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 OF *AMICUS CURIAE* EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

Eagle Forum Education and Legal Defense Fund ("EFELDF") is a nonprofit organization founded in 1981. For more than twenty years it has defended American sovereignty. EFELDF has consistently opposed the abdication of authority by American governmental entities to newly created international institutions. EFELDF promotes adherence to the U.S. Constitution and respect for the obligations

[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus*, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

and power that it mandates for the federal government free from control by global entities. EFELDF has repeatedly taken a stand against delegation of power by any American governmental entity to an international tribunal.

Amicus has a direct and vital interest in the issues presented to this Court based on its longstanding defense of American sovereignty.

SUMMARY OF ARGUMENT

North American Free Trade Agreement (NAFTA) is being tested here for the first time. Implicitly at stake is whether congressional bypass of the Treaty Clause, Article II, Section 2, can trump federal law in favor of a decision by an international tribunal. On February 6, 2001, a five-member foreign panel mandated that the United States lift its restrictions on Mexican trucks and allow them full access. Though NAFTA could not be ratified by the Senate as required by the Treaty Clause, the tribunal repeatedly referred to NAFTA as a "treaty" and purported to enforce it as such. The Administration has arbitrarily and capriciously ignored applicable federal law in adhering to that decision.

In creating an international tribunal and then ignoring domestic obligations in submitting to that tribunal, NAFTA implementation has gone overboard. In the first fifty years after ratification of the Constitution, the vast majority of international agreements complied with the Treaty Clause. But since World War II, over 90% of international agreements have ignored that constitutional requirement. Unchecked, the agreements have assumed increased power, as exemplified by the contemplated invasion of Mexican trucks in the case at bar. It is time to reaffirm limits on congressional-executive agreements that were never properly ratified as treaties.

The judiciary abdicates its responsibilities if it allows international tribunals to usurp adjudicative power. Vigilant

in invalidating congressional expansion in jurisdiction of Article I courts, this Court should likewise strike down congressional submission to international tribunals that dictate domestic issues such as use of our highways. Congress cannot create or endorse a new adjudicative entity to wield power over domestic issues. At a minimum this violates the separation of powers inherent in our constitutional system. If allowed, the erosion of the judiciary in the face of global tribunals could dramatically worsen.

The Ninth Circuit correctly required the Department of Transportation to comply fully with domestic laws before allowing Mexican trucks to travel on our highways and byways. An environmental impact statement must be prepared. It should include not only the adverse effect of the trucks on nature, but also on human safety. It should analyze not only the pollution caused by truck emissions, but also the loss of life through accidents. Mexican trucks are older and more dangerous than domestic trucks, and their drivers are less familiar with our roads and our language. The resulting loss of life from a predictable increase in accidents must be part of the requisite environmental impact statement.

ARGUMENT

The Ninth Circuit properly found that a federal agency had failed to comply with federal law, and had acted arbitrarily and capriciously in violating the National Environmental Protection Act (NEPA) and the Clean Air Act (CAA). The court was right in remanding the case to the Department of Transportation with instructions to comply with those laws. Simply put, the Department adhered to an international tribunal opinion at the expense of domestic law. Such agency action must be reversed.

Though the government maintains that admitting Mexican trucks is within executive discretion, in fact it adhered to an international tribunal never authorized by any treaty. The

arbitral panel established by NAFTA encroaches impermissibly on the sovereignty of our domestic laws and institutions. By effect if not design, the executive branch has become subservient to the judicial decisions of a tribunal lacking in constitutional authority. The tribunal was neither established under the Treaty Clause nor pursuant to a recognized congressional power. Rote implementation of its decision must be invalidated.

Finally, the requisite environmental impact statement must address the impact on human lives, not merely the impact on nature. Life-threatening and fatal accidents caused by older trucks like those in Mexico should be analyzed and included in the statement. Deaths caused by language incompatibility, such as misunderstanding directions or road signs, are an essential aspect of this required analysis. An analysis of the indirect harm caused by increased pollution must accompany a study of the threat of direct harm to men, women and children. Increased drug trafficking should also be included in the impact statement.

