

No. 07-73987

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

OWNER-OPERATOR INDEPENDENT )  
DRIVERS ASSOCIATION, INC. )

Petitioner, )

vs. )

UNITED STATES DEPARTMENT OF )  
TRANSPORTATION; FEDERAL MOTOR )  
CARRIER SAFETY ADMINISTRATION; MARY )  
E. PETERS; Secretary of the U.S. Department of )  
Transportation; JOHN H. HILL, Administrator of )  
the Federal Motor Carrier Safety Administration; )  
and THE UNITED STATES, )

Respondents. )

PETITIONER OOIDA'S REPLY BRIEF

PAUL D. CULLEN, SR.  
PAUL D. CULLEN, JR.  
DANIEL E. COHEN  
JOYCE E. MAYERS  
The Cullen Law Firm, PLLC  
1101 30th Street NW, Suite 300  
Washington, DC 20007  
Tel: (202) 944-8600  
Fax: (202) 944-8611

*Attorneys for Petitioner*

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## INTRODUCTION AND SUMMARY OF ARGUMENT

Under the North American Free Trade Agreement (NAFTA), the United States agreed to afford Canadian and Mexican motor carriers national treatment with respect to cross-border trade in trucking services. Mexican motor carriers may operate in the United States beyond the 25 mile commercial zone adjacent to the border if they are willing and able to obey all U.S. statutes and regulations covering safety, driver fitness, employment and financial responsibility.<sup>1</sup>

Motor carriers authorized to operate within the United States are eligible under appropriate circumstances to receive exemptions from various regulatory requirements.<sup>2</sup> Interested parties are given important procedural rights during the exemption granting process at FMCSA, including the right to detailed notification of proposed exemptions and the analysis supporting such exemptions, as well as the right to file comments with FMCSA prior to final agency action.<sup>3</sup>

In its Demonstration Project on Mexican trucks, FMCSA has agreed to accept compliance by Mexico-domiciled motor carriers with Mexican regulations covering commercial drivers' licenses, physical examinations of drivers and drug

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<sup>1</sup> 49 U.S.C. § 13902(a)(1) and (2). *See also* 49 U.S.C. § 13902(c).

<sup>2</sup> 49 U.S.C. § 31315(b).

<sup>3</sup> 49 U.S.C. § 31315(b)(4).

testing in lieu of compliance with corresponding U.S. regulations. These undertakings constitute exemptions from compliance with U.S. regulations.

FMCSA contends that it has not awarded any regulatory exemptions, asserting that its finding under 49 U.S.C. § 31315(c)(2) that compliance with Mexican regulations will provide the same level of safety as compliance with corresponding U.S. regulations allows an award of U.S. operating authority under 49 U.S.C. § 13902(a). But Section 31315(c)(2) covering pilot programs does not establish free-standing authority to circumvent the Secretary's narrow discretion under Section 13902(a).<sup>4</sup> The plain language of Section 31315(c) shows that the requirements for a pilot program overlay, but do not supercede, the requirements for exemptions under Section 31315(b). FMCSA acceptance of compliance with Mexican rather than U.S. regulations was not in accordance with law because it failed to follow the statutory prerequisites for exemptions. Nothing in the pilot program provisions of Section 31315(c) supports a different conclusion.

FMCSA's discussion of "Statutory Background" makes no reference to Section 13902(a)(1) and (4). FMCSA points only to Section 350 of the 2002

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<sup>4</sup> *Department of Transportation v. Public Citizen*, 541 U.S. 752, 770 (2004).

Appropriations Act<sup>5</sup> and Section 6901 of the 2007 Act<sup>6</sup> as if satisfaction with the threshold conditions in these appropriations bills is all that is required for a pilot program.<sup>7</sup> These appropriations bills establish additional conditions on the operation of Mexico-domiciled motor carriers within the whole United States. They do not, however, authorize the grant of operating authority to Mexico-domiciled motor carriers absent compliance with Section 13902(a)(1).

FMCSA asserts that “the most serious allegations leveled by petitioners pertain to the statutory mandate that safety measures under the Demonstration Project be designed to achieve a level of safety that is equivalent to or greater than that available under existing regulations.”<sup>8</sup> Without diminishing in any way the importance of this issue (which we address below), the threshold issue is whether there is any statutory authority for FMCSA to substitute compliance with Mexican regulations for compliance with its own regulations without following the statutory procedures applicable to the award of exemptions. If there is no statutory authority for proceeding as it did, then it is unnecessary to address FMCSA’s

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<sup>5</sup> Pub.L. 107-87, Title III, § 350 (Dec. 18, 2001), 115 Stat. 864.

<sup>6</sup> Pub.L. 110-28, Title X, § 6901 (May 21, 2007), 121 Stat. 112; Opening Brief Add. at Tab 3.

<sup>7</sup> FMCSA Brief at 16.

<sup>8</sup> FMCSA Brief at 24.

determination respecting equivalency.

The standing of professional truck drivers to challenge final agency action dealing with the regulation of highway safety is well settled. In *IBT v. Peña*, the D.C. Circuit upheld the standing of professional truck drivers to challenge agency action permitting Mexican truck drivers to operate within the United States under Mexican commercial drivers licences (“CDL’s”) on the ground that the risk posed to American truck drivers by unsafe Mexican drivers is “concrete,” and “[r]eductions in highway safety would cause more harm to them than to typical members of the public at large.”<sup>9</sup> FMCSA’s failure to address the implications of *Peña* undermines the credibility of its challenge.<sup>10</sup> FMCSA asks this Circuit to split with the D.C. Circuit without questioning the D.C. Circuit’s sound reasoning in *Peña*. OOIDA cited *Peña* in its petition for a stay pending review before the D.C. Circuit and again here in its opening brief. Petitioners in No. 07-73415 also cite *Peña* in their effort to obtain emergency relief. Although given ample opportunity to raise this issue at an earlier stage in this proceeding, FMCSA declined to do so. Petitioners’ standing is obvious under the *Peña* case and

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<sup>9</sup> 17 F. 3d 1478, 1482-84 (D.C. Cir. 1994).

