggestion that this case poses a constitutional question about the President's foreign affairs power. Pet. Cert. 13-14. Those powers are not challenged by respondents, nor are they implicated in this action. This case is solely about FMCSA's responsibility under generally applicable environmental laws to assess the environmental effects of its actions, specifically the effects that will be caused by the issuance of rules that will permit the entry of thousands of Mexico-domiciled trucks into the United States.

Congress has now repeatedly enacted legislation that forbids the expenditure of any federal funds to process applications by Mexico-domiciled trucks for authorization to operate throughout the United States until applicable FMCSA standards are in place. Not only did Congress enact such an appropriations restriction for fiscal year 2002, which triggered FMCSA's rulemaking, Congress *reenacted* the same provision for fiscal year 2003—*after* the court of appeals' ruling in this case—and again for fiscal year 2004. Congress did so for an unmistakable reason: to drive home Congress' intent that cross-border trucking should not take place until

FMSCA promulgates rules in full compliance with applicable environmental laws.

1. NEPA, 42 U.S.C. §§ 4321-70f, and the CAA, 42 U.S.C. §§ 7401-671q, are fundamental environmental statutes that impose requirements on all federal agencies in order to protect the environment and public health. *See generally* Pet. App. 3a-7a. In enacting NEPA, Congress required that federal agencies "shall . . . include in . . . proposals for . . . major Federal actions significantly affecting the quality of the human environment, a detailed statement" known as an Environmental Impact Statement ("EIS") with respect to "the environmental impact of the proposed action, . . . alternatives to the proposed action," and other environmental issues. 42 U.S.C. § 4332(2). The CAA requires each state to develop an implementation plan to comply with federal air quality standards. 42 U.S.C. § 7410(a). To ensure that the federal government would not interfere with state efforts to meet federal air standards, Congress required federal agencies to prepare a conformity analysis concerning the effects of their proposed actions on state air quality plans. *See* 42 U.S.C. § 7506(c)(1); 40 C.F.R. §§ 93.150(b), 93.154.

These NEPA and CAA provisions are background requirements that apply to all federal agency actions. The statutes do not distinguish between duties of an environmental agency and those of other agencies. Nor do these statutes—or the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551-59, 701-06, which authorizes judicial review of final agency actions—excuse agencies from compliance with NEPA or the CAA when another actor, including the President, takes a separate action that may also affect the environment.

The ratification of NAFTA did nothing to alter federal agency obligations under NEPA and the CAA, or Congress' power to enact legislation protecting public health and safety. In the NAFTA Implementation Act, Pub. L. No. 103-182, 107 Stat. 2037, 19 U.S.C. §§ 3301-473, Congress provided: "No

provision of the Agreement, nor the application of any such provision to any person or circumstance, which is inconsistent with any law of the United States shall have effect." 19 U.S.C. § 3312 (a)(1). Accordingly, NEPA and the CAA continue to constrain the actions of federal agencies just as those laws did before NAFTA.

2. For years before and after ratification of NAFTA, Congress and the President maintained a moratorium on the operation of Mexico-domiciled trucks within the United States, restricting operations to a narrow commercial zone along the border.[1]

a. In 1982, Congress enacted the Bus Regulatory Reform Act (Pub. L. No. 97-261, § 6(g), 96 Stat. 1102, 1107-08), by which "Congress imposed a two-year moratorium" on new authorizations for trucks domiciled in Mexico and Canada to travel into the United States. J.A. 49.[2] In Section 6(g) of the Act, Congress permitted the President to remove, modify, or extend the moratorium. The moratorium was quickly lifted for trucks domiciled in Canada. *See* Pet. App. 56a. With respect to Mexico-domiciled trucks, however, three Presidents exercised their authority under the 1982 Act to extend the moratorium through September 1996. *See* 49 U.S.C. § 13902 Memoranda of President; Pet. App. 9a & n.2.

Before the September 1996 extension of the moratorium expired, Congress enacted the Interstate Commerce Commission Termination Act of 1995, Pub. L. No. 104-88, 109 Stat.

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[1] The moratorium did not apply to Mexico-domiciled trucks that operate within the "border zone," defined as "commercial zones adjacent to Mexico in Texas, New Mexico, Arizona, and California." J.A. 50; *see also id.* at 253; Pet. App. 56a-57a.

[2] This statute and others discussed below refer to "motor carriers," the broad definition of which encompasses trucks. *See* 49 U.S.C. §§ 13102(12), (14). Throughout, we refer to "trucks" rather than "motor carriers" because the former are the basis of this litigation.

803, 883, which leaves in place "any existing restrictions on operations of motor carriers . . . domiciled in any contiguous foreign country" unless the President takes one of two potential actions set forth by Congress: (i) the President may place restrictions on trucking operations based on "unreasonable or discriminatory" practices placed on United States trucks by Canada or Mexico, and (ii) the President may remove or modify restrictions if he determines such action "is consistent with the obligations of the United States under a trade agreement or with United States transportation policy." 49 U.S.C. §§ 13902(c)(1), (3), (4). This litigation does not challenge the President's authority to modify or lift the moratorium as authorized by Congress.

b. In February 2001, an international arbitration panel established pursuant to NAFTA ruled that the blanket refusal of the United States to consider applications from Mexico-domiciled trucks to travel beyond the border zones due to safety concerns violated NAFTA. *See* J.A. 254, 279-80. The arbitration panel did not determine whether a delay in considering such applications as a result of compliance with domestic environmental laws would violate NAFTA and expressly noted that the panel "is not making a determination that the Parties to NAFTA may not set the level of protection that they consider appropriate in pursuit of legitimate regulatory objectives." *Id.* at 280. Petitioners do not assert that the panel considered environmental issues at all, and, indeed, the panel did not—nor could it—bar the United States from enforcing NEPA and the CAA.

Respondents agree with petitioners that "[a]lmost immediately after the arbitrators' decision, the President made clear his intention to lift the moratorium on cross-border operations." Pet. Cert. 5; *see also* J.A. 57.

3. Meanwhile, FMCSA, a federal "administration" or agency within the Department of Transportation ("DOT") (49 U.S.C. § 113(a)), began the process of preparing rules

governing both applications for admission from Mexico-domiciled trucks for entry to the United States and the safety of those trucks. Nothing in the statutes governing FMCSA precludes the agency from taking into account environmental issues in promulgating such rules.

In May 2001, FMCSA proposed two rules that are pertinent here: (1) the "Application Rule" concerning the application form for Mexico-domiciled trucks seeking to operate beyond the border zones (known as the "OP-1 (MX)" application form) (*see* 66 Fed. Reg. 22371 (May 3, 2001)); and (2) the "Safety Monitoring Rule" involving safety monitoring of Mexico-domiciled trucks (*see* 66 Fed. Reg. 22415 (May 3, 2001)). Without providing any rationale or conducting an Environmental Assessment ("EA"), FMCSA determined that neither rule required preparation of an EIS under NEPA. 66 Fed. Reg. at 22377; 66 Fed. Reg. at 22418. FMCSA also failed to prepare a CAA conformity analysis for either rule.

4. Congress intervened before the rules became final and prior to consideration of any applications from Mexico-domiciled carriers to operate beyond the border zones. On December 18, 2001, Congress passed and the President signed into law the fiscal year 2002 Department of Transportation and Related Agencies Appropriations Act, Pub. L. No. 107-87, 115 Stat. 833. Section 350 of that Act provides in part: "No funds limited or appropriated in this Act may be obligated or expended for the review or processing of an application by a Mexican motor carrier for authority to operate beyond United States municipalities and commercial zones on the United States-Mexico border until the Federal Motor Carrier Safety Administration" puts into place certain regulatory standards for Mexico-domiciled trucks seeking to operate beyond the border zones. Pub. L. No. 107-87, § 350(a), 115 Stat. 864. The congressional prerequisites went

beyond requirements in then-existing or proposed regulations. *See* Pet. App. 53a-54a, 128a; *see also* Pet. Br. 9.

The restriction in Section 350 of the 2002 DOT Appropriations Act—which was enacted *after* Congress gave the President the authority to lift the moratorium and *after* the President announced his intention to lift the moratorium—was independent of any presidential action, and was to remain in place regardless of whether the President lifted the moratorium.

Accordingly, as of mid-December 2001, two *independent* barriers prevented Mexico-domiciled trucks from operating throughout the United States: (i) the restrictions Congress imposed in Section 350, which prohibited use of funds to process applications from Mexico-domiciled trucks until FMCSA complied with the preconditions; and (ii) the moratorium on cross-border trucking the President was authorized by Congress to maintain (which the President had already announced he would lift).

5. In March 2002, FMCSA issued new Application and Safety Monitoring Rules. Pet. App. 53a-202a. The rules were intended to meet five of the congressional preconditions outlined in Section 350. *See id.* at 53a-54a, 62a, 125a, 128a; Pet. Br. 13.

a. As part of the rulemaking, FMCSA received numerous comments, including comments on the environmental effects of the rules from, *inter alia*, various environmental organizations, experts on environmental and health issues, and the California Attorney General. *See, e.g.*, J.A. 232-48, 283-95, 307-71, 372-86, 387-413. The majority of those comments focused on air quality concerns. California's Attorney General, for example, expressed concern that under the CAA the federal government was "requiring California to meet stringent air quality standards, . . . while simultaneously approving the entry into California of a very significant new

source of pollutants that will make it more difficult to attain these standards." J.A. 375-76.

b. In promulgating the two revised rules, FMCSA did not prepare an EIS, but this time it did provide an EA, upon which the agency relied for a finding that the rules would have no significant impact on the environment. *See* Pet. App. 64a-65a, 106a-107a, 154a-155a, 182a. FMCSA failed to undertake an analysis for conformity with state air quality plans under the CAA. *Id.* at 65a-66a, 155a.