Allowing tens of thousands of hazardous Mexican trucks on American roads is not a "foreign affairs action" exempt from application of domestic laws. The decision below should be affirmed.

I. NAFTA, AS ENACTED BY CONGRESS, DOES NOT AUTHORIZE PRESIDENTIAL BYPASS OF DOMESTIC LAW TO ADHERE TO A DECISION OF AN INTERNATIONAL TRIBUNAL.

NAFTA, as enacted by a simple majority in Congress, did not repeal the Administrative Procedure Act, 5 U.S.C. §§ 701-706, the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2)(C), or the Clean Air Act (CAA), 42 U.S.C. § 7506(c)(1). 19 U.S.C. § 3311. To the contrary, Congress expressly mandated that "[n]o provision of the Agreement . . . which is inconsistent with any law of

the United States shall have effect." 19 U.S.C. § 3312(a)(1). Moreover, Congress prohibited any construction of NAFTA that would "amend or modify any law of the United States, including any law regarding . . . the protection of human, animal, or plant life or health [or] the protection of the environment." *Id.* § 3312(a)(2). *See Barker v. Harvey*, 181 U.S. 481, 488 (1901) ("'[S]o far as the act of Congress is in conflict with the treaty with Mexico, that is a matter in which *the court is bound to follow the statutory enactments of its own Government*.'") (quoting *Botiller v. Dominguez*, 130 U.S. 238, 247 (1889), emphasis added).

This Court has emphasized that our border security cannot be surrendered, and surely not by a mere congressional-executive agreement:

> To preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation, and to attain these ends nearly all other considerations are to be subordinated. It matters not in what form such aggression and encroachment come, whether from the foreign nation acting in its national character or from vast hordes of its people crowding in upon us. . . . [The powers of exclusion] cannot be abandoned or surrendered. Nor can their exercise be hampered, when needed for the public good, by any considerations of private interest. The exercise of these public trusts is not the subject of barter or contract.

Chae Chan Ping v. United States, 130 U.S. 581, 606, 609 (1889). NAFTA cannot compel the opening of our borders to hordes of Mexican trucks.

The President may not bypass domestic law in attempting to comply with an international tribunal pursuant to NAFTA. "Almost immediately after the arbitrators' decision, President Bush made clear his intention to lift the moratorium on cross-border operations following the preparation of new regulations governing grants of operating authority to Mexican

motor carriers, **in order to comply with NAFTA** and promote trade between the United States and Mexico." Govt. Br. at 7 (citing Pet. App. 10a; J.A. 53; Pet. 5 & n.2, emphasis added). The Bush Administration announced that "we have assured the Mexican government that we intend to live up to our NAFTA obligations to open the U.S.-Mexico border to trucking [and] discussions are underway on how to implement the recent NAFTA Panel decision in a safe and orderly fashion." Alan Larson, "Outlining the Potential for Expanded US-Mexico Trade," Remarks to 54th Plenary of the Mexico-U.S. Business Committee (Mar. 5, 2001).[2]

The Administration seeks to ignore the APA, NEPA and CAA in the name of "foreign relations" and "foreign trade," phrases it invokes repeatedly in its brief before this Court. Govt. Br. at I, 2, 3, 18, 22, 23, 35. That argument may invite support in connection with a military conflict abroad or even an economic dispute in a foreign land. When the presidential action is directed outside of the borders of the United States, then there is little reason for the foregoing restraints on administrative action. But here the action is directed at domestic highways entirely within the United States, and even at intrastate roads. Invocation of a desire to improve foreign relations is no excuse for bypassing domestic legal requirements. *See, e.g.*, *Taylor v. Morton*, 23 F. Cas. 784, 785, 2 Curt. 454 (D. Mass. 1855), *aff'd*, 67 U.S. 481 (1863) ("The foreign sovereign between whom and the United States a treaty has been made, has a right to expect and require its stipulations to be kept with scrupulous good faith; but through what internal arrangements this shall be done, is exclusively, for the consideration of the United States.").