<sup>10</sup> Ironically, FMCSA cites *Peña -in its favor-* in support of other propositions in its brief. FMCSA Brief at 29-30.

FMCSA's tardy attempt to raise it now should be rejected.

## **ARGUMENT**

### **I. THE STANDING OF PROFESSIONAL TRUCK DRIVERS TO CHALLENGE FINAL AGENCY ACTION AFFECTING HIGHWAY SAFETY IS WELL-SETTLED**

#### **A. OOIDA Members Have Experienced Injury in Fact**

FMCSA questions whether OOIDA's members face "any particularized harms," satisfying the constitutional requirements for standing.<sup>11</sup> There can be no doubt that OOIDA's members have sustained particularized harm to their interests sufficient to meet the case-or-controversy requirement of Article III: (1) they have suffered an "injury in fact," injury that is concrete and particularized as well as actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action; and (3) it is likely, that the injury will be redressed by a favorable decision.<sup>12</sup>

This Court need not chart new waters in determining whether OOIDA's members meet these criteria. In *Peña*, the D.C. Circuit upheld the International Brotherhood of Teamsters' ("IBT") standing to challenge a memorandum of

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<sup>11</sup> FMCSA Brief at 20.

<sup>12</sup> *Central Delta Water Agency v. United States*, 306 F. 3d 938, 946-47 (9<sup>th</sup> Cir. 2002) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992)).

understanding (“MOU”) between the Federal Highway Administration (FMCSA’s predecessor) and Mexico under which drivers holding Mexican CDL’s would be permitted to operate trucks in American border zones. The IBT argued that the agreement would permit Mexican drivers to operate on American roads even though they would not qualify for American CDLs, and that they would “suffer both from the extra competition and from a possible increase in the number of truck accidents; in their view, the Implementing Rule threatens both their pocketbooks and their safety.”<sup>13</sup> The D.C. Circuit rejected the agency’s assertion that IBT suffered no particularized injury that was different from the injury suffered by the public at large:

Since the union has adequately alleged a concrete injury, there appears to be no constitutional bar to standing, even if every inhabitant of the country suffers the same concrete injury. . . . But we need not address this point, because the union's members spend far more time on the roads than most other Americans. Reductions in highway safety would cause more harm to them than to typical members of the public at large, and so the injury is not “common to all members of the public.”<sup>14</sup>

The court further found that the American drivers satisfied “prudential” standing requirements, holding that the interests that the union sought to protect were

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<sup>13</sup> *Id.* at 1483.

<sup>14</sup> *Id.*

arguably within the zone of interests protected by the statute in question.<sup>15</sup>

Finally, the court held that the American drivers met the criteria for procedural standing:

Standing to assert procedural protections is thus derivative; a party within the zone of interests of any substantive authority generally will be within the zone of interests of any procedural requirement governing exercise of that authority, at least if the procedure is intended to enhance the quality of the substantive decision.<sup>16</sup>

Further, this Circuit has recognized that “[t]he requisite weight of proof for each element of the test is lowered . . . for ‘procedural standing.’”<sup>17</sup> Where procedural rights are asserted, a court’s “inquiry into the imminence of threatened harm is less demanding.”<sup>18</sup> “To establish procedural standing, the plaintiff must show: (1) that it has been accorded a procedural right to protect its concrete interests, and, (2) that it has a threatened concrete interest that is the ultimate basis of its standing.”<sup>19</sup>

The more than 157,000 professional drivers within OOIDA’s membership

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<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 1484.

<sup>17</sup> *Churchill County v. Babbit*, 150 F. 3d 1072, 1077 (9<sup>th</sup> Cir. 1998), amended by 158 F. 3d 491 (9<sup>th</sup> Cir. 1998)(citing *Lujan*, 505 U.S. 555, 560-61).

<sup>18</sup> *Hall v. Norton*, 266 F. 3d 969, 977 (9<sup>th</sup> Cir. 2001).

<sup>19</sup> *Churchill County*, 150 F. 3d at 1078.

face the same concrete risk of harm through “reductions in highway safety,” that the D.C. Circuit found to confer standing upon American drivers in *Peña*. Further, unlike the prospect of harm in *Peña* which was limited to border zones, the pilot program at issue here allows drivers with Mexican CDLs to operate at large, *throughout the country*, thus eliminating any defense such as the one asserted in *Peña*, that the danger to American truck operators has been geographically delimited.

**B. Injury to OOIDA Members Is Neither Conjectural Nor Hypothetical**

FMCSA alleges that neither OOIDA nor IBT have demonstrated that their members face any “concrete and particularized” injury.<sup>20</sup> OOIDA has challenged the FMCSA’s pilot program for violation of 49 U.S.C. §§ 13902(a), 31315(b) and (c), 49 U.S.C. §§ 30112, 30115, 31149 as well as the 2007 Act and Section 350, all of which involve safety issues ranging from vehicle safety inspections, driver qualifications, and FMCSA’s determinations of safety under the pilot program. In its May 31, 2007 Comments to the FMCSA, OOIDA outlined numerous unanswered questions regarding “safety regulations for which Mexico has no

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<sup>20</sup> FMCSA Brief at 20.

equivalent law or regulation. . . .”<sup>21</sup> These violations pose a significant risk of injury to the safety, health and economic interests of OOIDA’s members.<sup>22</sup> But instead of answering those questions, FMCSA rhetorically asserts that OOIDA’s and IBT’s concerns about the safety threats presented by Mexican truckers are too “speculative” to present a case or controversy worthy of court review.<sup>23</sup>

FMCSA has made no attempt to distinguish *Peña* even though OOIDA cited *Peña* both in its September 7, 2007 Petition for Emergency Review filed with the D.C. Circuit,<sup>24</sup> and in its Opening Brief in this proceeding.<sup>25</sup> FMCSA’s stubborn refusal to offer any acknowledgment or distinction of *Peña* on the issue of standing is tantamount to a concession that there is none that could be offered.<sup>26</sup>

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<sup>21</sup> Comments of the Owner-Operator Independent Drivers Association, Inc., May 31, 2007, Docket No. FMCSA-2007-28055-1521 at 6-14 (E.R. at Tab 9).