The Council on Environmental Quality ("CEQ") has promulgated regulations implementing NEPA that are "binding on all Federal agencies." 40 C.F.R. § 1500.3. The CEQ regulations permit an agency to prepare an EA to determine whether or not a more detailed EIS is necessary. *See* 40 C.F.R. §§ 1501.3, 1501.4, 1508.9, 1508.11, 1508.13. FMCSA's EA was issued in January 2002 with respect to four proposed rules, including the Application and Safety Monitoring Rules, in an attempt to comply with NEPA. *See* J.A. 36, 47, 59; C.A. ER 29. On the basis of the EA, FMCSA made a "finding of no significant impact" and decided not to prepare the more detailed EIS. J.A. 34-35. Such a finding is permitted only when an action "will not" significantly affect the environment. 40 C.F.R. § 1508.13.

c. The EA makes three important concessions about the ramifications of the congressional preconditions in Section 350 (all of which necessarily follow from Congress' action). First, FMCSA must meet "several conditions" before the agency may expend funds to process applications for Mexico-domiciled trucks to travel beyond the border zones—the OP-1 (MX) applications. J.A. 57. Second, the proposed rules satisfy conditions of Section 350. *Id.* at 57-58; Pet. App. 53a-54a, 125a. Third, "*While the appropriations hold is in effect, any Presidential order to modify the statutory moratorium will have no practical effect*, since FMCSA would still be

prohibited from processing OP-1 (MX) applications." J.A. 58 (emphasis added).

In addition to agreeing that, under Section 350, there will be no cross-border trucking without the rules and hence no environmental effects, the EA also makes other critical concessions about the agency's discretion to mitigate environmental effects. First, the new Application Rule is expected to result in a smaller increase in applications from Mexico-domiciled trucks than the old rule "because the revised application form would deter applicants that would be unable to adequately demonstrate their willingness and ability to comply with the safety regulations." J.A. 66-67. That is, making the application process more onerous will reduce the number of Mexico-domiciled trucks operating in the United States.

Second, there is a direct relationship between safety and the environment. Specifically, the EA states: "Aside from direct and indirect safety benefits, *the inspections could have an environmental benefit*, as they have the potential to alert officials of other problems, such as leaking" trucks. *Id.* at 201 (emphasis added). Also, "factors that affect emissions from vehicles include . . . maintenance practices." *Id.* at 98. Hence, to the extent the rules require better maintenance they will have beneficial environmental effects.

More generally, the EA provides: "FMCSA expects to target the highest risk [trucks] and bring them into compliance with United States *safety and environmental laws*, standards, policies, rules, and regulations." *Id*. at 193 (emphasis added); *see also id.* at 138 (describing benefits of safety audit for reducing "high-risk" trucks). That is, high-risk trucks present a risk to both safety and the environment, and FMCSA's rules would target both risks. By promulgating safety standards aimed at preventing high-risk trucks from obtaining operating authority, FMCSA would also prevent environmental problems from those same trucks.

d. The EA did not properly make a finding of no significant impact on the environment, as several examples demonstrate. First, the EA is inherently contradictory. The EA acknowledges that Section 350 means that there will be no Mexico-domiciled trucks in the interior of the United States absent agency action. *See id.* at 58. But then, claiming to examine the environmental effects when *both* the President lifts the moratorium and the agency promulgates new rules (*id.* at 56), and conceding "there could be an increase" in cross-border trucking beyond the current rates of increase (*id.* at 60; *see also id.* at 32-33, 316; C.A. ER 246), the EA "assumed that the implementation of the Proposed Action would not affect the trade volume between the United States, Mexico, and Canada" (J.A. 59). The EA cannot properly examine the effects of cross-border trucking without determining how increased trade volume will affect the number of trucks.

Second, the EA does not properly account for the emissions from even the artificially small number of Mexico-domiciled trucks it assumed will travel into the interior of the United States. There is overwhelming evidence that emissions levels for the Mexican trucking fleet have been, are now, and will in the future be higher than for the United States trucking fleet. *Id.* at 315, 332-38, 388, 392, 394-97, 411-12, 424, 456. For example, until 1993 there were no emissions standards for Mexico-domiciled trucks, which lagged significantly behind U.S. domiciled trucks in emissions controls. *Id.* at 334, 392, 456; *see also id.* at 426, 458-59. But the EA erroneously assumed that all Mexico-domiciled trucks fit the emissions profiles of U.S. trucks. *See id.* at 154, 205, 392, 410, 422, 456.

Third, despite a CEQ regulation requiring consideration of *local* effects (40 C.F.R. § 1508.27(a)), the EA determined the environmental effect of emissions contributions from Mexico-domiciled trucks by comparing them to "national levels." J.A. 147; *see also id.* at 150, 154, 157-58, 167, 327,

329. The EA did not examine separately areas along major transportation corridors just outside the border zones where cross-border trucking is likely to have the most environmental effects, such as Los Angeles, Houston, and Phoenix—areas that already are suffering from serious air pollution problems. *See id.* at 319-25, 330, 423.

Fourth, the same CEQ regulation requires consideration of *long-term* effects (40 C.F.R. § 1508.27(a)), but the EA limited its analysis to one year. *See* J.A. 331, 423-24. There is no analysis of what will happen over the long term, including after 2004 and 2007 when, as the EA notes, the United States emissions regulations become considerably more stringent—without any evidence that Mexico will follow suit. *See id.* at 118, 315, 392, 403, 432, 444, 457-58.

Fifth, FMCSA failed to consider "[t]he degree to which the proposed action affects public health or safety." 40 C.F.R. § 1508.27(b)(2). Despite the substantial record evidence discussed below, the EA overlooked the public health effects that will result from cross-border trucking.

Finally, although the agency has the ability to ameliorate environmental effects, the EA barely considered alternatives that could reduce environmental harm. And most of the exceedingly modest alternatives the agency considered relate solely to mitigating harm from inspections. *See* J.A. 193-96.

These and other limitations of the EA are critical. A respected consulting firm specializing in air quality issues (*id.* at 414) concluded that the document "is both inadequate in terms of scope as well as fatally flawed in terms of the methodology used to assess the significance of the air quality impacts" (*id.* at 310). Another respected air quality consultant (*id.* at 448) concluded that the EA "is seriously flawed because it underestimated the emissions impact" (*id*. at 410).

e. The public health effects from the emissions at issue are serious. The EA admits that "[a]ir pollutants are a

significant cause for concern for both public health and welfare." *Id.* at 93; *see also id.* at 103. This is particularly true for children. *Id.* at 293. Motor vehicles, including trucks with diesel engines, are significant contributors to air pollution. *Id.* at 95-95, 326, 421. Diesel trucks are particularly significant contributors of nitrogen dioxide ("NOx") and particulate matter ("PM"). *Id.* at 95, 97, 99, 312, 314, 326, 421. For instance, in the highway corridors from San Antonio, Texas to Monterrey, Mexico, and from Tucson, Arizona to Hermosillo, Mexico, approximately 80% of smog causing NOx and 90% of other pollutants are caused by freight trucking. *Id.* at 100-01. Most of the areas of the country that are in non-attainment (that is, do not meet national standards, *see id.* at 94) for PM are in the western United States, with the largest number of counties in Arizona and California. *Id.* at 209-10. These are the areas which, as discussed above, are likely to be most affected by cross-border trucking. *See id.* at 319-25.

Numerous studies indicate that diesel exhaust is associated with a significant increased risk of lung cancer. *Id.* at 441. California lists diesel exhaust as a known carcinogen. *Id.* at 235, 383; *see also id.* at 411. NOx creates ozone (or smog), which can aggravate asthma, emphysema, and other conditions. *See id.* at 99, 421. PM can cause cancer, increase the risk of cardiovascular mortality, impair lung function, and cause or aggravate respiratory illnesses. *Id.* at 317, 421, 440-43, 451-52. The EA lists cancer as a potential effect of the PM in diesel. *See id.* at 211.

Even moderate increased emissions of fine PM are associated with increased mortality. *Id.* at 436. "[I]ncreased emissions of fine particulate matter from Mexico-domiciled trucks can be expected to translate into incremental increases in premature deaths, an enhanced incidence of respiratory diseases, numerous lost work days and increased health care costs." *Id.* at 436-37; *see also id.* at 440, 446. Put another

way, "removing particulate matter from the atmosphere will translate directly into saved lives." *Id.* at 445. Exposure to fine particulate air pollution "is the single largest environmental public health problem at present in the United States." *Id.* at 436.

6. Respondents filed petitions for review of the rules in the court of appeals starting in May 2002. *See id.* at 1; Pet. App. 13a. The petitions sought to ensure that FMCSA complied with NEPA and the CAA in promulgating its rules, but did not seek to interfere with the President's decision whether to lift the moratorium. *See* J.A. 26a, 51a.

7. In November 2002, the President lifted the moratorium to permit cross-border trucking. *See* Pet. App. 13a-14a, 232a-34a. Despite this presidential action, Mexico-domiciled trucks were not able to travel into the interior of the United States (and thereby cause environmental effects beyond the border zones) because FMCSA still had to meet the *separate* prerequisites that Congress under Section 350 placed on the entry of the trucks.

8. On January 16, 2003, the court of appeals issued a decision requiring compliance with "long-established environmental laws." *Id.* at 51a. The court first found that respondent Public Citizen has standing to pursue this challenge. *Id.* at 14a-26a. The critical determination in the standing analysis was that FMCSA's actions would cause environmental harm because cross-border trucking would be permitted only after FMCSA had met the congressional conditions. *See id.* at 18a-22a. The lower court noted that the relief requested was not directed at presidential action and would not affect the viability of NAFTA. *Id.* at 26a. The court of appeals instead found that "the issues before us do not touch on [the President's] clear, unreviewable discretionary authority to modify the moratorium" and that "neither the validity of nor the United States' compliance with

NAFTA is before us." *Id.* Petitioners do not contest the standing decision. Pet. Cert. 14 n.6.

The court of appeals next addressed NEPA's statutory and regulatory requirements. Based on an analysis of the statute and CEQ regulations, the lower court found that the two challenged rules constitute "major federal actions" under NEPA, and that the rules may have a significant environmental impact; accordingly, FMCSA should have prepared an EIS. *See* Pet. App. 28a-43a. In particular, the lower court rejected FMCSA's contention that "the effects of the Application and Safety Rules are limited to the increased diesel emissions of Mexican trucks during the road-side inspections and safety monitoring mandated by the regulations." *Id.* at 30a. The court also found numerous other shortcomings in the EA. *Id.* at 31a-43a.

The court of appeals then turned to the CAA claims, holding that a conformity analysis was required. *Id.* at 46a-52a. The lower court found that FMCSA's actions were not subject to either of the CAA exemptions the agency advanced. First, FMCSA did not show that the total emissions caused by the rules would fall below the established threshold levels. *See id.* at 47a-48a. Second, the court held that regulations are not categorically excluded from the conformity analysis requirement. *See id.* at 48a-51a. Petitioners no longer press the second point. Pet. Br. 14 n.6; Pet. Cert. 10 n.4.