The government cannot justify its failure to comply with NEPA and CAA in opening the borders to Mexican trucks by

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[2] http://www.state.gov/e/rls/rm/2001/1133pf.html (visited Apr. 16, 2002).

relying on 49 U.S.C. § 13902. That statute permits the President or his delegate to combat discriminatory practices by foreign countries against United States transportation companies by restricting access from those foreign countries. Section 13902(c), for example, expressly targets "[p]revention of discriminatory practices" by foreign countries and mandates "[e]qualization of treatment" for domestic companies. "Any action taken under [Section 13902(c)(1)(A)] to eliminate an act, policy, or practice shall be so devised so as to equal to the extent possible the burdens or restrictions imposed by such foreign country on United States transportation companies." 49 U.S.C. § 13902(c)(2). But that provision is designed to protect domestic transportation companies, not subject them to a foreign invasion using workers paid less than the minimum wage. Nothing in Section 13902 allows the Department of Transportation to open the borders in violation of the NEPA and CAA.

The government brief distorts this statute by changing its remedial purpose—to combat discrimination by foreign countries against United States transportation companies—into a blanket presidential authority to ignore domestic law. In fact, the Section 13902(c)(3) grant to the President of authority to modify the moratorium only applies to actions taken under "paragraph (1)(A)", which consist of responses to discriminatory actions taken by foreign nations against United States transportation companies. 49 U.S.C. § 13902(c)(3). No such discrimination is the cause of the Administration's action here, and thus it cannot be justified as a remedy for domestic transportation companies faced with discrimination by a foreign power.

The government insists that opening the borders "was the result of the joint exercise by Congress and the President of their constitutional responsibilities for foreign trade and foreign relations, and was made in accordance with NAFTA obligations and pursuant to statutory provisions vesting trade

authority directly in the President." Govt. Br. at 3. But who drives on U.S. highways is surely a domestic rather than "foreign" issue. Moreover, the government cannot create a new loophole for avoiding statutory restraints on administrative action by having the President issue an administrative rule directly. This is unavailing because numerous administrative actions are essential to implement a presidential directive, and those actions may be properly challenged.

This lawsuit is not against the President, and the court below did not order or enjoin the President. "The President of the United States is not a party to this action, and the issues before us do not touch on his clear, unreviewable discretionary authority to modify the moratorium pursuant to 49 U.S.C. § 13902(c)." *Public Citizen v. Department of Transp.*, 316 F.3d 1002, 1020 (9th Cir.), *cert. granted*, 124 S. Ct. 957 (2003). The court observed that "neither the validity of nor the United States' compliance with NAFTA is before us." *Id.*

The government misplaces reliance on *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 375 (2000). That decision merely applied the Supremacy Clause to invalidate a "state Act's provisions [in] conflict with Congress's specific delegation to the President of flexible discretion." *Id.* at 388. There the presidential action concerned sanctions against a foreign country, not activity on domestic roads. *Id.* at 368-69. Congress has never delegated, implicitly or explicitly, authority to the President to open internal roads to tens of thousands of Mexican trucks in derogation of NEPA and CAA. *See Tag v. Rogers*, 267 F.2d 664 (D.C. 1959), *cert. denied*, 362 U.S. 957 (1960) ("Whatever force appellant's argument might have in a situation where there is no applicable treaty, statute, or constitutional provision, it has long been settled in the United States that the federal courts are bound to recognize any one of these three sources of law as superior to canons of international law.")

The government insists that the President himself is not subject to the APA even though its definition of "agency" includes "each authority of the Government of the United States" and excludes specific entities like Congress without excluding the President. 5 U.S.C. §§ 551(1), 701(b)(1). *See Franklin v. Massachusetts*, 505 U.S. 788 (1992). There this Court did hold that "textual silence" in the APA's definition of "agency" would not subject the President to the procedural requirements of the APA. *Id.* at 800.