<sup>22</sup> *Peña*, 17 F. 3d at 1483.

<sup>23</sup> FMCSA Brief at 20.

<sup>24</sup> *Petitioner’s Emergency Motion for Stay Pending Appeal and Request for Expeditious Consideration Pursuant to FRAP 25 and Circuit Rules 18 and 27(g)* (D.C. Cir. No. 07-1355), Petitioner Owner-Operator Independent Drivers Association, September 7, 2007.

<sup>25</sup> OOIDA Brief at 53.

<sup>26</sup> Nor does FMCSA assert that OOIDA fails to satisfy the causation and redressability requirements for standing, as it clearly satisfies those requirements as well. As to causation, there is a “reasonable probability of the challenged action’s threat to [American truckers’] concrete interest,” i.e., their interest in

FMCSA's September 14, 2007 Opposition to OOIDA's Petition before the D.C. Circuit raised *no* questions as to OOIDA's standing. Nor did FMCSA bother to raise standing in its opposition to IBT's petition for a stay in No. 07-73415. For that reason alone, FMCSA's belated decision to challenge OOIDA's standing after OOIDA filed its opening brief reinforces the self-evident nature of OOIDA's standing.<sup>27</sup> Nonetheless, while OOIDA's standing is amply substantiated on the current record, FMCSA's eleventh hour challenge has prompted OOIDA to submit the Declaration of OOIDA Treasurer Rick Craig for the purpose of responding to FMCSA's conclusory assertion that its unlawful actions have not caused injury to OOIDA members.<sup>28</sup>

Mr. Craig's declaration sets forth his findings of numerous safety violations

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highway safety and right to notice and comment. *Hall*, 266 F. 3d at 977. As to redressability, there is no doubt that the implementation of the pilot program "could be influenced" by FMCSA's compliance. *Id.*

<sup>27</sup> Tellingly, FMCSA has not heretofore challenged OOIDA's standing in other cases. *See, e.g., OOIDA v. FMCSA*, 494 F.3d 188 (D.C. Cir. 2007)(OOIDA's standing to challenge FMCSA rule uncontested by FMCSA). *See also OOIDA v. Skinner*, 931 F.2d 582 (9<sup>th</sup> Cir. 1991)(OOIDA's standing to challenge FHWA regulations affecting members not questioned); *OOIDA v. Pena*, 996 F.2d 338 (D.C. Cir. 1993)(OOIDA standing not questioned).

<sup>28</sup> *See Nuclear Information and Resource Service v. NRC*, 457 F.3d 941, 951 (9<sup>th</sup> Cir. 2006)(declarations filed with petitioners' reply brief permitted on issue of standing); *Nw. Env'tl. Def. Ctr. v. Bonneville Power Admin.*, 117 F.3d 1520, 1528 (9<sup>th</sup> Cir. 1997)(supplemental affidavits permitted to establish standing).

evidenced in FMCSA's own safety inspection reports of Mexico-domiciled motor carriers who have passed the Pre-Authorization Safety Audit prerequisite to participation in the Demonstration Project. Safety Reports contained in the Federal Motor Carrier Safety Administration's SafeStat database disclose a variety of serious safety problems of those carriers while operating in the commercial zone adjacent to the Mexico border. Mr. Craig's declaration focuses on out of service violations which he describes as follows:

Federal law defines the conditions under which a driver or commercial motor vehicle shall be placed out-of-service as those where an "imminent hazard" is present. "*Imminent hazard*" is defined by federal law at 49 U.S.C. § 521(b)(5)(B) as "*any condition of vehicle, employee, or commercial motor vehicle operations which substantially increases the likelihood of serious injury or death if not discontinued immediately.*"

Craig Declaration at ¶ 4. (Emphasis added). Mr. Craig goes on to observe:

The data demonstrates a high rate of safety violations, out-of-service orders, and safety violations that should have, but inexplicably did not, result in an out-of-service order. These inspection reports demonstrate the *imminent hazard* to safety and *increased likelihood of serious injury or death* for commercial truck drivers including OOIDA members that is presented by permitting these Mexican motor carriers to operate beyond the border areas under FMCSA's demonstration project.

Craig Declaration at ¶ 6. (Emphasis added). Mr. Craig addresses the safety records of four Mexico-domiciled motor carriers who have passed the Pre-Authorization Safety Audit prerequisite to participation in the Demonstration

Project. Trinity Industries de Mexico received 75 out-of-service orders during the period surveyed, but received citations for an additional 476 violations that *should* have prompted out-of-service orders.<sup>29</sup> GCC received 42 out-of-service orders but *should* have received an additional 56 out-of-service orders.<sup>30</sup> Aeromex received 46 out-of-service orders, but should have received an additional 59.<sup>31</sup> Each of these carriers *could* have received dozens of additional out-of-service orders, but the data reported by FMCSA was not complete enough to be conclusive on this subject.<sup>32</sup>

In light of the empirical data set forth in Mr. Craig's declaration, there is no question that the harm faced by American truckers is concrete, particularized, and imminent, satisfying all criteria for standing set forth by this Court in *Hall*, *Central Delta Water Agency*, and *Churchill County*, as well as the D.C. Circuit's decision in *Peña*.

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<sup>29</sup> Craig Declaration at ¶ 10.

<sup>30</sup> Craig Declaration at ¶ 12.

<sup>31</sup> Craig Declaration at ¶ 14.