The court of appeals took pains to explain that the issue in this case "is relatively narrow: we are asked only to review the adequacy of the environmental analyses conducted by [the agency] before promulgating" the rules at issue. Pet. App. 26a. The court "emphasize[d] that we draw no conclusions about the actions of the President of the United States nor the validity of NAFTA, neither of which is before us." *Id.* at 51a.

After the court below issued its January 16, 2003 decision, petitioners filed a petition for rehearing and petition for rehearing *en banc*, which the court of appeals denied without a request for an *en banc* vote by Order of April 10, 2003. *Id.* at 221a-22a.

9. FMCSA is in the midst of conducting both an EIS and a CAA conformity analysis, which may be completed as early as this summer. *See* Pet. Cert. 15 n.7; Resp. Br. Opp. Cert. 10.

10. Meanwhile, Congress twice reenacted the preconditions on Mexico-domiciled trucks operating throughout the United States, with the understanding that FMCSA must complete an EIS and a conformity analysis to meet those preconditions. On February 20, 2003, after the widely publicized decision by the court of appeals, Congress passed and the President signed into law the 2003 Consolidated Appropriations Resolution, which *reenacted* the preconditions for the 2003 fiscal year. Pub. L. No. 108-7, Div. I, Tit. III, § 348, 117 Stat. 11, 419. On January 23, 2004, Congress passed and the President signed into law the 2004 Consolidated Appropriations Act, which again *reenacted* the preconditions, this time for the 2004 fiscal year. Pub. L. No. 108-199, Div. F, Tit. I, § 130, 118 Stat. 3, 298. At the time of such reenactment, Congress knew that only the court of appeals' decision requiring an EIS and conformity analysis was standing in the way of cross-border trucking; indeed, the Senate and House Reports explicitly reference the decision. *See* S. Rep. No. 108-146, 108th Cong., 1st Sess. 69-70 (Sep. 8, 2003); H.R. Rep. No. 108-243, 108th Cong., 1st Sess. 81 (July 30, 2003).

SUMMARY OF ARGUMENT

Exercising its uncontested power under the Commerce Clause, Congress placed a restriction in Section 350 on FMCSA's use of appropriated funds to process applications

from Mexico-domiciled trucks to travel into the interior of the United States until the agency properly puts in place certain regulatory standards. To meet the congressional conditions, FMCSA promulgated the rules at issue in this case. Petitioners concede that FMCSA's action was a precondition to the operation of Mexico-domiciled trucks throughout the United States. Respondents challenge this agency action, not a separate presidential action. Regardless of the President's action with respect to the moratorium, there can be no cross-border trucking under Section 350 until FMCSA separately meets the congressional prerequisites.

Congress has comprehensive power under the Commerce Clause to enact safety and environmental requirements. In Section 350, Congress provided FMCSA authority over the entry of Mexico-domiciled trucks for cross-border trucking *separate* from the authority Congress previously gave the President with regard to the moratorium.

As this case challenges agency action rather than presidential action, judicial review is appropriate under the APA. Under this Court's precedents, "final agency action" challengeable under the APA exists where an agency makes a final decision that the President does not directly review. Because Congress provided FMCSA and the President separate authority over cross-border trucking, and because this case challenges only FMCSA's decision, judicial review of that agency's final action is proper.

Because Congress had the power to require environmental reviews as well as safety standards, the issue is whether Congress in enacting Section 350 meant to do so. That question can be determined without interpreting NEPA or the CAA because Congress has twice ratified the court of appeals' decision. After the lower court interpreted Section 350 and required an EIS and conformity analysis, Congress on two occasions took affirmative action to reenact the critical appropriations restriction when it was set to expire. The legislative history demonstrates that Congress did so with

full knowledge of the court of appeals' decision, and that the decision requiring environmental reviews was all that was standing in the way of cross-border trucking. Congress' intent to require the environmental reviews is plain, and Congress' power to do so cannot seriously be challenged by petitioners.

Should the Court reach the NEPA issues in this case, they too are governed by Congress' enactment of Section 350. The appropriations restriction made FMCSA's actions both a condition precedent to, and a proximate cause of, cross-border trucking and the consequent serious effects on the environment and public health. In such situations, even agencies that have no environmental responsibilities apart from NEPA must prepare an EIS. It is irrelevant under this Court's cases and the CEQ regulations that another actor not covered by NEPA, here the President, also had to take a separate action for environmental effects to result. It is also well within the purposes of NEPA to require the agency to prepare an EIS when, as here, the agency can shape its action to mitigate adverse environmental effects. FMCSA has substantial discretion over how stringent to make the safety standards, and therefore how many older Mexico-domiciled trucks—which are both less safe and more polluting—are permitted across the border.

The Clean Air Act requires states to attain and maintain federal air quality standards and imposes sanctions on those states that fail to do so. Congress enacted a conformity provision in the CAA to ensure that the federal government will not make it more difficult for a state to comply with federally mandated standards. FMCSA did not undertake a conformity analysis here even though the agency would cause environmental effects by allowing Mexico-domiciled trucks to travel into the interior of the United States. Under Section 350, the agency has control over permitting cross-border trucking to begin, how stringent to make the safety standards,

how to enforce the standards, and how to change the standards over time. FMCSA will thereby determine whether older, more heavily polluting trucks will be traveling into areas within the interior of the United States that are not in attainment with federal air quality standards, thus necessitating a conformity analysis.

ARGUMENT

I. THE COURT OF APPEALS' DECISION PROPERLY RESPECTED CONGRESSIONAL AUTHORITY

A. Congress Has Broad Power Under The Commerce Clause To Enact Prerequisites To The Entry Of Mexico-Domiciled Trucks

1. This case concerns the authority of Congress to require a federal agency to take specified action prior to the agency's use of appropriated funds to allow Mexico-domiciled trucks to operate throughout the United States. Petitioners do not take issue with Congress' power to do so. *See* Pet. Br. 21-22. The Constitution provides that Congress has the power to "regulate commerce with foreign nations, and among the several states." Art. I, § 8, Cl. 3. It is hard to imagine an activity more squarely within Congress' Commerce Clause power than the regulation of trucks traveling from another country into this country and then throughout the several states. *See, e.g., Gibbons v. Ogden*, 22 U.S. (9 Wheat. 1) 1, 193-94 (1824) (Commerce Clause "comprehend[s] every species of commercial intercourse between the United States and foreign nations" such that "[n]o sort of trade can be carried on between this country and any other, to which this power does not extend"); *United States v. Lopez*, 514 U.S. 549, 572 (1995) (Kennedy, J., concurring) ("Even the most confined interpretation of 'commerce' would embrace transportation between the States.").

The trucking activity at issue plainly involves both foreign commerce and interstate commerce, providing Congress broad power to regulate, including with respect to issues of safety and the environment. *See Pierce County, Washington v. Guillen*, 537 U.S. 129, 147 (2003) ("legislation aimed at improving safety in the channels of commerce" is "within Congress' Commerce Clause power"); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 282 (1981) ("[W]e agree with the lower federal courts that have uniformly found the power conferred by the Commerce Clause broad enough to permit congressional regulation of activities causing air or water pollution, or other environmental hazards that may have effects in more than one State.").

2. Congress exercised its commerce power by placing a restriction on *agency* action in an appropriations bill. Petitioners do not contest that Congress has the power to put in place safety and environmental requirements or that Congress may do so through the appropriations process. Nonetheless, they seek to nullify the exercise of congressional power by claiming that the challenged action is the President's, and that respondents seek to apply NEPA and the CAA to the President's action of lifting the moratorium. *See* Pet. Br. 24-25 ("The President's decision to lift the moratorium on cross-border operations by Mexican carriers is not subject to NEPA's requirement of preparing an EIS."); *id.* at 43 ("[T]he Presidential action to open the border is exempt from the conformity-review requirement."); *see also id.* at 1, 2, 18, 23, 26. Repetition does not strengthen a hollow argument. Petitioners' contention that respondents challenge the President's action, not FMCSA's separate action, is the linchpin of petitioners' arguments. Once it is clear that it is the agency's action that is at issue, petitioners' entire argument collapses.

Petitioners' argument cannot be reconciled with the statutory framework under which FMCSA operates. Regardless

of what action the President takes, Congress prohibited FMCSA from processing applications for cross-border trucking until the agency meets the requirements of Section 350.

For this reason, as petitioners acknowledge, FMCSA promulgated the rules challenged in this case to meet conditions Congress imposed in Section 350. *See* Pet. App. 53a-54a, 125a; Pet. Br. 13. No matter what happens with regard to the moratorium, Mexico-domiciled trucks cannot travel throughout the United States with the attendant environmental effects unless the challenged rules are implemented. The agency action in promulgating the rules is the subject of this case.

3. Petitioners have repeatedly conceded that FMCSA has control over the initiation of cross-border trucking. FMCSA admitted in the EA, "[w]hile the appropriations hold is in effect, any Presidential order to modify the statutory moratorium will have no practical effect." J.A. 58; *see also* Pet. Br. 11. Petitioners similarly concede in their brief that Congress in Section 350 made FMCSA's action "a precondition" to processing applications. Pet. Br. 32; *see also id.* at 35. The court of appeals was therefore correct in recognizing that the President and the agency "both had to take action for the event to occur." Pet. App. 19a.

Petitioners attempt to sidestep their concessions by arguing that "Section 350 of the 2002 Appropriations Act does not render FMCSA responsible for the President's decision to allow cross-border operations by new Mexican carriers." Pet. Br. 32. But this is not and has never been the point. Nor are petitioners correct in arguing that by lifting the moratorium the President caused the rules. *See id.* at 31. Congress gave the President and FMCSA separate spheres of responsibility. As petitioners acknowledge, the "function of processing applications is *separate* from the President's decision to lift the moratorium." Pet. Cert. 19-20 (emphasis added). The court of appeals therefore properly recognized that the actions

of the President and the agency are independent. Pet. App. 19a, 21a. Nor was FMCSA merely acting as a "subordinate" of the President (Pet. Br. 32) or simply "implementing a policy of the President" in promulgating the rules (Pet. Cert. 16). *Congress* made the *agency's* actions a precondition to the entry of Mexico-domiciled trucks as part of *Congress'* policymaking prerogatives. FMCSA is only subordinate to the President and implementing presidential policy in the sense that *every* executive branch agency in every situation is subordinate to the President or in some sense implementing presidential policy. This does not affect Congress' authority to require FMCSA to comply with NEPA and the CAA in taking action to permit cross-border trucking.