But *Franklin* does not support the presidential action here. In *Franklin*, the President had a statutory duty to decide whether or not to send a census report to Congress. Massachusetts, facing a loss of a seat under the decennial census, sued the Secretary of Commerce and the President over the census. But the presidential action there was nothing like the presidential action here. In *Franklin*, Congress had delegated specific duties to the President, who then acted within that delegation without the need for further administrative action. Here, the President acted beyond his statutory authority and the implementation by the Department of Transportation has violated multiple federal statutes.

In essence, the government blithely seeks to ignore federal law under the pretext of allegedly "serious and ongoing harm to United States' businesses and consumers and to international relations with Mexico." Pet. at 26. And what is that supposed harm? In its Petition, the government argued that it will be more efficient simply to open the borders to trucks from Mexico, and that the court below protects inefficiency. "The Ninth Circuit's decision prevents the President's action from taking effect and thereby hampers commerce. On a border where there are approximately 4.5 million northbound truck crossings each year, cargo from Mexico must be transferred at the border onto U.S. trucks before it can be shipped to points in the United States beyond the border zone. Passengers using scheduled bus services must follow

similarly inefficient procedures." Pet. at 25-26 (citation omitted). But this inefficiency has sound justifications, and other applicable federal laws cannot be ignored in the name of efficiency.

The action by the Department of Transportation to expose our highways and byways to tens of thousands of trucks from Mexico is the impermissible result of a foreign adjudication rather than compliance with applicable federal law. The decision below properly held that the Department acted arbitrarily and capriciously in violating federal law.

II. NAFTA UNCONSTITUTIONALLY CREATES A FOREIGN COURT WITHOUT AUTHORIZATION BY TREATY.

The NAFTA tribunal, the court below, and most commentators repeatedly describe and interpret NAFTA as though it were an actual treaty. *See, e.g.*, *Public Citizen*, 316 F.3d at 1009, 1011, 1913, 1017, 1018. This is error. "Express power is given to the President, by and with the advice and consent of the Senate, to make treaties, **provided two-thirds of the senators present concur**." *Holden v. Joy*, 84 U.S. 211, 242-43 (1872) (emphasis added). This is, after all, what the U.S. Constitution expressly requires. The President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur." U.S. Const. Art. II, Sec. 2. There is no other constitutional authority for binding the United States to major international commitments. Nothing else can subject Americans to the rulings of international tribunals. Approved by a vote of only 61-38 in the Senate, NAFTA fell short of the requisite two-thirds majority for passage as a treaty. 139 Cong. Rec. S16,712-13 (daily ed. Nov. 20, 1993).

NAFTA, sweeping in scope, far surpasses most bona fide treaties in breadth and impact. The House Ways and Means Committee itself declared that NAFTA "is the most com-

prehensive trade agreement ever negotiated and creates the world's largest integrated market for goods and services." House Report No. 103-361(I), at 8 (1993). NAFTA is unique in American history in how it integrates the domestic economy with those of two other large nations. NAFTA has everything that one would expect in a treaty; most treaties duly ratified by the Senate pale in comparison. The House has no authority to pass such a treaty. 5 Annals of Cong. 760-62 (1796) (reprinting President Washington's message in which he denied any role by the House in determining whether to implement treaties that were properly approved by the President and then duly ratified by the Senate); *id.* at 771-72 (resolution adopted by the House disclaiming "any agency in making Treaties," while reserving some authority with respect to treaties that stipulate regulations on matters within enumerated congressional powers).