<sup>32</sup> Craig Declaration at ¶¶ 10, 12, 14.

## **II. IMPLEMENTATION OF FMCSA'S DEMONSTRATION PROJECT IS NOT IN ACCORDANCE WITH LAW**

### **A. NAFTA Neither Authorizes Nor Requires FMCSA to Provide Exemptions to U.S. Safety Regulations**

In its opening brief, OOIDA demonstrated that under NAFTA the only obligation undertaken by the United States with respect to cross-border trade in trucking services with Mexico is to provide “national treatment” to Mexico-domiciled motor carriers.<sup>33</sup> FMCSA does not dispute this fact, but seems to be confused as to why this is important.<sup>34</sup> OOIDA does not contend that the Demonstration Project violates the NAFTA treaty. Rather, OOIDA’s position is simply that the NAFTA treaty contains no provisions that would require or authorize FMCSA to undertake obligations beyond those embodied within the concept of national treatment. Granting exemptions to Mexico-domiciled motor carriers from U.S. statutes and regulations is not embodied within the concept of national treatment.

FMCSA asserts that “Congress approved long-haul trucking by Mexico-domiciled carriers to destinations in the United States when it approved NAFTA . .

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<sup>33</sup> OOIDA Brief at 21 - 27.

<sup>34</sup> FMCSA Brief at 23, n.11.

. . .”<sup>35</sup> It goes on to state that “[t]here is no dispute that NAFTA requires the United States to open its Southern border to long-haul Mexican trucks . . . .”<sup>36</sup> These statements are not quite correct. When the Senate ratified the NAFTA treaty, the United States undertook to allow Mexico-domiciled motor carriers to operate in the United States on the same terms and conditions as U.S.-domiciled motor carriers.<sup>37</sup> Under NAFTA’s national treatment provision, the border will be open only to the extent that Mexico-domiciled carriers are willing and able to abide by the same laws and regulations as are applicable to U.S.-domiciled motor carriers. *NAFTA* removed a long-standing bar on cross-border trade in transportation services, but it *did not directly authorize the provision of such services* by individual Mexican motor carriers. Congress is not in the business of approving operating authority for individual motor carriers. That function is conferred upon the Secretary of Transportation under 49 U.S.C. § 13902(a)(1) and (4).<sup>38</sup> Congress merely establishes the conditions under which such approvals may be granted.

**B. The Demonstration Project Does Not Satisfy the Requirements for Granting Operating Authority**

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<sup>35</sup> *Id.* at 4.

<sup>36</sup> *Id.* at 23.

<sup>37</sup> *Id.*

<sup>38</sup> OOIDA Brief at 27-29.

## **Under Section 13902(a)**

### **1. The Secretary's Discretion Under Section 13902(a) is Limited**

In its opening brief, OOIDA demonstrated that 49 U.S.C. § 13902(a)(1) and (4) establishes a specific mandate to issue operating authority *only* to persons willing and able to obey all regulatory requirements for safety, fitness, employment and financial responsibility. The unqualified application of these requirements to foreign-domiciled motor carriers is reinforced in 49 U.S.C. § 13902 (c).<sup>39</sup> In *Department of Transportation v. Public Citizen*, the Supreme Court held that the Secretary had *no discretion* under section 13902(a) but to grant [or withhold] operating authority to motor carriers based upon their willingness and ability to comply with applicable regulations.<sup>40</sup> FMCSA's conduct in these matters departs significantly from the limited discretion found in *Public Citizen*.

FMCSA has determined that it will accept compliance with Mexican CDL, drug testing and medical qualification regulations in lieu of compliance with its own regulations.<sup>41</sup> We now demonstrate that no authority exists to expand upon

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<sup>39</sup> OOIDA Brief at 7.

<sup>40</sup> 541 U.S. 752, 767, 770 (2004).

<sup>41</sup> 72 Fed.Reg. At 31184.

the narrow discretion conferred under Section 13902(a) except the authority to grant formal exemptions under Section 31315(b).

**2. Section 31315(c) Does Not Authorize the Secretary to Bypass the Exemption Provisions when Awarding Operating Authority**

FMCSA argues that the Secretary's authority to conduct pilot programs under Section 31315(c) permits participating motor carriers to acquire operating authority under Section 13902(a)(1) without the need to have exemption approved under Section 31315(b).<sup>42</sup> Neither the language of the statute nor FMCSA's implementing regulations support this interpretation.

The statute defines a pilot program in Section 31315(c)(1) of Title 49:

The Secretary may conduct pilot programs to evaluate *alternatives to regulations* relating to, or innovative approaches to, motor carrier, commercial motor vehicle, and driver safety. Such pilot programs may include exemptions from a regulation . . . if the pilot program contains, at a minimum the elements described in paragraph (2).<sup>43</sup>

FMCSA's Demonstration Project accepts compliance with certain Mexican regulations as an *alternative* to compliance with corresponding U.S. regulations. Accepting such an *alternative to compliance* constitutes an exemption any way one looks at it. Section 31315(c)(1) anticipates the use of the exemption process

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<sup>42</sup> FMCSA Brief at 27, n. 12; 57.

<sup>43</sup> 49 U.S.C. § 31315(c)(1). (Emphasis added).

under Section 31315(b), but only if the pilot program also satisfies the separate and distinct requirements of Section 31315(c)(2). While section 31315(c)(2) imposes requirements that are in addition to requirements for an exemption under Section 31315(b), there is no conflict between these two subsections with respect to the exemption process.

FMCSA's position appears to be that Section 31315(c)(2) contains a free-standing safety equivalency standard that, if met, authorizes the award of operating authority under Section 13902(a)(1) without the need for the award of exemptions under Section 31315(b).<sup>44</sup> But a careful reading of subsections (c)(1) and (2) shows that the safety equivalency language in subsection (c)(2) is tied directly to the award of one or more exemptions under Section 31315(b). Subsection (c)(1) conditions the award of exemptions in a pilot program to situations where the program "contains, at a minimum, the elements described in paragraph (2)." Subparagraph (c)(2) requires that the Secretary, "in proposing a pilot program and *before granting exemptions*," shall require that the project contain safety measures designed "to achieve a level of safety that is equivalent to, or greater than, the *level of safety that would otherwise be achieved through*

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<sup>44</sup> FMCSA Brief at 27, n. 12; 8, 24, and 26.

