

RECEIVED DECEMBER 4, 2006. DECIDED JULY 24, 2007]
Nos. 06-1035, 06-1078

OWNER-OPERATOR INDEPENDENT DRIVERS ASSOCIATION, INC.,
Petitioner,

v.

FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION and THE UNITED
STATES,
Respondents.

On Petition for Review of a Final Rule Issued by
Respondent Federal Motor Carrier Safety Administration

**COMBINED PETITION FOR PANEL REHEARING
AND REHEARING EN BANC**

Paul D. Cullen, Sr.
Paul D. Cullen, Jr.
The Cullen Law Firm, PLLC
1101 30th Street, NW, Suite 300
Washington, DC 20007
(202) 944-8600 (phone)
(202) 944-8611 (fax)
*Counsel for Petitioner Owner-
Operator Independent Drivers
Association, Inc.*

September 7, 2007

**PETITIONER'S CERTIFICATE OF COUNSEL
AS TO PARTIES, RULINGS, AND RELATED CASES**

Under Rule 28(a)(1) of the U.S. court of Appeals for the District of Columbia Circuit and Rule 26.1 of the Federal Rules of Appellate Procedure, counsel for Petitioner certifies the following:

A. Parties

The Petitioner is the Owner-Operator Independent Drivers Association, Inc., (“OOIDA”). Under Federal Rule of Appellate Procedure 26.1, counsel states OOIDA is a trade association incorporated under the laws of the State of Missouri. No Parent company or publicly-held company holds a 10% or greater ownership interest in OOIDA. Its membership consists primarily of individuals who operate commercial motor vehicles. The purpose of OOIDA is to promote the general commercial, professional, regulatory, legislative, and other interests of its membership.

Respondents are the Federal Motor Carrier Safety Administration (FMCSA) and the United States.

B. Rulings Under Review

Petitioners seek Rehearing and Rehearing En Banc of the opinion of the Court in the above captioned case filed on July 27, 2007.

C. Related Cases

The case on review has not previously been before this Court or any other court. Subsequent to filing the petition for review involved in this case, No. 06-1035, Petitioner Public Citizen filed a separate petition for review of FMCSA's "Hours-of-Service of Driver's" Final Rule, docketed as No. 06-1078. On May 8, 2006, the court consolidated these two actions.

Petitioners are not aware of any related cases currently pending before this Court or any other court.

Respectfully submitted,



Paul D. Cullen, Sr.

Paul D. Cullen, Jr.

Cullen Law Firm, PLLC

1101 30th Street, NW, Suite 300

Washington, DC 20007

(202) 944-8600 (phone)

(202) 944-8611 (fax)

*Counsel for Petitioner Owner-
Operator Independent Drivers
Association, Inc.*

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**Authorities upon which we chiefly rely are marked with asterisks.*

GLOSSARY

APA	Administrative Procedure Act
ANPRM	Advance Notice of Proposed Rulemaking
CDL	Commercial Driver's License
CMV	Commercial Motor Vehicle
DOT	Department of Transportation
FMCSA	Federal Motor Carrier Safety Administration
HOS	Hours-of-Service
J.A.	Joint Appendix
NPRM	Notice of Proposed Rulemaking
OOIDA	Owner-Operator Independent Drivers Association, Inc.

I. Statement of Issues Under Fed. R. App. P. 35(b)(1)

A. Petition For Rehearing by Panel or Rehearing En Banc

Petitioners respectfully submit that the resolution of this issue is necessary to maintain consistency of this Circuit's decisions applying the "logical outgrowth" test.¹ The potential impact of the Court's decision on the federal rulemaking process makes this case one of exceptional importance. The Court's technical application of the "logical outgrowth" test in this case is at odds with the purpose for which this Court devised the test: to assess whether an agency's public notice of a proposed rule was sufficient to meet the requirements of the Administrative Procedure Act. The precedential impact of the Court's holding will be to permit federal agencies to propose rules in a way that subverts the purposes of the APA notice requirements by hiding the agency's true agenda - - discouraging public participation in the rulemaking process, and preventing agencies from testing their rules by exposure to diverse public comment.