"If there is to be a new procedure in which the President will play a different role in determining the final text of what may 'become a law,' such change must come not by legislation but through the amendment procedures set forth in Article V of the Constitution." *Clinton v. City of New York*, 524 U.S. 417, 449 (1998). *See also* Federalist No. 75, The Federalist Papers 419-20 (Rossiter & Kesler eds. 1999) ("The [treaty] power in question seems therefore to form a distinct department, and to belong, properly, neither to the legislative nor to the executive. . . . However proper or safe it may be in governments where the executive magistrate is an hereditary monarch, to commit to him the entire power of making treaties, it would be utterly unsafe and improper to entrust that power to an elective magistrate of four years duration. . . . [T]he joint possession of the power in question, by the President and Senate, would afford a greater prospect of security, than the separate possession of it by either of them."). Lacking approval as a treaty, the delegation by NAFTA of adjudicatory authority is particularly objectionable. It implicitly transfers power from the federal judges

confirmed by the Senate to foreign arbitrators appointed by foreign countries.

The creation by Congress, without treaty authorization, of an international tribunal to dictate who may travel on our roads is no more acceptable than shifting jurisdiction from Article III to Article I courts. *See Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) (invalidating an attempt by Congress to shift jurisdiction from Article III courts to Article I bankruptcy courts). Justice Brennan noted in his plurality opinion that "of course, virtually all matters that might be heard in Art. III courts could also be left by Congress to state courts . . . [and] the principle of separation of powers is not threatened by leaving the adjudication of federal disputes to such judges." 458 U.S. at 64 n.15. But transferring the same power to a new tribunal other than an Article III court would be constitutionally infirm:

> Art. III bars Congress from establishing legislative courts to exercise jurisdiction over all matters related to those arising under the bankruptcy laws. The establishment of such courts does not fall within any of the historically recognized situations in which the general principle of independent adjudication commanded by Art. III does not apply. Nor can we discern any persuasive reason, in logic, history, or the Constitution, why the bankruptcy courts here established lie beyond the reach of Art. III.

Id. at 76.

The same constitutional prohibition applies with greater force to NAFTA's tribunals. As the *Marathon* decision made clear, Congress does not have the power to establish new courts to decide a new category of commercial disputes, nor can it endow such courts with the power to dictate entry by tens of thousands of trucks from a foreign country. It matters not, as the government argues, that "[t]his Court has recog-

nized that '[t]he Constitution gives Congress broad, comprehensive' and 'plenary' powers to regulate foreign commerce." Pet. at 3 (quoting *United States v. 12 200-Ft. Reels of Super 8MM. Film*, 413 U.S. 123, 125-126 (1973)). The Constitution does not allow Congress to subject federal law to decisionmaking by international tribunals. This sort of dispute could only be handled by an Article III court rather than a tribunal outside of the judiciary, and presidential implementation of the foreign decision does not justify it.

Currently the executive branch enforces decisions by the judiciary. Does the Constitution authorize the executive branch to enforce decisions by extraterritorial tribunals? That is what NAFTA, through a congressional-executive agreement rather than Senate ratification, purports to accomplish. Unsatisfied with the American judiciary, Congress and the President could then apparently limit its jurisdiction and establish adherence to courts outside of the United States. If NAFTA's method of resolving disputes is affirmed without ratification by a treaty, nothing would prevent Congress and the President from moving judicial authority offshore. Implicitly transferring authority to an international tribunal in the Hague over disputes concerning a multinational corporation would become possible without even complying with the Treaty Clause.

"Few constitutional provisions seem so easily evaded" as the Treaty Clause. John C. Yoo, "Laws as Treaties?: The Constitutionality of Congressional-Executive Agreements," 99 Mich. L. Rev. 757, 759 (2001). If NAFTA need not comply, one wonders why any controversial treaty need be submitted to the Senate for ratification again. "According to this logic, President Bush could now resubmit the Test-Ban Treaty to Congress for approval by majority vote, and President Wilson could have brought the United States into the League of Nations through a statute, even after the defeat of both agreements in the Senate." *Id.* *See also Made in the USA Foundation v. United States*, 242 F.3d 1300, 1311-17

(11th Cir.), *cert. denied*, 534 U.S. 1039 (2001) (reviewing, without deciding, whether NAFTA is constitutional despite bypassing the Treaty Clause); Laurence H. Tribe, "Taking Text and Structure Seriously; Reflections on Free-Form Method in Constitutional Interpretation," 108 Harv. L. Rev. 1221 (1995) (arguing, in the context of NAFTA, that the Constitution may require treaty ratification for major congressional-executive agreements).