*compliance with the regulations* prescribed under this chapter or section 3116.”<sup>45</sup>

Thus, this safety equivalency provision is tied directly to the proposition that the pilot program will involve alternatives to enforcement of current regulations, i.e. exemptions. Subsection (c)(2)(B) calls for data collection and a safety analysis plan that “identifies a method for comparison.” Comparison of what? Obviously, a comparison of safety conditions under the pilot program with those under the regulations for which exemptions have been granted. Subsection (c)(2)(E) refers to “countermeasures” to protect health and safety. Countermeasures to what? Countermeasures to deal with the fact that certain regulations are not being enforced because of exemptions. Subsection (c)(2)(F) requires that safety compliance and enforcement personnel must be informed about the pilot program and its participants. Why would safety enforcement personnel need to be informed of anything if pilot program participants were following all safety regulations? The only reason to inform them of anything is so they can deal properly with program participants who have been exempted from certain regulations.

The obvious conclusion one must draw from the statutory language is that the requirements for a pilot program under Section 31315(c) overlay, but do not

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<sup>45</sup> 49 U.S.C. § 31315(c)(2). (Emphasis added).

supercede, the requirements for an exemption under Section 31315(b). There is simply nothing in this statutory language that would authorize the Secretary to expand upon the narrow discretion she has in granting or withholding operating authority under Section 13902(a).

FMCSA makes much of the fact that waivers, exemptions and pilot programs have different time limits providing a “strong textual indication that Congress intended these three subsections to operate separately.”<sup>46</sup> This proceeding does not deal with waivers – a concept that we may put to one side. While it is true that exemptions may be granted for only two years under subsection (b)(1), it is also true that that subsection allows exemptions to be extended upon application to the Secretary. With this kind of flexibility, the fact that pilot programs can be three years in duration under subsection (c)(2)(A) presents no serious incompatibility with the exemption provision. This is precisely how FMCSA viewed the potential disparity in program length when it adopted a regulation authorizing exemptions “up to three years” in pilot programs.<sup>47</sup> Thus, apart from this litigation, FMCSA had no problem with the symbiotic relationship between the statutory provisions for exemptions and pilot

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<sup>46</sup> *Id.* at 58.

<sup>47</sup> 49 C.F.R. § 381.400(b).

programs, and it drafted its regulations accordingly.<sup>48</sup>

FMCSA points out that exemptions and pilot programs have different functions: exemptions provide individual departures from regulatory requirements, while pilot programs provide a mechanism for testing regulatory alternatives designed by DOT.<sup>49</sup> These differences do not obviate the fact that Congress adopted the same regime for exemptions when granted as part of a pilot program as it did for private exemptions - both must provide the same level of public safety as provided by the regulations for which compliance has been executed. Thus, the purpose of a pilot program may be somewhat broader than that of an exemption, pilot programs are established to test specific alternatives to the regulations from which exemptions are given, but the means to each end are identical for all practical purposes.

Both the statute and regulations applicable to exemptions provide important procedural protections for interested parties who may be impacted by a proposed exemption.<sup>50</sup> FMCSA's myopic interpretation of Section 31315(c) robs interested

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<sup>48</sup> Compare the nearly identical language in the definitional provisions set forth in 49 C.F.R. §§ 381.300(a) and 381.400(a). Compare also, 49 C.F.R. §§ 381.300(c) and 381.400(f); §§ 381.310(c) and 381.410(c).

<sup>49</sup> FMCSA Brief at 59.

<sup>50</sup> OOIDA Brief at 32-34.

parties of those procedural protections without any textual foundation or support from the regulatory framework of Section 31315. The path taken by FMCSA in this proceeding improperly shields it from accountability to interested parties under the regulations applicable to exemptions.

**III. FMCSA’S DISCLOSURES AND EQUIVALENCY FINDINGS DO NOT SATISFY STATUTORY REQUIREMENTS AND ARE ENTITLED TO NO DEFERENCE**

**A. Medical Qualification Standards**

FMCSA did not address OOIDA’s argument that its disclosures and analysis regarding Mexican medical qualification standards were insufficient to comply with the requirements for establishing an exemption. FMCSA merely states that its disclosure in the June 8, 2007 Federal Register notice was sufficient to comply with Section 6901 of the 2007 Act. Section 6901 required the Secretary to publish:

*a list of Federal motor carrier safety laws and regulations, including the commercial drivers license requirements, for which the Secretary of Transportation will accept compliance with a corresponding Mexican law or regulation as the equivalent to compliance with the United States law or regulation, including for each law or regulation an analysis as to how the corresponding United States and Mexican laws and regulations differ.*<sup>51</sup>

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<sup>51</sup> Pub. L. 110-28 Section 6901 (b)(2)(B)(v); Opening Add. at Tab 3. (Emphasis added).

FMCSA's disclosure at the bottom of the chart at 72 Fed.Reg. 31885, can only be described as a citation to two broad provisions of the Mexican and U.S. medical qualification rules.<sup>52</sup> Congress directed FMCSA to *list* all of the pertinent laws and regulations. The use of the word "list" indicates that Congress expected a certain level of detail - a list of the laws and regulations themselves. Yet FMCSA failed to cite to any laws related to driver medical qualification (i.e. 49 U.S.C. §§ 31136 and 31149) and only cited to the part of the regulations that contain all driver qualification rules (Part 391 of Title 49) rather than the specific sections of those rules that provide for medical qualifications (*see* 49 C.F.R. §§ 391.21- 391.49).