B. Congress' Grant Of Authority To FMCSA Does Not Interfere With The Separate Authority Congress Delegated To The President

1. Congress properly exercised its power in giving FMCSA separate decisionmaking responsibility over Mexico-domiciled trucks notwithstanding the issues of trade and presidential authority petitioners raise. Petitioners correctly recognize that NAFTA was a "joint exercise" of the President's and Congress' powers. Pet. Br. 22.[3] Congress imposed the moratorium and delegated to the President authority to lift the moratorium. *See, e.g.*, 49 U.S.C. § 13902(c); J.A. 49. Petitioners concede that when "the President lifted [the] trade moratorium," he did so "pursuant to express congressional authorization" (Pet. Br. 2), and they do not claim that absent such a delegation by Congress the President would have authority to permit cross-border trucking (*id.* at 22).

[3] Petitioners do not argue that NAFTA diminished Congress' broad authority over commerce, both foreign and domestic, including over safety and environmental issues. Nor could they. *See, e.g.*, 19 U.S.C. § 3312(a)(1) ("No provision of the Agreement, nor the application of any such provision to any person or circumstance, which is inconsistent with any law of the United States shall have effect.").

Indeed, in lifting the moratorium on November 27, 2002, the President noted that the Interstate Commerce Commission Termination Act of 1995 "empowered the President to make further modifications to the moratorium." 67 Fed. Reg. 71795 (Dec. 2, 2002), *reprinted in* Pet. App. 232a; *see also* 66 Fed. Reg. 30799 (June 5, 2001).

Petitioners argue that Congress granted the President sole authority over cross-border trucking because "Congress has given the President express authority to determine whether, and to what extent, Mexican motor carriers should be granted access to United States markets." Pet. Br. 22. This argument is simply incorrect. Congress enacted Section 350 *after* granting the President authority to lift the moratorium. That appropriations restriction gave FMCSA separate authority over the access of Mexico-domiciled trucks to the United States by making the conditions set forth in Section 350 "a condition precedent" (Pet. Cert. 19) for the entry of such trucks. This case involves FMCSA's separate responsibility as provided by Congress and is a challenge to that agency's action; the President's prerogatives are not at issue.

2. Petitioners do not dispute that Congress has the power to condition cross-border trucking upon FMCSA's issuance of safety standards, notwithstanding the President's separate authority to lift the moratorium or to negotiate bilateral agreements on cross-border commerce.[4] But if Congress had the constitutional power to make the entry of Mexico-domiciled trucks contingent on FMCSA's issuance of valid *safety* standards, Congress also had the power to make entry contingent upon compliance with *environmental* laws. Both the power to require safety standards and the power to require

[4] To the extent petitioners claim Congress has *unconstitutionally* impinged on the President's foreign-affairs powers by enacting Section 350, that argument has been waived because it was not raised or passed on below.

environmental reviews equally affect the ability of trucks to come into the United States, and therefore have the same ramifications for presidential action. Petitioners' foreign affairs argument would strip Congress of any power to regulate the conditions of commerce from Mexico or other countries with which the United States has trade agreements, including enacting restrictions on transportation of hazardous materials or unsafe foods or pharmaceutical products.[5]

Nor can petitioners argue that there is something unique about environmental reviews because they take time to complete. *See* Pet. Br. 40. There is no meaningful distinction between the delay caused by the imposition of safety requirements and that caused by environmental reviews. In any event, the decision whether determining and possibly mitigating the environmental effects creates too much delay belongs to Congress. *See, e.g.*, *The Abby Dodge v. United States*, 223 U.S. 166, 176-77 (1912) ("[S]o complete is the authority of Congress over the subject that no one can be said to have a vested right to carry on foreign commerce with the United States."). Congress certainly understood the possibility of delay when it enacted Section 350 in *December 2001*. The appropriations provision imposed numerous preconditions to the entry of trucks even though the President had announced his decision to lift the moratorium by *January 2002*, just one month later. *See* J.A. 254.

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[5] Petitioners invoke language about foreign affairs from cases involving the President's powers during times of war (*Ludecke v. Watkins*, 335 U.S. 160 (1948)), and over national security (*Dep't of the Navy v. Egan*, 484 U.S. 518 (1988)); *see also United States v. Curtis-Wright Export Corp.* 299 U.S. 304 (1936) (arms sales to foreign countries engaged in armed conflict). *See* Pet. Br. 21. But these are areas where the President's authority is at its peak, and this case plainly does not implicate the President's power as Commander-in-Chief. It is a long leap from those cases to this one, which involves Congress' regulation of traditional commerce—an area where petitioners concede Congress has comprehensive power. *See id.*

C. Judicial Review Of Final Agency Action Is Appropriate

1. The APA permits review of "final agency action." 5 U.S.C. § 704; *see also Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). Petitioners do not dispute that FMCSA's rules constitute "final agency action." Instead, petitioners argue that the President is not an agency and his decisions are not reviewable by the courts. *See* Pet. Br. 25-26, 43-44. But this is irrelevant because, as discussed above, this case does not challenge the President's decision to lift the moratorium, but rather FMCSA's action pursuant to its *separate* responsibility under Section 350.

2. Petitioners rely primarily on this Court's ruling in *Franklin v. Massachusetts*, 505 U.S. 788 (1992). The Court there established that when an agency decision is not "a final and binding determination," there is no "final agency action" under the APA. *Id.* at 798. *Franklin* does not preclude judicial review of otherwise "final agency action" just because the President has a *separate* decision to make. *Franklin* simply found that there is no final action under the APA when an agency only makes a "tentative recommendation" to the President. *Id.*; *see also Dalton v. Specter*, 511 U.S. 462, 469 (1994) (describing *Franklin* as follows: "Because the President reviewed (and could revise) the Secretary's report, made the apportionment calculations, and submitted the final apportionment report to Congress, we held that the Secretary's report was 'not final and therefore not subject to review.'") (quoting *Franklin*, 505 U.S. at 798). That is, *Franklin* (and *Dalton*) involved direct presidential review of an agency recommendation.

Unlike *Franklin* (and *Dalton*), this is not a case where the agency provides a recommendation to the President, who then has final decisionmaking authority with respect to that

recommendation.[6] Under Section 350, FMCSA's action has independent, legally operative effect with respect to whether Mexico-domiciled trucks are permitted into this country, and the President plays no role in reviewing or revising FMCSA's rules. In *Bennett*, this Court's most recent case on the subject, the Court clarified the limited nature of *Franklin*, noting that "our holding that this [action] did not constitute 'final agency action' was premised on the observation that the report carried 'no direct consequences' and served 'more like a tentative recommendation than a final and binding determination.'" 520 U.S. at 178 (quoting *Franklin*, 505 U.S. at 798). In sum, challenges to administrative proceedings that are final without presidential action are permitted.

3. In keeping with these principles, the court of appeals reviewed only agency action (Pet. App. 51a), not the President's action, finding that "the issues before us do not touch on his clear, unreviewable discretionary authority to modify the moratorium" (*id.* at 26a). A challenge to an agency's failure to comply with a statute is eminently proper. *See, e.g.*, *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 681 (1986) (stating presumption that Congress "expects the courts to grant relief" if federal agency violates statutory command); *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986) (rejecting contention that case was not suitable for judicial review because it involved foreign relations by stating that "one of the Judiciary's characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones").

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[6] This case is also unlike *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 109 (1948), where the order at issue was not a final disposition, but simply a recommendation to the President with no independent force.

II. CONGRESS RATIFIED THE COURT OF APPEALS' DECISION

Because Congress has the power to place environmental conditions on trucks crossing the border, the only remaining question is whether Congress did require environmental analyses in this instance. Before we demonstrate that the court of appeals was correct in its application of NEPA and the CAA to FMCSA's actions, we show that Congress ratified the lower court's decision that an EIS and conformity analysis were required—not once, but twice—thereby removing any doubt that Congress intended NEPA and the CAA to apply here. Since the court of appeals decided this case, Congress has made crystal clear that the enactment of Section 350 triggered the application of these environmental statutes. Accordingly, the doctrine of ratification provides a separate, narrow ground for this Court to affirm the decision of the court of appeals.

1. The doctrine of ratification is well-settled: "Congress is presumed to be aware of a[] . . . judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Lorillard v. Pons*, 434 U.S. 575, 580 (1978); *see also, e.g., Keene Corp. v. United States*, 508 U.S. 200, 212-13 (1993); *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 381-82 & n.66 (1982).

This case presents at least as strong a claim for application of the ratification doctrine as any case previously before this Court. The court of appeals required an EIS and conformity analysis on the basis that the challenged rules "were issued in compliance with a rider to the 2002 Appropriations Act for DOT [Section 350], which conditioned funding for permitting Mexican truck traffic into the United States on DOT's issuance" of the rules, that the rules were an independent cause of trucks being permitted to cross the border, and that the rules therefore caused environmental effects. Pet. App. 9a, 19a-23a, 30a-31a, 47a. The court of

appeals expressly noted that the rules that would permit cross-border trucking "would be in effect now absent this action." *Id.* at 34a.

After the court of appeals ruled on January 16, 2003, Congress *twice* reenacted Section 350—once on February 20, 2003, and again on January 23, 2004. Consolidated Appropriations Resolution, 2003, Pub. L. No. 108-7, Div. I, Tit. III, § 348, 117 Stat. 11, 419 ("Funds appropriated or limited in this Act shall be subject to the terms and conditions stipulated in section 350 of Public Law 107-87, including that the Secretary submit a report to the House and Senate Appropriations Committees annually on the safety and security of transportation into the United States by Mexico-domiciled motor carriers."); Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, Div. F, Tit. I, § 130, 118 Stat. 3, 298 (same).