The growing use of congressional-executive agreements as a bypass to the Treaty Clause threatens even federalism. Agreements with foreign powers have traditionally enjoyed greater latitude in infringing on state sovereignty, perhaps implicitly justified by the requisite 2/3rd approval requirement in the Senate. *Missouri v. Holland*, 252 U.S. 416, 434 (1920) ("No doubt the great body of private relations usually fall within the control of the State, but a treaty may override its power."). Congressional-executive agreements, in contrast, lack the legitimacy of approval by a supermajority of the Senate. A simple majority in Congress should not enjoy treaty authority that would thereby enable it to erode state sovereignty. *Cf. New York v. United States*, 505 U.S. 144, 168 (1992) (invalidating a federal statute in part because it caused "the accountability of both state and federal officials [to be] diminished").

The U.S. Constitution does not allow treaties to be passed by simple majorities of Congress. Nor does it allow Congress to create a mechanism for the President to enforce a decision of an international tribunal.

III. THE REQUISITE ENVIRONMENTAL IMPACT STATEMENT MUST INCLUDE EFFECTS ON HUMAN SAFETY AND LIVES.

The requisite environmental impact statement (EIS) should thoroughly address the safety, pollution and even drug hazards posed by an influx of tens of thousands of Mexican

trucks on roads throughout the United States. The risks are substantial and NEPA requires an objective and realistic assessment of them. The Department of Transportation and its Federal Motor Carrier Safety Administration (FMCSA) failed in their obligations to evaluate completely these dangers.

The Department and FMCSA underestimated the threat to the safety of American citizens posed by a vast increase in trucks from Mexico on our roads. Tragic stories of needless deaths caused by a foreign driver who failed to understand or obey the rules of our roads are all too familiar. In 1994, Rev. Duane Willis and his wife Janet lost all six of their children in a fiery crash caused by a truck illegally driven by Ricardo Guzman. "Company that Hired Illegal Driver to Pay $10.7M," USA Today, June 19, 2001. Former Democratic Congressman Glenn Poshard later explained, "We found out that there were at least three people that tried to tell Guzman to get off the road only minutes before the crash, that the huge taillight assembly on the truck was about to fall off and cause a wreck. Several truck drivers even tried reaching Guzman by radio, but they said he couldn't speak English so he didn't understand a word they said." Jim Muir, "Glenn Poshard: On the Record: Speaking Frankly About the Corruption, Wrongdoing and Cover-Ups," The Southern Illinoisan, Mar. 1, 2003.

Texas legislator Ciro Rodriguez observed the following at the time of the NAFTA panel decision mandating access by Mexican trucks:

> Mexican trucks are held to less stringent safety standards than U.S. trucks. Unlike American drivers, Mexican drivers do not have to meet minimal medical quailfications, submit to drug testing, or maintain logbooks which monitor the length of time they spend behind the wheel. Additionally, Mexican trucks are older, heavier, and more likely to transport unmarked toxic or

> hazardous materials. Overall, Mexican trucks are reported to have three times as many safety deficiencies than U.S. trucks and without a standard regulatory apparatus in place, Mexico has been unable to improve the safety of its trucks or enforce a border safety inspection program of its own.

Ciro Rodriguez, "Safety on the NAFTA Superhighway," Congressional Press Releases, Feb. 17, 2001 (quoted in Paul Stephen Dempsey, "Free Trade But Not Free Transport? The Mexican Stand-Off," 30 Denv. J. Int'l L. & Pol'y 91, 96 (Winter 2001)). Mexican truck drivers are also not covered by the minimum wage laws, creating an incentive for employers to overutilize the Mexican drivers. Dempsey, 30 Denv. J. Int'l L. & Pol'y at 95.