Congress directed FMCSA to conduct an *analysis* of the differences in the corresponding U.S. and Mexican laws. Congress' use of the word "analysis" indicates that a certain level of detail was intended, not a brief citation to the corresponding rules.

Despite the Congressional mandate that the *Secretary* publish an analysis of such differences, FMCSA criticizes the *Petitioners* for not pointing out any differences between the two countries' medical qualification requirements.

OOIDA asked in its opening brief, whether or not Mexico grants waivers to any of

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<sup>52</sup> E.R. at Tab 3.

its medical qualification rules. FMCSA responds, without citation to the record, that FMCSA “understands” that Mexico does not grant such waivers.<sup>53</sup> Such a difference should have been disclosed in its Federal Register announcement, and the agency’s failure to cite to differences as required by law. Reciting that it has an “understanding” of the regulatory provision in Mexico in a legal brief does not remedy its prior failure to disclose what the facts actually are.

FMCSA goes on to criticize OOIDA for expecting the agency to provide a translation of the Mexican medical qualification requirements and states that “no statute required DOT to offer its services as a translator.”<sup>54</sup> Under the requirements for granting an exemption, however, the Secretary “shall give the public an opportunity to inspect the safety analysis and any other relevant information known to the Secretary and to comment on the request.”<sup>55</sup> To perform a safety analysis or make an equivalence determination, one would expect the Secretary to have an English language translation of the Mexican rules. The rules would have to be known to the Secretary and could have been easily made available to the public. The Secretary’s refusal to share such a resource strongly

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<sup>53</sup> FMCSA Brief at 35, n. 17.

<sup>54</sup> *Id.*

<sup>55</sup> 49 U.S.C. § 31315(b)(4).

suggests that FMCSA did not analyze the Mexican rules themselves before making its finding of equivalence. There is not even a Spanish language version of the Mexican regulations in the administrative record, calling the equivalency finding further into question.

Finally, FMCSA's reference to its years of experience with the operations of Mexico-domiciled motor carriers in the border areas, and to the fact that it is not aware of any problems, is puzzling. This statement, whether based in fact or not, is neither relevant to its statutory disclosure requirements nor a finding of equivalence between the two countries' rules. The quality of FMCSA's disclosure fails as a matter of law, and, substantively does not support its equivalence determinations.

## **B. Drug Testing**

FMCSA's response to OOIDA's arguments concerning drug testing is limited to a critique of OOIDA's reliance on FMCSA's misstatements in its Federal Register disclosures. FMCSA does not respond to OOIDA's arguments that its disclosures and analysis were insufficient under the exemption requirements of 49 U.S.C. §31315(b) and Section 6901 of the 2007 Act.

FMCSA admits in its reply that it made an error in the August 17, 2007 Federal Register notice by describing a lack of certified drug testing facilities and

laboratories in Mexico.<sup>56</sup> Although it faults OOIDA's opening brief for relying on this statement, OOIDA's brief cited to FMCSA's June 8, 2007, Federal Register notice, that stated no "collection facilities [are] certified in Mexico to collect controlled substance and alcohol specimens in accordance with 49 CFR Part 40."<sup>57</sup> This challenge to FMCSA's actions is based in part on the adequacy of the agency's disclosures, and both the June and August Federal Register notices appear to misinform the public of the agency's findings.

FMCSA replies, that it meant to say that there are no certified drug testing *laboratories* in Mexico.<sup>58</sup> This supports, rather than detracts from, OOIDA's allegation that FMCSA failed to consider important differences between U.S. and Mexican drug testing procedures and requirements.

Like FMCSA's medical certification disclosures, FMCSA's disclosure of the differences between U.S. and Mexican drug testing rules at 72 Fed.Reg. 21855<sup>59</sup> does not consist of a list of the statutes and regulations themselves as required by Congress in Section 6901 of the 2007 Act. FMCSA itself

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<sup>56</sup> FMCSA Brief at 38 n. 19.

<sup>57</sup> 72 F.R. 31880 (June 8, 2007).

<sup>58</sup> FMCSA Brief at 38 n. 19.

<sup>59</sup> E.R. at Tab 3.

characterizes it as just the opposite: that Table 1 “outlines the specific U.S. and Mexican regulations in the three areas where the Mexican regulations or processes are being accepted as *meeting* U.S. requirements.”<sup>60</sup>

FMCSA’s “outline” cites to no statutes related to drug testing (i.e. 49 U.S.C. § 31306) and only cites to the part of the regulations that contain all driver qualification rules (Part 40 of Title 49) rather than specific sections of those rules that provide drug testing rules and procedures (*see* 49 C.F.R. §§ 40.1- 40.413 plus Appendices A through H). FMCSA’s broad “outline” to these rules does not consist of the *analysis* required by Congress of how the two countries’ rules *differ* under Section 6901 or how acceptance of the Mexican rules would provide for the same level of safety as required under 49 U.S.C. §31315(b).

FMCSA cites to no authority for its claim that it may accept non-compliance with U.S. safety rules through the use of the 1998 MOU or that an MOU is a substitute for the disclosures and analysis required for granting exemptions to the motor carrier safety rules. The agency does not explain how, on one hand, it claims that it will be accepting Mexican carrier and driver compliance Mexican drug testing rules as equivalent to compliance with U.S. drug testing rules, and on the other hand that Mexican carriers will be complying with U.S. rules under the

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<sup>60</sup> 72 F.R. 31884 (June 8, 2007). (Emphasis added).

MOU.

The 1998 MOU itself provides for the development of information sharing about the drug-testing experience of operators under the MOU.<sup>61</sup> One would think that such information would be useful in any new safety analysis concerning this pilot program, however none has been disclosed by the agency. The statements and conclusions made part of the agency's Federal Register announcements are not supported by information made part of the record and fail to comply with 49 U.S.C. § 31315(b) or Section 6901 of the 2007 Act.