The most basic element of ratification is readily satisfied because Congress knew about the court of appeals' decision when it reenacted Section 350. There is no need to presume congressional awareness because both the Senate and House Reports for the fiscal year 2004 reenactment *expressly reference the decision.* The Senate Report states:

> On November 27, 2002, the Secretary of Transportation announced that all the preconditions had been met and directed the Federal Motor Carrier Safety Administration [FMCSA] to begin to open the border. However, on January 16, 2003, *the Ninth Circuit Court of Appeals in Public Citizen v. Department of Transportation [DOT], delayed opening the border pending completion of environmental impact statements and a Clean Air Act conformity determination on the FMCSA's implementing regulations.*

S. Rep. No. 108-146 at 69-70 (emphasis added). Likewise, the House Report states:

> The Administration has completed all requirements under section 350 and has implemented a regime of

> regulations to ensure the safety of Mexican trucks operating within the U.S. However, on January 18, 2003, *the 9th U.S. Circuit Court of Appeals blocked Mexican trucks from gaining wider access to U.S. highways citing that DOT did not prepare a full environmental impact statement.*

H.R. Rep. No. 108-243 at 81 (emphasis added).[7]

In both fiscal years 2003 and 2004, when Section 350 was about to expire, Congress had the complete power to express its disapproval of the court of appeals' decision simply by allowing Section 350 to lapse, or by reenacting the provision while stating that nothing in the appropriations language required FMCSA to prepare an EIS or a conformity analysis. Congress knows how to exercise such power in the context of the appropriations process, and has exempted certain activities from NEPA's application, including in response to litigation.[8] That Congress chose not to do so here and instead

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[7] Moreover, at the time of the fiscal year 2003 reenactment on February 20, 2003, Congress certainly knew about the court of appeals' decision. The decision received widespread publicity in the Washington Post, New York Times, Wall Street Journal, Los Angeles Times, CBS Evening News, National Public Radio, and other media sources. In these circumstances, in addition to the *proof* that Congress knew about the decision during the time of the second reenactment, there is no basis to overcome the *presumption* that Congress knew about the decision at the time of the first reenactment.

[8] *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 ("[A]ctions authorized by this section shall proceed immediately and to completion notwithstanding any other provision of law including, but not limited to, NEPA."); Emergency Supplemental Appropriations for Additional Disaster Assistance, for Anti-Terrorism Initiatives, for Assistance in the Recovery from the Tragedy that Occurred at Oklahoma City, and Rescissions Act, 1995, Pub. L. No. 104-19, Tit. II, § 2001(d), 109 Stat. 194, 244 ("The issuance of any such regulation . . . shall not require the

reenacted the same restriction twice speaks volumes about Congress' intent.

2. Petitioners' responses that congressional reenactment had nothing to do with the court of appeals' decision and that the legislative history only involved safety and not environmental issues miss the mark. *See* Pet. Br. 33. The Committee Reports quoted above expressly refer to the decision in this case and state that the basis of the court of appeals' decision was environmental. S. Rep. No. 108-146 at 69-70 ("Public Citizen v. Department of Transportation [DOT], delayed opening the border pending completion of environmental impact statements and a Clean Air Act conformity determination."); H.R. Rep. No. 108-243 at 81 ("Court of Appeals blocked Mexican trucks from gaining wider access to U.S. highways citing that DOT did not prepare a full environmental impact statement"). Thus, there is no basis to suggest that congressional reenactment did not address the decision or have environmental implications.

Moreover, at the time of the 2004 reenactment, *only* the failure to prepare an EIS and conformity analysis was preventing cross-border trucking. *See* H.R. Rep. No. 108-243 at 81 ("The Administration has completed all requirements under section 350."); S. Rep. No. 108-146 at 69 ("On November 27, 2002, the Secretary of Transportation announced that all the preconditions had been met."). Yet Congress reenacted the entirety of Section 350 *twice*, thereby ratifying the decision and requiring the environmental reviews.

Petitioners attempt to evade the doctrine of ratification by characterizing the two reenactments as congressional *inaction*. Pet. Br. 33; *see also Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 186-87 (1994). But appropriations bills by their very nature have expiration dates.

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preparation of an environmental impact statement under . . . the National Environmental Policy Act of 1969.").

Only by affirmatively taking action did Congress provide for the continued vitality of Section 350. Unlike in *Central Bank*, where Congress did not reenact the statutory provisions at issue during the relevant time period (511 U.S. at 185), here Congress twice affirmatively reenacted Section 350 because the legislation was set to expire.

In sum, the Court may decide this case on an even narrower ground than the narrow decision of the court of appeals. Congress has the power to require FMCSA to conduct an EIS and a conformity analysis, and Congress twice reenacted the appropriations language upon which the court of appeals relied after the court required these reviews. Thus, this Court may find that the reviews are required without an independent analysis of NEPA and the CAA and how those statutes interact with the appropriations restriction. Because of the unique facts of this case, Congress' intent to require environmental reviews can be determined without deciding any issue of law other than that Congress meant the EIS and conformity analysis to proceed in this instance.

III. NEPA REQUIRES FMCSA TO PREPARE AN ENVIRONMENTAL IMPACT STATEMENT

Even apart from congressional reenactment of Section 350, the conclusion that NEPA required FMCSA to prepare an EIS flows directly from Congress' original decision making action by FMCSA a prerequisite to cross-border trucking. Petitioners' principal argument to the contrary—that "[t]he *President's decision* to lift the moratorium on cross-border operations by Mexican carriers is not subject to NEPA's requirement of preparing an EIS" (Pet. Br. 24-25 (emphasis added))—is, as we have shown, non-responsive. Moreover, petitioners do not contest the lower court's findings as to the deficiencies of the EA, including that the EA does not properly analyze local effects (Pet. App. 33a), long-term effects (*id.* at 34a), effects on public health and safety (*id.* at 35a), uncertain environmental effects such as increased truck

traffic and the emissions profile and age of Mexico-domiciled trucks (*id.* at 35a-39a), and effects on California air pollution laws (*id.* at 39a-40a). Petitioners instead provide an ill-conceived causation analysis in an attempt to excuse the failings of the EA. Relying again on the President's separate action with regard to lifting the moratorium, petitioners dispute the causal link between FMCSA's actions and the environmental effects of cross-border trucking. We demonstrate below that petitioners' analysis is incorrect.[9]

A. FMCSA's Actions Will Cause Environmental Effects

1. NEPA applies to "all agencies of the Federal Government" (42 U.S.C. § 4332(2)), including FMCSA, and petitioners concede that FMCSA must comply with NEPA. *See* Pet. Br. 38 n.16. Under NEPA, proposed "major Federal actions significantly affecting the quality of the human environment" require an EIS. 42 U.S.C. § 4332(2)(C).[10] To interpret this broad statutory command we, as do petitioners, rely on the CEQ regulations implementing NEPA, which are "binding on all Federal agencies" (40 C.F.R. § 1500.3)

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[9] The APA provides for reversal of agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Because the issue here is whether FMCSA followed the law in interpreting NEPA's standards on causation and other issues, the strict standard of review governing legal issues applies. *See Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 376-77 (1989) (distinguishing legal disputes, such as one that would turn on legal meaning of "significant" under NEPA, from factual disputes which implicate substantial agency expertise). Even under the more deferential standard applicable to an agency's factual determination (*see id.* at 377), FMCSA has *not* taken the requisite "hard look" at the environmental consequences of its proposed action (*id.* at 374).

[10] The court of appeals separately examined "major federal action" and "significantly affecting the environment." *See* Pet. App. 29a-43a. The portions of the opinion that petitioners contest relate to the former component, on which we focus.

and are "entitled to substantial deference." *Marsh*, 490 U.S. at 372.

The CEQ regulations define "major federal action" to "include[] actions with effects that may be major and which are potentially subject to Federal control and responsibility," including "[a]doption of official policy, such as rules, regulations, and interpretations." 40 C.F.R. § 1508.18. Further, "effects" include "[i]ndirect effects, which are *caused by* the action and are later in time or farther removed in distance, but are still *reasonably foreseeable*." 40 C.F.R. § 1508.8(b) (emphases added).

2. As previously discussed, and as petitioners concede, even though the President lifted the moratorium, Section 350 precludes Mexico-domiciled trucks from operating in the interior of the United States absent FMCSA action. *See supra* at pp. 19-21; Pet. Cert. 11, 19 ("Section 350 did establish the promulgation of FMCSA's safety rules as a condition precedent to processing Mexican carriers' applications."). Since the President lifted the moratorium in November 2002, there has been no cross-border trucking.[11]

Congress gave FMCSA separate control over whether such nationwide trucking could occur. FMCSA's action is therefore a key condition precedent of any environmental effects. There is no requirement under NEPA that agency action also be the sole cause of environmental effects. For instance, this Court has found that a Forest Service "special use permit" that authorizes development of a ski resort by a private developer constitutes "major Federal action." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332,

[11] Having conceded that Mexico-domiciled trucks cannot travel throughout the United States until the challenged rules are implemented, petitioners spend considerable time rebutting a straw man: That FMCSA's rules caused the President to lift the moratorium. *See* Pet. Br. 30-32. Respondents have never made this argument.

336-37 (1989); *see also Kleppe v. Sierra Club*, 427 U.S. 390, 399-400 (1976); *Aberdeen & Rockfish R.R. Co. v. SCRAP*, 422 U.S. 289, 318-19 (1975). In *Robertson*, as here, there was "major federal action" because the agency's decision was a condition precedent for environmental effects, even though other actors not covered by NEPA also had to take action for there to be any such effects.[12]

3. Petitioners' reliance on *Metropolitan Edison v. People Against Nuclear Energy*, 460 U.S. 766 (1983), is misplaced. In that case, the Court examined whether an EIS was necessary to evaluate the possible psychological harm from

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[12] The courts of appeals regularly find "major federal action" in such circumstances. *See, e.g., Ramsey v. Kantor*, 96 F.3d 434, 444 (9th Cir. 1996) ("if a federal permit is a prerequisite for a project with adverse impact on the environment, issuance of that permit does constitute major federal action," even though environmental effects will not occur absent further action by state governments not subject to NEPA and by private actors' fishing); *Citizens Awareness Network, Inc. v. United States Nuclear Regulatory Comm'n*, 59 F.3d 284, 292-93 (1st Cir. 1995) (Nuclear Regulatory Commission's permission for operator of nuclear power plant to decommission facility constitutes "major federal action"); *Maryland Conservation Council, Inc. v. Gilchrist*, 808 F.2d 1039, 1041, 1042 (4th Cir. 1986) ("Because of the inevitability of the need for at least one federal approval, we think that the construction of the highway will constitute a major federal action," even though a county government would have to authorize construction.); *Cady v. Morton*, 527 F.2d 786, 793 (9th Cir. 1975) (Department of Interior approval of leases to private company that would conduct coal mining operations was "major federal action").