Particularly frequent are road accidents by vans or trucks filled with illegal aliens, driven by "coyotes" who are paid handsomely to transport them into the United States. As reported by the Denver Post, "[s]mugglers stuff cars, vans and trucks with Latin Americans willing to pay up to $10,000 to be transported illegally into the U.S. Several times a year, the outcome is similar to Tuesday's crash that killed five people on Interstate 76." Kirk Mitchell, "Police: Deadly I-76 Crash Fits Immigrant-Smuggling Profile," Denver Post, Jan. 29, 2004. The van in that crash was carrying eleven people from Guatemala; one of the fatalities was a pregnant woman who was rushed to the hospital in order to save and deliver her unborn child. "Tuesday's early-morning crash of her sport utility vehicle, packed dangerously full with Guatemalan families on a long-distance trip, was all too familiar for investigators." *Id.*

Road accidents pose a greater safety hazard than any other environmental issue. In 2002, 30.7 million drivers were involved in motor vehicle accidents in the United States. *See* World Almanac 79 (2004) (citing the National Safety Council). Far more people die in car accidents than from

terrorism, for example. *Id.* (noting that 44,000 people died in 2002 in car accidents). Truck accidents now kill more than 5,000 people annually in the United States. Sixty federal officers inspected Mexican trucks along the border in fiscal year 2000 and found that safety violations required taking 36% out of commission; fifty-three Texas officials did inspections in calendar year 2000 and safety violations required taking 37% out of service. James Pinkerton, "Semi-Conscious State; Inspection of Trucks on Border Threadbare," Houston Chronicle, Aug. 12, 2001, A1. Opening the border would flood our highways with unsafe trucks, creating a hazard for all American drivers. The ability to communicate in English and understand the flow of traffic is crucial to avoiding accidents, ascertaining afterwards what happened, and planning how they can be prevented in the future.

Pollution from the Mexican trucks should also be addressed by an EIS. The court below observed "a wealth of government and private studies showing that diesel exhaust and its components constitute a major threat to the health of children, contribute to respiratory illnesses such as asthma and bronchitis, and are likely carcinogenic." *Public Citizen*, 316 F.3d at 1024. The court properly found that the Department of Transportation was remiss in failing to prepare an environmental impact statement "to consider whether any negative health effects could be associated with increased diesel exhaust emissions." *Id.* (citing *United States v. 27.09 Acres of Land*, 760 F. Supp. 345, 353 (S.D.N.Y. 1991) (holding that "even [the] marginal degradation of drinking water" has been considered enough to trigger the need for an environmental impact statement)).

There is no "interference" with "presidential discretion," as the government now argues, in requiring the Department of Transportation to obey the law. Pet. at 24. The Department lacks treaty authorization to override domestic law. Its failure

to prepare an EIS was arbitrary and capricious. Like a spraying program, the introduction of numerous pollution-emitting vehicles from Mexico poses a direct threat to the well-being of American citizens, and this threat must be thoroughly analyzed and vetted. *See, e.g., Oregon Environmental Council v Kunzman*, 714 F.2d 901, 904 (9th Cir. 1983) (EIS must address the effects of the pollutant on children and others, and must analyze carcinogenic effects).

Allowing tens of thousands of Mexican trucks onto our highways is surely as threatening to our environment as highway construction itself, and both require preparation of an EIS. "The health and safety of the residents of this neighborhood will be significantly affected by the introduction of a highway through their community," and therefore required preparation of an EIS. *Highland Cooperative v. City of Lansing*, 492 F. Supp. 1372, 1380 (W.D. Mich. 1980). That court enjoined the city "from acquiring the rights-of-way, awarding construction contracts, commencing construction, or in any other way proceeding with the Edgewood Project pending the preparation and issuance of an Environmental Impact Statement." *Id.* at 1383. Far more compelling is the case for an EIS here, with the attempted opening of all highways to numerous old trucks from a foreign country.