### **C. Commercial Driver's Licenses**

OOIDA established in its opening brief the admitted substantive differences in the qualification standards between the US CDL and the Mexican LFC. FMCSA never addresses these important issues. Rather, as it has done throughout the demonstration project authorization process, FMCSA continues to answer all challenges with the same mantra:

The agency has long recognized Mexico's LFC as equivalent to the CDL, as a valid substitute for the CDL and is the basis for a signed international agreement under which the United States and Mexico have recognized each other's commercial licenses, a decision that was upheld on judicial review. See *International Brotherhood of Teamsters v. Peña*,

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<sup>61</sup> FMCSA Supplemental Excerpts of Record at 4 *citing* Articles VIII and IX.

17 F. 3d 1478 (D.C. Cir. 1994).<sup>62</sup>

FMCSA acknowledges that OOIDA's challenge focuses on new requirements enacted in 1999 disqualifying drivers from obtaining a CDL for offenses committed while driving a private vehicle.<sup>63</sup> Nevertheless, without one word of substantive analysis or discussion, FMCSA cites back to the 1991 determination of equivalence in the Memorandum of Understanding, and cites the 1994 *Peña* decision as affirmation of its validity.<sup>64</sup> In other words, FMCSA argues that it need never address any present differences between the CDL and LFC resulting from the Congressionally mandated substantive changes in the qualification standards for a CDL, because, prior to the enactment of those requirements, it once made a determination that the CDL and LFC were equivalent.

FMCSA's repeated reliance on *Peña* as validation of its equivalency determination is wholly misplaced. In *Peña*, the D.C. Circuit rejected the Teamsters' challenge to the finding of equivalency between the CDL and the LFC based on the standards for qualification existing in 1991 when the Memorandum

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<sup>62</sup> Demonstration Project on NAFTA Trucking Provisions, 72 Fed. Reg. 46263, 46276 (Aug. 17, 2007). FMCSA Brief at 29-30.

<sup>63</sup> 49 U.S.C. § 31310(g).

<sup>64</sup> FMCSA Brief at 30.

of Understanding was signed by the U.S. and Mexico. The differences raised by the Teamsters at that time were characterized by the D.C. Circuit as “*operating* standards, not *licensing* standards.”<sup>65</sup> The operating standards were requirements that existed “*in addition* to the requirement that drivers possess a valid CDL.”<sup>66</sup> For example, the hours of service rules apply to all motor carriers and drivers operating on U.S. highways regardless of whether they are qualified to drive with a CDL or an LFC.<sup>67</sup>

In contrast to the comparison at issue in *Peña*, the disqualifying criteria applicable to the CDL resulting from violations committed while driving a non-commercial vehicle is a substantive *licensing* requirement. Congress mandated these *licensing* disqualification standards as part of the Motor Carrier Safety and Improvement Act of 1999.<sup>68</sup> FMCSA’s contention that DOT’s equivalency determination “upheld on judicial review” in *Peña* somehow precludes Petitioners’ challenge here is simply wrong.

FMCSA finally argues that the 1991 MOU is entitled to deference as a

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<sup>65</sup> 17 F.3d at 1485. (Emphasis in original).

<sup>66</sup> *Id.* (Emphasis in original).

<sup>67</sup> *Id.*

<sup>68</sup> Pub. L. 106-159, 113 Stat. 1748, 49 U.S.C. § 31310.

“longstanding international agreement.” In actions involving relationships with foreign countries, “congressional statutes must be construed wherever possible in a manner that will not require the United States to ‘violate the law of nations.’”<sup>69</sup> However, FMCSA cites no authority which would afford the MOU that status. In *Peña*, the D.C. Circuit strongly implied that the MOU does not rise to that level.<sup>70</sup>

Even if the MOU was such an agreement, it is entitled to no deference in the context of OOIDA’s challenge here. Where Congress unambiguously passes legislation that conflicts with the earlier international agreement, the latter Congressional action controls.<sup>71</sup> Since Congress has the authority to “regulate Commerce with foreign nations, ‘[it]’ can denounce treaties if it sees fit to do so, and there is nothing the other branches of government can do about it.”<sup>72</sup>

Important changes to the U.S. CDL qualifications standards were enacted by

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<sup>69</sup> *South African Airways*, 817 F.2d 119, 125 (D.C. Cir. 1987) (citation omitted).

<sup>70</sup> 17 F.3d at 1487.

<sup>71</sup> *South African Airways v. Dole*, 817 F.2d at 126.

<sup>72</sup> *Id.* (citing *Diggs v. Shultz*, 470 F.2d 461, 466 (D.C. Cir. 1972). *See also Reid v. Covert*, 354 U.S. 1, 18 (1957); *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) (“By the constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation. . . . [I]f the two are inconsistent, the one last in date will control the other. . . .”).

Congress in 1999,<sup>73</sup> long after the MOU was signed. Those later enacted qualifications trump the earlier MOU no matter what the MOU's status was as an international agreement. In any event, in the 2007 Act, the Secretary was specifically directed to publish an analysis in the Federal Register as to how corresponding U.S. and Mexican laws and regulations respecting, *inter alia*, CDLs differ.<sup>74</sup> FMCSA declined to do so on the basis of the 1991 MOU. Under Section 6901 of the 2007 Act, its failure to provide the requested analysis precluded the obligation or expenditure of any funds to support its demonstration project and is entitled to no deference.

**IV. FMCSA CANNOT EXEMPT MEXICAN DRIVERS FROM PROVIDING PROPER MEDICAL CERTIFICATES SIMPLY BECAUSE OF ITS FLAWED ENFORCEMENT REGIME FOR U.S. DRIVERS**

Section 31149(b)(1)(B) of Title 49 requires operators of commercial motor vehicles have a current, valid medical certificate. Section 31149(d)(3) provides that the Secretary “shall accept as valid only medical certificates issued by persons on the national registry of medical examiners.” These provisions do not authorize FMCSA to accept medical certificates issued by examiners in Mexico who are not

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<sup>73</sup> 49 U.S.C. § 31310.