This concept is so well established that it is often accepted without discussion. *See, e.g., Audubon Society of Central Arkansas v. Dailey*, 977 F.2d 428, 433 n.6 (8th Cir. 1992) (noting parties do not dispute that there is "major federal action" where Corps of Engineers issued permit upon application of city for construction of bridge by private contractor); *Sierra Club v. Marsh*, 769 F.2d 868, 870, 882 (1st Cir. 1985) (Breyer, J.) (federal agencies responsible for grant of "necessary permits and funding" for state to build cargo port and causeway must prepare EIS); *Sierra Club v. Peterson*, 717 F.2d 1409 (D.C. Cir. 1983) (federal agency that leases land for oil and gas exploration by private parties must prepare EIS).

the risk of an accident that might conceivably result from the restarting of a nuclear reactor. *See id.* at 768. *Metropolitan Edison* thus did not address the connection between agency action and harm to the environment, but rather the connection between harm to the environment and psychological harm, which in that case was obviously attenuated. *See id.* at 775; Pet. Br. 34. The case did not concern the classic threshold NEPA issue of the connection between agency action—here the issuance of rules that allow cross-border trucking—and harm to the environment. That issue, which is the issue in this case, is governed by *Robertson* and like cases.

But even under the analysis *Metropolitan Edison* employed (*see* 460 U.S. at 775-77), an EIS is required here. Petitioners are simply wrong in arguing that this case, like *Metropolitan Edison*, "involved a long 'causal chain' between the agency's action" and the environmental harm. Pet. Br. 34 (quoting *Metropolitan Edison*, 460 U.S. at 774-75). To the contrary, the rules serve the gatekeeper function of determining which trucks will and will not be able to travel into the interior of the United States. The President lifted the moratorium, but under Section 350, FMCSA's rules are also necessary for Mexico-domiciled trucks to travel beyond the border zones and affect the environment. And, the standards contained in the rules will determine precisely which trucks will do so. There is much more than a "bare 'but for' relationship" (Pet. Br. 33) between FMCSA's rules and the predictable environmental effects of trucking beyond the border zones. Rather, there is an extremely close connection between the application of FMCSA's rules and the environmental harm they will cause. Because of Section 350, FMCSA's rulemaking is a *proximate cause* of those environmental effects in the classic sense that there is "a reasonably close causal relationship." *Metropolitan Edison*, 460 U.S. at 774.

4. Petitioners refer to the President's action in lifting the moratorium as an "intervening event." Pet. Br. 10-11, 31.

But there are two independent conditions that must be satisfied for cross-border trucking: the President must lift the moratorium and FMCSA must meet the prerequisites of Section 350. That Congress has enacted two conditions does not deprive the performance of each one of its causal significance. Otherwise, every time two federal agencies need to issue permits for a state construction permit, one of them would be an "intervening event." Indeed, NEPA does not even recognize the concept of an "intervening event" at all. There is no reason to impose such a requirement separate and apart from the concept of foreseeability already established by 40 C.F.R. §1508.8(b). *See* s*upra* at p. 32.

Even assuming *arguendo* that an intervening cause can affect an agency's obligations under NEPA and that the President's action in lifting the moratorium is an intervening cause, petitioners' argument fails in light of traditional tort law principles and the CEQ regulations. Under tort law: "*Foreseeable intervening forces* are within the scope of the original risk, and hence of the defendant's negligence." W. Page Keeton *et al.*, Law Of Torts 303 (5th ed. 1984) (emphasis added). Put another way, if "the intervening cause is 'foreseeable,'" the defendant is still liable. *Id.* at 302. Here, the President's action in lifting the moratorium was not simply foreseeable, it was inevitable. As petitioners concede, the President announced his intention to lift the moratorium *before* the agency promulgated its rules. *See, e.g.*, Pet. Cert. 5.[13] Therefore, the environmental effects of the flow of trucks from Mexico to interior points of the United States were reasonably foreseeable at the time FMCSA promulgated

[13] Petitioners belatedly speculate that it was "possible" that something could have changed the President's mind. Pet. Br. 31. The test under the CEQ regulations, however, is "reasonably foreseeable" not conceivably possible. 40 C.F.R. § 1508.8(b). The EA actually dismissed consideration of a scenario in which the President declined to lift the moratorium. J.A. 57. It is too late to argue that scenario is reasonably foreseeable.

its rules and are now certain in light of the President's lifting the moratorium.

5. This causation analysis does not subject a presidential decision to NEPA for, as we have pointed out, the President's decision is not being reviewed, only the actions of FMCSA. *See supra* at pp. 19-20.[14] The relevant question is whether the *agency's* actions may significantly affect the environment. Petitioners' argument that the President is exempt from NEPA misses the point. *See* Pet. Br. 24-27. One or more of the actors that cause environmental effects (state agencies, construction companies, etc.) are often exempt from NEPA. Those actors do not have to prepare an EIS, and respondents do not seek to require the President to do so. But that does not excuse an agency that is covered by NEPA from preparing an EIS when it takes action that is a key condition precedent to, and a proximate cause of, significant environmental effects.

Petitioners' claim that respondents challenge the effects of the President's action (*see* Pet. Br. 2, 3, 27-30) is the same as characterizing *Robertson* as a challenge to the effects of a private company's decision to build a ski resort. But in that and similar cases the actions of the federal *agency* are subject to NEPA. That the statute limits who must prepare an EIS to federal agencies does not mean that a covered agency may ignore the environmental effects it causes because an entity not within the statute also must take action to cause the effects.

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[14] Petitioners claim respondents are challenging the President's lifting of the moratorium because we have cited a report that criticizes the EA's "No Action Alternative," under which the President lifts the moratorium, there are no new rules promulgated, and FMCSA nonetheless allows cross-border trucking *notwithstanding* Section 350's express prohibition of such activity. *See* Pet. Br. 29; J.A. 56, 58, 63. Petitioners certainly cannot defend the EA and rebut criticisms of it by relying on a scenario grounded on defiance of the law.

Petitioners claim that an agency's NEPA review cannot touch on "sensitive and highly discretionary areas such as foreign affairs." Pet. Br. 26. The CEQ regulations, however, explicitly include "treaties and international conventions or agreements" within the realm of "federal actions" subject to NEPA. 40 C.F.R. § 1508.18(b)(1). "[L]egislative proposals" (40 C.F.R. § 1508.18(a)), including "requests for ratification of treaties" (40 C.F.R. § 1508.17), also are "federal actions" subject to NEPA. Agencies covered by NEPA therefore prepare EISs even though their actions may take place against the backdrop of foreign affairs. *See, e.g.*, 64 Fed. Reg. 31553, 31553-54 (June 11, 1999) (Air Force to prepare EIS with regard to dismantlement of missile system that would be required by treaty between United States and Russia).

B. Preparation Of An EIS Would Further NEPA's Purposes

In cases in which there is any doubt as to causation—and this is not one of those cases—courts "look to the underlying policies or legislative intent in order to draw a manageable line between those causal changes that may make an actor responsible for an effect and those that do not." *Metropolitan Edison*, 460 U.S. at 774 n.7. As we have previously discussed, the legislative intent could not be more clear: Through Section 350, Congress made FMCSA action a prerequisite to the cross-border trucking that will cause the environmental effects, and then confirmed this by twice reenacting the preconditions after the court of appeals required an EIS. *See supra* at pp. 26-30.

In addition, NEPA must be applied "to the fullest extent possible." 42 U.S.C. § 4332. With that command in mind, NEPA has two aims: "It ensures that *the agency*, in reaching its decision, will have available, and *will carefully consider*, detailed information concerning significant environmental impacts"; and it "guarantees that the relevant *information will be made available to the larger audience* that may also play a

role in both the decisionmaking process and the implementation of that decision." *Robertson*, 490 U.S. at 349 (emphases added); *see also Baltimore Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 97 (1983); 40 C.F.R. §§ 1500.2, 1502.1. FMCSA's preparation of an EIS would advance both of these aims.

1. An EIS would ensure that FMCSA considers the environmental effects of allowing Mexico-domiciled trucks to travel into the interior of the United States before it is too late for the agency to do anything to mitigate the effects. *See Robertson*, 490 U.S. at 349.

NEPA specifically makes its policies and goals "*supplementary* to those set forth in existing authorizations of Federal agencies." 42 U.S.C. § 4335 (emphasis added). The statute ensures that environmental issues are considered along with more traditional priorities. *See, e.g.*, 42 U.S.C. § 4332(2)(B). Petitioners claim FMCSA does not have "expertise" in issues beyond safety and need not "step back from the immediate safety-related task at hand and evaluate under NEPA the environmental effects." Pet. Br. 3, 35. This contention is at odds with NEPA. This Court has made clear that NEPA constrains agencies possessing statutory duties that do not explicitly address environmental issues, and which undertake tasks that are not environmental in nature. *See, e.g., Aberdeen*, 422 U.S. at 318-19 (regarding Interstate Commerce Commission's general revenue proceeding).[15] The only exception is if compliance with NEPA is impossible. *See* 40 C.F.R. § 1500.6. Petitioners do not argue

[15] Petitioners cite *Aberdeen* for the proposition that an EIS is not warranted here because it would not serve a purpose in informing FMCSA's decision. *See* Pet. Br. 38. But *Aberdeen supports* requiring FMCSA to prepare an EIS because the Court there held only that "no purpose" would be served by ordering an agency to explore environmental issues when the same agency was *already doing so in another proceeding*. 422 U.S. at 325.

FMCSA's statutory authorization makes compliance impossible. *See* Pet. Br. 38 n.16.

Petitioners characterize FMCSA's rules as "ministerial." Pet. Br. 39. But petitioners do not dispute that the agency has meaningful discretion over how to satisfy the preconditions in Section 350. *See* J.A. 481. Among other examples, FMCSA could add to the nine safety audit areas of Section 350(a)(1)(B), as the agency did by requiring that trucks have "other basic safety management controls in place." Pet. App. 116a. The agency further used its discretion to provide a detailed explanation of the criteria FMCSA would use for safety audits. *Id.* at 118a-24a. FMCSA also could determine whether to conduct safety audits in Mexico or the United States. *See id.* at 114a. The agency likewise enjoys discretion over the frequency of inspections. *See* J.A. 141-42.[16]

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[16] Indeed, besides providing the agency broad discretion over how stringent to make the safety standards, Congress nowhere stated that FMCSA had to promulgate rules meeting the preconditions specified in Section 350, only that the agency must do so before spending appropriated funds to process applications for cross-border trucking. Pub. L. No. 107-87, § 350(a), 115 Stat. 864. Congress certainly knows how to require agencies to adopt rules, but did not do so here. Nor do other statutes governing FMCSA mandate that the agency meet the numerous preconditions in Section 350, as demonstrated by the dramatic differences between the original proposed Application and Safety Monitoring Rules and the more extensive rules promulgated after Section 350. *Compare* 66 Fed. Reg. at 22377 *and* 66 Fed. Reg. at 22419-20 *with* Pet. App. 107a-24a *and* 183a-202a. Petitioners' only claim to the contrary is a passing reference to the effect that, because FMCSA must grant authority to "particular carriers" that satisfy requirements (Pet. Br. 22-23; *see also* J.A. 52), the agency is "effectively require[d]" to promulgate rules that meet the conditions of Section 350. Pet. Br. 35. This point is inapposite because the issue is FMCSA's discretion whether or not to promulgate rules (which the agency enjoys), not to ignore them in particular instances once promulgated (the issue petitioners discuss).

