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April 2, 2009

Ms. Molly Dwyer
Clerk, United States Court of Appeals
for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103-1526

Re: Sierra Club v. U.S. Department of Transportation, et al.,
No. 07-73415, and Owner-Operator Independent Drivers
Association v. U.S. Department of Transportation, et al.
No. 07-73987 (Consolidated)

Dear Ms. Dwyer:

Respondents the United States Department of Transportation (DOT), et al., respectfully submit this letter brief in response to the Court's order of March 17, 2009, which directs the parties to address the impact of the Omnibus Appropriations Act, Pub. L. No. 111-8, § 136 ("Section 136") on this litigation.

Petitioners in these cases have asserted a variety of statutory challenges to a demonstration project implemented by the Federal Motor Carrier Safety Administration (FMCSA), a DOT operating administration. The demonstration project, which was initiated on September 6, 2007, with an anticipated duration of one year, allowed up to 100 Mexico-domiciled motor carriers to operate beyond commercial zones located along the U.S.-Mexico border. FMCSA subsequently announced that the project would be extended to the full three years allowed by statute. 73 Fed. Reg. 45,796 (Aug. 6, 2008).

On March 11, 2009, the President signed into law the Omnibus Appropriations Act, 2009, Pub. L. 111-8, division I, title I, 123 Stat. 524. Section 136 prohibits use of funds appropriated under that legislation "to establish, implement, continue, promote, or in any way permit a cross-border motor carrier demonstration program to allow Mexican-domiciled motor carriers to operate beyond the commercial zones along the international border between the United States

and Mexico, including continuing, in whole or in part, any such program that was initiated prior to the date of the enactment of this Act."

In accordance with Section 136, FMCSA has terminated the cross-border demonstration project at issue in this case. 74 Fed. Reg. 11628 (March 18, 2009). The agency has ceased processing applications by prospective project participants and has taken other necessary steps to comply with the provision, including revocation of registrations issued by FMCSA to Mexico-domiciled carriers pursuant to the demonstration project. *Id.*

Termination of the demonstration project renders the claims in these cases moot. "The basic question in determining mootness is whether there is a present controversy as to which effective relief can be granted." *Feldman v. Bomar*, 518 F.3d 637, 642 (9th Cir. 2008) (internal quotation marks omitted). Here, termination of the demonstration project precludes issuance of the injunctive relief requested by petitioners -- there is no longer any allegedly unlawful conduct by DOT for the Court to enjoin.

Declaratory relief is equally inappropriate. "[A] case or controversy exists justifying declaratory relief [where injunctive relief has become moot] only when the challenged government activity is not contingent, has not evaporated or disappeared, and, by its continuing and brooding presence, casts what may well be a substantial adverse effect on the interests of the petitioning parties." *Id.* (internal quotation marks omitted). Congress has now prohibited both the continuation and the resumption of the agency action challenged here. Accordingly, petitioners can assert no "tangible prejudice to [their] existing interests" (*id.* (internal quotation marks omitted)), and their claims for declaratory relief are moot.

Petitioner OOIDA contends that these cases are not moot, urging the Court to resolve "the terms under which the Secretary must entertain applications for operating authority by Mexico-based motor carriers." OOIDA Letter Brief at 2. According to OOIDA, this issue remains alive because, in fiscal year 2010, the Secretary of DOT could (1) start a new pilot program or (2) simply authorize long-haul, cross-border trucking under 49 U.S.C. 13902 (a) (1) and (4).¹ *Id.* Neither scenario preserves a live controversy here.

Even if DOT were to undertake a new pilot program on cross-border trucking after the limitations in Section 136 expire and Congress did not reimpose a spending limitation to prohibit it, any new pilot program would be different from the now-terminated demonstration project and would present different issues regarding consistency with statutory and regulatory requirements. *See, e.g.*, OOIDA Letter Brief, Exhibit 1 at 1 (quoting DOT Secretary LaHood's statement that his "goal is to build a program to satisfy the concerns of Congress"); *id.* Exhibit 3 at 1 (describing Secretary LaHood's effort to "find some common ground" with members of Congress who have opposed cross-border trucking). OOIDA's suggestion that DOT might rely on data from the

¹These provisions direct the Secretary to grant registration to motor carriers that comply with statutory and regulatory requirements and to withhold registration from those that do not.

terminated project to evaluate a new program is speculative and, in any event, any such reliance could be contested in a challenge to the new program. The possibility that this or some other court might eventually be confronted with a challenge by these same petitioners to a different pilot program does not keep alive the dispute here about the lawfulness of a now-terminated project.

Moreover, OOIDA's contention that, once Section 136 expires, the Secretary could authorize long-haul, cross-border trucking pursuant to 49 U.S.C. 13902 without a new pilot program is mistaken. Section 6901 of the U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act, 2007 ("the 2007 Act"), Pub. L. No. 110-28, 121 Stat. 112, 183, imposes a continuing restriction on DOT, permitting the agency to grant authority for cross-border long-haul operations only after completion of a successful pilot program and satisfaction of other procedural and substantive requirements. See Brief For Respondents at 6-8. Thus, any DOT authorization of long-haul, cross-border trucking without prior completion of a pilot program would require new legislation lifting the restriction in Section 6901. A new statutory scheme permitting long-haul, cross-border operations by Mexican trucks obviously would be possible only if it adequately addressed the Congressional concerns acknowledged by Secretary LaHood in the statements quoted above.

OOIDA has not shown that these cases fall within the exception to the mootness doctrine for disputes that are "capable of repetition, yet evading review." Davis v. Fed. Election Comm'n, 128 S. Ct. 2579, 2769 (2008) (internal quotation marks omitted). That exception applies only where (1) the duration of the challenged action is "too short to be fully litigated prior to cessation or expiration," and (2) there is a "reasonable expectation that the same complaining party will be subject to the same action again." Id. (internal quotation marks omitted; emphasis added). Even if DOT were, in the future, to initiate another pilot program for cross-border trucking, whether such a program would be halted by Congress before its legality could be litigated is entirely speculative. Further, as we have explained, any new program -- whether pilot or permanent -- would have different requirements and thus would not subject petitioners to "the same action again." Id. And the proper vehicle for review of a new program with different requirements would be an entirely new and separate suit.

For the foregoing reasons, respondents respectfully urge the Court to dismiss these petitions for review as moot.

Sincerely,

s/ IRENE M. SOLET
Attorney, Appellate Staff
Civil Division

cc: All counsel (proof of service attached)

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of April, 2009, I caused copies of the foregoing Letter Brief to be served on the following by U.S. Postal Service First Class Mail as well as, for those counsel registered, through electronic filing:

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