<sup>74</sup> Section 6901(b)(2)(3)(v). Opening Brief Add. at Tab 3.

listed on the national registry and whose performance is not monitored by the Secretary under Section 31149(c)(2). FMCSA made no reference to how Mexican drivers would comply with this provision under the Demonstration Project.

FMCSA contends, without the benefit of supporting authority, that OOIDA may not challenge its failure to abide by this statutory mandate with respect to Mexican drivers because it has not first challenged its failure to publish implementing regulations applicable to U.S.-domiciled operators.<sup>75</sup> OOIDA and its members are aggrieved by FMCSA's decision to accept non-conforming medical certificates for Mexican drivers. The fact that it has not felt sufficiently aggrieved to expend resources to challenge FMCSA's more generalized delinquencies is of no legal consequence. FMCSA's decision to grant lawful status to a whole class of non-conforming medical certificates is qualitatively different from its decision to forebear from enforcement action against current operators. Further, FMCSA admits that the purpose of its Demonstration Project

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<sup>75</sup> FMCSA Brief at 61.

is to “demonstrate both the ability of Mexico-domiciled motor carriers to comply with U.S. laws and regulations and the effectiveness of DOT’s monitoring and enforcement mechanisms . . .”<sup>76</sup> How can FMCSA measure the ability of Mexico-domiciled motor carriers to comply with U.S. laws and regulations regarding medical certificates when it provides them with an unauthorized exemption from Section 31149 in its Demonstration Project?

## **CONCLUSION**

FMCSA’s implementation of its Demonstration Project on Mexican trucks is not in accordance with law. The Secretary exceeds her narrow discretion under 49 U.S.C. § 13902(a)(1) and (4) by granting operating authority to motor carriers who are unable to comply with all applicable U.S. laws and regulations.

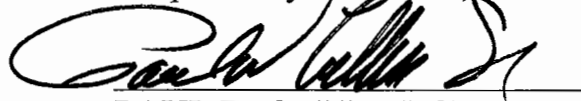
FMCSA’s decision to accept compliance with Mexican laws and regulations applicable to medical standards, drug testing and CDL’s constitutes the award of exemptions from U.S. regulations. The award of such exemptions without following the requirements of 49 U.S.C. § 31315(b) is not in accordance with law. Section 6901(b) of the 2007 Act requires a meaningful level of disclosure and analysis by FMCSA of the differences between certain Mexican and U.S. laws and regulations. FMCSA did not provide the minimum level of disclosure and

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<sup>76</sup> FMCSA Brief at 12.

analysis required by the 2007 Act and was thus precluded from obligating or expending funds to implement the Demonstration Project.

Respectfully submitted,



PAUL D. CULLEN, SR.

PAUL D. CULLEN, JR.

DANIEL E. COHEN

JOYCE E. MAYERS

THE CULLEN LAW FIRM, PLLC

1101 30<sup>th</sup> Street, N.W., Ste. 300

Washington, D.C. 20007

Tel: (202) 944-8600

Fax: (202) 944-8611

Dated: December 3, 2007

**CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P.  
32(a)(7)( C) AND CIRCUIT RULE 32-1 FOR CASE NUMBER 07-73987**

I certify that Pursuant to Fed. R. App. P. 32(a)(7)( C) and Ninth Circuit Rule 32-1, the attached opening brief is proportionately spaced, has a typeface of 14 points or more, and contains 6,958 words.



PAUL D. CULLEN, SR.

PAUL D. CULLEN, JR.

DANIEL E. COHEN

JOYCE E. MAYERS

The Cullen Law Firm, PLLC

1101 30th Street NW, Suite 300

Washington, DC 20007

Tel: (202) 944-8600

Fax: (202) 944-8611

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT ON THIS 3<sup>RD</sup> DAY OF DECEMBER, 2007, I caused copies of the Petitioner's Reply Brief, Declaration of Rick Craig, and Declaration of Catherine M. O'Mara to be sent via First Class mail to:

Jonathan Weissglass  
Altshuler Berzon LLP  
177 Post Street, Suite 300  
San Francisco, CA 94108  
Tel: 415-421-7151

Irene Solet  
U.S. Department of Justice  
Civil Division, Appellate Staff  
950 Pennsylvania Ave., N.W.,  
Rm: 7324  
Washington, D.C. 20530  
Tel: (202) 514-3542  
Fax: (202) 514-9405



PAUL D. CULLEN, SR.  
PAUL D. CULLEN, JR.  
DANIEL E. COHEN  
JOYCE E. MAYERS  
THE CULLEN LAW FIRM, PLLC  
1101 30<sup>th</sup> Street, N.W., Ste. 300  
Washington, D.C. 20007  
Tel: (202) 944-8600  
Fax: (202) 944-8611

*Attorneys for Petitioner OOIDA*

## SUMMARY OF SELECTED SAFESTAT DATA

<b>Motor Carriers (Date Range of Data)</b>	<b>DOT #</b>	<b>Total Inspections w/ Violations</b>	<b>Total Violations</b>	<b>Driver OOS Orders</b>	<b>Vehicle OOS Orders</b>	<b>No of Power Units</b>	<b>No. of Violations per vehicle</b>
<b>Trinity Industries De Mexico S. DE R L DE CV</b> (9/21/2006-9/21/2007)	610385	604	1123	1	74	10	112.3
<b>GCC Transporte, SA DE CV</b> (9/21/2006-9/21/2007)	650155	445	372	n/a	42	13	28.6
<b>Fidepal S. DE R L DE IP Y CV</b> (1/9/2006-9/21/2007)	975522	5	11	5	0	1	11
<b>Avomex Internacional SA DE CV</b> (9/21/2006-9/21/2007)	1142107	172	206	0	15	5	41.2