Given this discretion over the content of the rules, FMCSA could decide, in light of an EIS, to consider enacting more restrictive safety standards that would also mitigate the environmental effects of Mexico-domiciled trucks operating throughout the United States.

The agency concedes that there is a correlation between safety and environmental concerns in that older, less safe trucks pollute more. In the court of appeals, FMCSA suggested that increased emissions from Mexico-domiciled trucks will not be as great because "the heightened standards put into place by the challenged safety rules will tend to restrict the number of older (pre-1993) Mexican trucks that can be operated in the United States." J.A. 484; *see also* Pet. Br. 12; J.A. 67, 98, 193, 201.

The relation between tighter safety rules and more environmental protection makes eminent sense as Mexico-domiciled trucks began meeting United States safety and environmental standards at approximately the same time (*see id.* at 255), and hence the same, older trucks are both more dangerous and more polluting. By making the safety rules more stringent, FMCSA could thus help mitigate the serious environmental and public health problems resulting from cross-border trucking.[17] In light of the agency's discretion,

[17] Petitioners do not dispute any of this; they only claim that the point is waived because it was raised in response to FMCSA's argument below (J.A. 484) that the more stringent the agency made the safety standards, the fewer older, more polluting, trucks would be allowed entry. *See* Pet. Br. 28-29. The agency also acknowledged this tie between the stringency of the safety rules and the environment in the EA. *See* J.A. 67, 98, 193, 201. The court of appeals properly addressed and decided the issue, as it plainly had the discretion to do. *See* Pet. App. 42a; *County of Suffolk v. Secretary of Interior*, 562 F.2d 1368, 1385 (2d Cir. 1977). This Court has long held that it will entertain arguments that were either pressed or passed on below. *See, e.g., United States v. Williams*, 504 U.S. 36, 41 (1992).

there should be no serious dispute that FMCSA was required to prepare an EIS.[18]

Further, FMCSA may have additional ways to mitigate the adverse effects of certifying Mexico-domiciled trucks to travel to interior points within the United States. For example, FMCSA could engage in cooperative agreements with other agencies, such as with the Environmental Protection Agency ("EPA") to include emissions inspections with its safety inspections. NEPA's requirement that the EIS consider alternatives, 42 U.S.C. § 4332(2)(C)(iii), is meant to stimulate agencies to identify and examine innovative options for protecting the environment. *See, e.g.*, *Robertson*, 490 U.S. at 351-52; 40 C.F.R. § 1502.14.

The lower court cases petitioners rely on regarding agency discretion do not help them. *See* Pet. Br. 39. Every one involves a situation where the agency was stripped of all significant discretion over the challenged action.[19] In

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[18] Indeed, given FMCSA's undoubted discretion over the stringency of the safety rules and the plain relationship between safety and environmental concerns, FMCSA should have prepared an EIS with respect to the environmental effects of various possible rules even in the absence of Section 350.

[19] *See Citizens Against Rails-to-Trails v. Surface Transp. Bd*, 267 F.3d 1144, 1151-53 (D.C. Cir. 2001) (agency was required to issue authorization); *Goos v. ICC*, 911 F.2d 1283, 1293-96 (8th Cir. 1990) (same); *City of New York v. Minetta*, 262 F.3d 169, 178 (2d Cir. 2001) (agency had no discretion regarding take-off and landing slot exemptions); *Sac & Fox Nation v. Norton*, 240 F.3d 1250, 1262 (10th Cir. 2001) (agency had no discretion about acquiring land); *American Airlines, Inc. v. Dep't of Transp.*, 202 F.3d 788, 803 & n.11 (5th Cir. 2000) (agency lacked discretion over whether to allow increased flights); *Aircraft Owners and Pilots Ass'n v. Hinson*, 102 F.3d 1421, 1425 (7th Cir. 1996) (agency had no discretion with respect to closure of airport); *Sierra Club v. Babbitt*, 65 F.3d 1502, 1512-13 (9th Cir. 1995) (agency had no discretion to modify construction of logging road); *Milo Cmty. Hosp. v. Weinberger*, 525 F.2d 144, 147-48 (1st Cir. 1975) (agency had no discretion over decertification of hospital).

contrast, where an agency has significant discretion it must prepare an EIS. *See Forelaws on Board v. Johnson*, 743 F.2d 677, 681 (9th Cir. 1985) (finding that even when Congress mandated contracts for power delivery, agency had discretion over content of contracts and had to prepare EIS). Given FMCSA's substantial discretion here, the agency action can hardly be termed ministerial.[20]

2. In addition to helping guide FMCSA's decision, an EIS would also perform an important informational role. Publication of an EIS "provides a springboard for public comment," and offers governmental entities other than the agency "adequate notice of the expected [environmental] consequences and the opportunity to plan and implement corrective measures in a timely manner." *Robertson*, 490 U.S. at 349-50; *see also Marsh*, 490 U.S. at 371 ("NEPA permits the public and other government agencies to react to the effects of a proposed action at a meaningful time.").

An EIS would inform the public and other governmental bodies of the environmental issues implicated by allowing Mexico-domiciled trucks to travel into the interior of the United States. An EIS would also permit state and local authorities with responsibility for air quality control to determine what the effect of the trucks will be on compliance with air quality standards so that, *inter alia*, they can adjust requirements on other sources of the relevant pollutants accordingly. Moreover, an EIS would allow Congress, other governmental bodies, and the public at large to examine, and potentially implement, alternatives and mitigation measures outside of FMCSA's authority. Petitioners do not discuss any of this, but instead explain why in their view an EIS would

[20] Petitioners' assertion that "FMCSA did not have discretion to countermand any determination by the President that Mexican carriers would no longer be barred" (Pet. Br. 39) is irrelevant. The issue is whether FMCSA has discretion in its *own* rulemaking action, which it does.

not be helpful to the President alone. *See* Pet. Br. 36. That is simply not the standard.

3. Finally, the lower court's decision does not "contravene[] the 'rule of reason'" agencies employ in preparing their NEPA documents. Pet. Br. 37. Section 350 gave FMCSA control over environmental effects regardless of the President's decision on the moratorium. As petitioners' main case suggests, "[a]pplication of the 'rule of reason' . . . turns on the value of . . . information to the still pending decision-making process." *Marsh*, 490 U.S. at 374. An EIS is invaluable, for the reasons discussed above, in aiding FMCSA's decision to adopt the rules and how strict to make them, as well as bringing the environmental consequences of FMCSA's actions to the attention of the public and other governmental bodies.

Petitioners' complaints about the purported delays and monetary expense of preparing an EIS (*see* Pet. Br. 37-38) are meritless. FMCSA could have completed an EIS long ago had it properly fulfilled its responsibilities under NEPA. Moreover, an EIS is already well underway and could be complete as early as this summer. *See* Pet. Cert. 15 n.7; Resp. Br. Opp. Cert. 10. There is no evidence that FMCSA will save any money if it prevails here. More fundamentally, nothing in NEPA permits an agency to elevate the costs of an EIS above the potential harm to the environment and public health.[21]

IV. FMCSA MUST COMPLY WITH CLEAN AIR ACT CONFORMITY REQUIREMENTS

A. The Federal Government Cannot Allow Actions That Impinge On States' Ability To Meet Federal Air Quality Standards

The Clean Air Act was enacted to prevent pollution and to protect and enhance the quality of national air resources. 42

[21] Moreover, petitioners raised none of these arguments below, and the court of appeals did not address them. They are therefore waived.

U.S.C. § 7401. The CAA requires EPA to promulgate National Ambient Air Quality Standards ("NAAQS") for air pollutants to protect the public health and welfare. 42 U.S.C. §§ 7409(a), (b); *see also Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. ___, ___, 124 S. Ct. 983, 991 (2004); *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 462, 465 (2001). Once EPA has promulgated NAAQS for particular pollutants, the "primary responsibility" for attaining and maintaining those standards shifts to the states. *E.g., Union Electric Co. v. EPA*, 427 U.S. 246, 256 (1976); *see also Alaska Dep't of Envtl. Conservation*, 124 S. Ct. at 1012 (Kennedy, J., dissenting); 42 U.S.C. § 7401(a)(3). In particular, the states must promulgate State Implementation Plans ("SIPs") to attain and maintain the NAAQS. 42 U.S.C. § 7410(a); *see also Alaska Dep't of Environmental Conservation*, 124 S. Ct. at 991-92; *Union Electric*, 427 U.S. at 249-50. This requirement imposes a "lengthy and expensive task" on the states. *Whitman*, 531 U.S. at 479.

Congress provided the states broad discretion to determine how to meet the NAAQS. *See, e.g., Union Electric*, 427 U.S. at 266 ("So long as the national standards are met, the State may select whatever mix of control devices it desires."). But Congress was clear that those standards must be met. *See, e.g., Whitman*, 531 U.S. at 479; *Union Electric*, 427 U.S. at 249-50. The CAA imposes penalties on states that fail to attain and maintain the NAAQS by providing for limitations on federal funds for state highways and restrictions on new sources of pollution in nonattainment areas (42 U.S.C. §§ 7509(a), (b))—that is, areas that do not meet the NAAQS (*see General Motors Corp. v. United States*, 496 U.S. 530, 534 (1990)). Put another way, the CAA manifests Congress' "determination to tak[e] a stick to the states . . . to guarantee the prompt attainment and maintenance of specified air quality standards." *Union Electric*, 427 U.S. at 249 (internal quotation marks omitted; alteration in original).

Thus, the CAA "made the States and the Federal Government partners in the struggle against air pollution." *General Motors*, 496 U.S. at 532; *see also Alaska Dep't of Envtl. Conservation*, 124 S. Ct. at 1018 (Kennedy, J., dissenting). To ensure that the federal government holds up its end of the partnership and does not interfere with a state's efforts to comply with the CAA and thereby risk federally imposed sanctions, the CAA further provides: "No department, agency, or instrumentality of the Federal Government shall engage in, *support in any way* or provide financial assistance for, license or permit, or approve, any activity which does not conform to [a SIP]." 42 U.S.C. § 7506(c)(1) (emphasis added). Conformity means that the activities conform to a SIP's "purpose of eliminating or reducing the severity and number of violations of the [NAAQS]" and will not (i) *cause or contribute* to a new air quality violation, (ii) *increase the frequency or severity* of an existing violation, or (iii) *delay attainment* of any standard or required emission reductions or other milestones. 42 U.S.C. § 7506(c)(1).