The EIS should also address the inevitable increase in illicit drugs coming into the United States in Mexican trucks. U.S. Attorney Frank Whitney admitted that, even without the influx of endless numbers of Mexican trucks, "It's virtually impossible for the border patrol or customs to truly check every one of these vehicles." Craig Jarvis, "N.C. Seen as Hub where Illicit Drugs Repackaged," The News & Observer (Raleigh, N.C.), Jan. 22, 2004, A1. The Department of Transportation's Office of Inspector General (OIG) "found that the number of trucks crossing the U.S.-Mexico border increased from 2.5 million in 1993 (the year NAFTA was

passed) to 3.7 million in 1997. Out of the millions of trucks, only about one percent of trucks are inspected." J. Patrick LaRue, "The 'ILL-ICIT' Effects of NAFTA: Increased Drug Trafficking into the United States Through the Southwest Border," 9 Currents Int'l Trade L.J. 38, 40 (Summer 2000) (citations omitted). Mexico is an "important supplier of marijuana and heroin to the United States and emerged as a point of transit for the cocaine coming from South America." Jorge Chabat, "Mexico's War on Drugs: No Margin for Maneuver," 582 The Annals of The American Academy of Political and Social Science 134, 136 (July 2002).

NAFTA has already increased illegal drug trafficking so much in border states that the Texas Attorney General described it as the "North American Free *Trafficking* Agreement." *Major Drug Traffickers*, U.S. DEP'T OF JUSTICE, DEA BRIEFING BOOK (Oct. 1999) (emphasis added).[3] "NAFTA has undoubtedly 'opened' the floodgates for Mexican drug traffickers by not only increasing trucking and railway traffic, but by crippling the Southwest border's economic development." LaRue, 9 Currents Int'l Trade L.J. at 45. The hazard to be caused by opening our borders further would be catastrophic. One commentator observed:

> Recent intelligence reports indicate that Mexican traffickers . . . have focused on three major means of transport into the U.S.: truck cargo, railway and illegal or migrant workers known as 'mules'. For example, one truck that was stopped near San Diego carried eight tons of cocaine in cans of jalapeno peppers. Law enforcement officials believe that the cocaine belonged to a businessman who owns one of the biggest trucking companies in Mexico. . . . In May 1997 a tractor-trailer

[3] http://www.usdoj.gov/dea/briefing-book/page34-48.htm (visited Nov. 20, 1999).

> load of commercial size cans of Del Monte tomatoes were opened by the DEA in New York City revealing sealed bundles of cash in the tomato sauce.

Id. at 40-41. The more trucks that enter the country from Mexico, the greater the potential for drug smuggling.

Another commentator echoed identical concerns:

> Drug traffickers smuggle record levels of narcotics into the U.S. via the U.S.-Mexico border, and are presenting a growing risk to the security of the U.S. Mexico is a major source of heroin, marijuana, and cocaine trafficking to the U.S. Three of the four primary points of cocaine importation are located along the Mexico border in Texas, Arizona, and California. Marijuana trafficking through Mexico accounts for the majority of marijuana smuggled into the U.S. This high volume of narcotics trafficking has established Mexican traffickers as "the world's preeminent drug traffickers."

Jason C. Messenger, "Opening the U.S.-Mexico Border: Problems and Concerns for the Bush Administration, the Countries, and the Legal System to Consider," 9 Tulsa J. Comp. & Int'l L. 607, 617 (Spring 2002) (citations omitted). He concluded that "[t]he essential role of commercial traffic and the U.S.-Mexico border is obvious since rather large amounts of these illegal drugs are carried on tractor-trailers and are reused to carry the funds from the sales in the U.S." *Id.* at 617-18 (citations omitted).

Increased importation of drugs has a devastating effect on the human environment, and should be addressed in the requisite EIS. This is not merely a psychological harm as alleged and rejected in *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766 (1983). Increased levels and usage of narcotics inflict serious and often fatal harm to innocent human beings. Regardless of whether the increased drug trafficking would itself trigger the need for an EIS, the

compilation of an EIS required for independent reasons should not ignore the devastating effect of drugs in its analysis.

CONCLUSION

The decision of the Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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