In enacting the conformity requirement in 1977, Congress understood the threat that actions taken by federal agencies like FMCSA posed to state efforts to attain and maintain the NAAQS. The 1977 Senate Report concluded:

> The requirement that Federal licenses, permits, and other activities must conform to implementation plans may be one of the most important in assuring the eventual attainment of the ambient standards. Without the ability of a State or local planning agency to consider and provide for control of emissions from Federally licensed activities such as Outer Continental Shelf oil or gas leasing, it would be considerably more difficult for some areas to attain the oxidant standards.

S. Rep. No. 95-127, 95th Cong., 1st Sess. 40-41 (1977). As states would frequently be powerless to regulate federal activities directly, Congress imposed on federal agencies an

independent obligation to ensure that those federal activities were incorporated into the state planning process and did not make it more difficult for a state to conform to its federally mandated plan to achieve the CAA's air quality goals.

B. FMCSA Improperly Failed To Prepare A Conformity Analysis

The challenged rules fall directly under the "support in any way" provision of 42 U.S.C. § 7506(c)(1). EPA regulations governing the applicability of the conformity requirements to federal agency actions require federal agencies to make a determination that an action conforms to applicable SIPs under certain conditions. *See* 40 C.F.R. §§ 93.150(b), 93.154. In particular, the regulations require a conformity determination "where the total of direct and *indirect emissions*" in certain areas will exceed specified threshold levels. 40 C.F.R. § 93.153(b) (emphasis added). The regulations define "indirect emissions" to mean emissions that:

> (1) Are *caused by* the Federal action, but may occur later in time and/or may be further removed in distance from the action itself but are still reasonably foreseeable; and
>
> (2) The Federal agency can *practicably control* and will maintain control over due to a *continuing program responsibility* of the Federal agency.

40 C.F.R. § 93.152 (emphases added).

Despite these broad regulations, petitioners contend FMSCA need not perform a conformity analysis because the agency (i) cannot control the President's decision to lift the moratorium, (ii) has "no significant ability to control the emissions of Mexican motor carriers engaged in cross-border operations" and (iii), has no "continuing program responsibility" under 40 C.F.R. § 93.152 for those emissions. Pet. Br. 46. These arguments are misplaced.

First, whether or not FMCSA can control the President's action is irrelevant, as, once again, respondents are chal-

lenging FMCSA's separate action, not the President's action in lifting the moratorium. The statutory issue is whether FMCSA action would "support in any way" cross-border trucking. 42 U.S.C. § 7506(c)(1). In line with this broad language, EPA in 40 C.F.R. § 93.152 has defined "caused by" to mean "emissions that would not otherwise occur in the absence of the Federal action." 40 C.F.R. § 93.152. This regulation embraces the "condition precedent" analysis explicated with regard to NEPA. *See supra* at pp. 32-33. The emissions at issue "would not otherwise occur in the absence" of the challenged rules because Section 350 prohibits FMCSA from authorizing Mexico-domiciled trucks to travel into the interior of the United States in the absence of FMCSA meeting the congressional preconditions. Hence, emissions will be "caused by" the rules, although they "may occur later in time." 40 C.F.R. § 93.152.

Second, FMCSA *can* control emissions from Mexico-domiciled trucks. As respondents have shown, Section 350 gives control to the agency. In addition, FMCSA has the ability to increase or reduce emissions by making the safety standards more or less stringent, and thereby determine *how many* older, more heavily polluting, trucks will be allowed to travel into the interior of the United States. The agency need not have sole control over the activity, a conclusion that would read out of the statute the "support in any way" language.

Third, FMCSA has a "continuing program responsibility" under 40 C.F.R. § 93.152. The agency must conduct inspections and take such other actions that are necessary to enforce its rules after they have been properly promulgated. Indeed, under the Safety Monitoring Rule, during the time that Mexico-domiciled trucks retain "provisional" status, they are "subject to intensified monitoring through frequent roadside inspections." J.A. 185a-86a. The more effectively the agency enforces the safety requirements, the fewer heavily polluting Mexico-domiciled trucks will be allowed to

operate within the United States interior. Moreover, FMCSA has the continuing responsibility to reevaluate the regulations and make the safety restrictions more or less stringent based on practical experience.

EPA's regulations confirm this common-sense conclusion: "When an agency, in performing its normal program responsibilities, takes actions itself or imposes conditions that result in air pollutant emissions by a non-Federal entity taking subsequent actions, such emissions are covered by the meaning of a continuing program responsibility." 40 C.F.R. § 93.152. The challenged rules, the promulgation of which is certainly part of FMCSA's normal program responsibilities, will "result in air pollutant emissions by a non-Federal entity taking subsequent actions" because the rules will result in Mexico-domiciled trucks traveling beyond the border zones and emitting pollution. Again, this is consistent with the extremely broad "support in any way" language of 42 U.S.C. § 7506(c)(1) and Congress' intent in enacting the conformity provisions to counter the serious threat to the ability of states to fulfill their federal obligations.

Accordingly, as petitioners do not dispute any of the other requirements for performing a conformity analysis, FMCSA was required to do so.[22]

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

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[22] Petitioners' suggestion that the court of appeals erred by requiring an EIS and conformity analysis rather than remanding for FMCSA to decide how to proceed (Pet. Br. 36-37 n.14) is meritless. First, it was not raised below and is therefore waived. Second, petitioners do not contest in this Court the court of appeals' findings concerning the potential serious environmental effects from cross-border trucking. *See* Pet. App. 31a-43a, 47a-48a.

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APPENDIX

APPENDIX

Additional Provisions Involved

1. North American Free Trade Agreement Implementation Act

19 U.S.C. § 3312(a)(1) provides as follows:

> No provision of the Agreement, nor the application of any such provision to any person or circumstance, which is inconsistent with any law of the United States shall have effect.

2. National Environmental Policy Act

a. 42 U.S.C. § 4335 provides:

> The policies and goals set forth in this chapter are supplementary to those set forth in existing authorizations of Federal agencies.

b. 40 C.F.R. § 1500.6 provides:

> Each agency shall interpret the provisions of the Act as a supplement to its existing authority and as a mandate to view traditional policies and missions in the light of the Act's national environmental objectives. Agencies shall review their policies, procedures, and regulations accordingly and revise them as necessary to insure full compliance with the purposes and provisions of the Act. The phrase "to the fullest extent possible" in section 102 means that each agency of the Federal Government shall comply with that section unless existing law applicable to the agency's operations expressly prohibits or makes compliance impossible.

c. 40 C.F.R. § 1508.17 provides:

> *Legislation* includes a bill or legislative proposal to Congress developed by or with the significant cooperation and support of a Federal agency, but does not

include requests for appropriations. The test for significant cooperation is whether the proposal is in fact predominantly that of the agency rather than another source. Drafting does not by itself constitute significant cooperation. Proposals for legislation include requests for ratification of treaties. Only the agency which has primary responsibility for the subject matter involved will prepare a legislative environmental impact statement.

d. 40 C.F.R. § 1508.18 provides:

Major Federal action includes actions with effects that may be major and which are potentially subject to Federal control and responsibility. Major reinforces but does not have a meaning independent of significantly (§ 1508.27). Actions include the circumstance where the responsible officials fail to act and that failure to act is reviewable by courts or administrative tribunals under the Administrative Procedure Act or other applicable law as agency action.

> (a) Actions include new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies; new or revised agency rules, regulations, plans, policies, or procedures; and legislative proposals (§§ 1506.8, 1508.17). Actions do not include funding assistance solely in the form of general revenue sharing funds, distributed under the State and Local Fiscal Assistance Act of 1972, 31 U.S.C. 1221 *et seq.*, with no Federal agency control over the subsequent use of such funds. Actions do not include bringing judicial or administrative civil or criminal enforcement actions.

(b) Federal actions tend to fall within one of the following categories:

(1) Adoption of official policy, such as rules, regulations, and interpretations adopted pursuant to the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*; treaties and international conventions or agreements; formal documents establishing an agency's policies which will result in or substantially alter agency programs.

(2) Adoption of formal plans, such as official documents prepared or approved by federal agencies which guide or prescribe alternative uses of federal resources, upon which future agency actions will be based.

(3) Adoption of programs, such as a group of concerted actions to implement a specific policy or plan; systematic and connected agency decisions allocating agency resources to implement a specific statutory program or executive directive.

(4) Approval of specific projects, such as construction or management activities located in a defined geographic area. Projects include actions approved by permit or other regulatory decision as well as federal and federally assisted activities.

e. 40 C.F.R. § 1508.27 provides:

Significantly as used in NEPA requires considerations of both context and intensity:

(a) *Context*. This means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific

action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short- and long-term effects are relevant.

(b) *Intensity*. This refers to the severity of impact. Responsible officials must bear in mind that more than one agency may make decisions about partial aspects of a major action. The following should be considered in evaluating intensity:

(1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.

(2) The degree to which the proposed action affects public health or safety.

(3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.

(4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.

(5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.

(6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.

(7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant

> impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.
>
> (8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.
>
> (9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.
>
> (10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

3. Clean Air Act

40 C.F.R. § 93.152 provides in part:

> *Caused by*, as used in the terms "direct emissions" and "indirect emissions," means emissions that would not otherwise occur in the absence of the Federal action.

4. Section 348 of the Consolidated Appropriations Resolution, 2003, Pub. L. No. 108-7, Div. I, Tit. III, 117 Stat. 11, 419, provides:

> Funds appropriated or limited in this Act shall be subject to the terms and conditions stipulated in section 350 of Public Law 107-87, including that the Secretary submit a report to the House and Senate Appropriations Committees annually on the safety and security of transportation into the United States by Mexico-domiciled motor carriers.

5. Section 130 of the Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, Div. F, Tit. I, 118 Stat. 3, 298, provides:

> Funds appropriated or limited in this Act shall be subject to the terms and conditions stipulated in section 350 of Public Law 107-87, including that the Secretary submit a report to the House and Senate Appropriations Committees annually on the safety and security of transportation into the United States by Mexico-domiciled motor carriers.