B. Petition for Rehearing by Panel

The Court held that, in its formulation of the hours-of-service rule, FMCSA adequately considered the issue of drivers being discouraged from taking short rest

¹ *Small Refiner Lead Phase-Down Task Force v. U.S.E.P.A.*, 705 F.2d 506, 547 (D.C. Cir. 1983); *National Min. Ass'n v. Mine Safety and Health Admin.*, 116 F.3d 520, 531 (D.C. Cir. 1997).

breaks and naps during the 14 hour work day because the Agency concluded that “*other considerations* minimized or outweighed this disadvantage.” Since the Court has vacated the 11th hour of driving and the 34 hour restart of the hours-of-service rule, it almost certainly caused the “*other considerations*” relied upon by the agency to be altered. FMCSA must now be ordered to reconsider this important driver issue as it promulgates a new hours-of-service rule in compliance with the Court’s order.

II. Petition for Rehearing by Panel or Rehearing En Banc: The Court’s technical application of the “logical outgrowth” test is at odds with the purpose for which this Circuit devised the test.

A. Summary of the Argument

This Court determined that because the elements of the final “sleeper berth” rule could be discerned from the proposed rule, the Final Rule was a “logical outgrowth” of the proposed rule. But due to the numerous possible rule changes suggested by the proposed rule and the agency’s unfocused requests for comments on a broad range of related subjects, the agency received no public comments on the combination of elements in the proposed rule that became part of the Final Rule. After publication of the Final Rule, however, the agency received over 250 comments raising serious safety issues with the Final Rule, five petitions for

reconsideration, and three petitions for exemptions. The Congressional purpose of the APA notice provision, to test proposed rules by exposure to diverse public comment, was clearly not served. This scattershot approach to rulemaking undermines the purpose of the APA notice requirement. It allows agencies to hide their policy preferences among many regulatory options and increases the burden on the public to guess at what the agency is really considering in order to write informed comments. Only those with the time and resources to analyze and draft a thorough response to each proposed option will be able to participate in the rulemaking process. Others will be discouraged from submitting comments altogether.

The Court has rendered the “logical outgrowth” test a meaningless formalization by looking backward from Final to Proposed Rule. This Petition questions the efficacy of the Court’s “logical outgrowth” test to measure a proposed rule’s compliance with the APA’s notice requirement.

B. The “logical outgrowth” test did not adequately measure compliance with the APA’s “notice” requirement.

The court’s discernment of the elements of the final “sleeper berth” provision in the proposed rule may have satisfied a technical application of the “logical outgrowth” test, but that analysis failed to evaluate whether the FMCSA’s

hours-of-service NPRM gave the public adequate notice under the APA.

The logical outgrowth test is not part of the APA statute, but a tool developed by the Court to review an agency's compliance with the notice provisions of the APA. As this court has acknowledged, "[o]ur cases offer no precise definition of what counts as a logical outgrowth...[w]e ask whether the purposes of notice and comment have been adequately served."²

Notice serves three purposes: 1) to ensure the proposed rule is tested by exposure to public comment; 2) to fairly notify parties affected by the proposed rule and give them an opportunity to comment; and 3) to improve the quality of judicial review by giving affected parties an opportunity to develop evidence in the record to support their objections.³ "Agency notice must describe the range of alternatives being considered with *reasonable specificity*. Otherwise, interested parties will not know what to comment on, and notice will not lead to better informed agency decisionmaking."⁴ Furthermore, the agency has the "obligation to make its views known to the public in concrete and focused form so as to make

² *National Min. Ass'n v. Mine Safety and Health Admin.*, 116 F.3d 520, 531 (D.C. Cir. 1997); quoting *American Water Works Ass'n v. EPA*, 40 F.3d 1266, 1274 (D.C. Cir. 1994).

³ *Small Refiner Lead Phase-Down Task Force*, 705 F.2d at 547.

⁴ *National Mine*, 116 F.3d at 531 (Emphasis added).

criticism or formulation of alternatives possible.”⁵

In this case, the Court held that the final sleeper berth rule was reasonably foreseeable, and therefore a “logical outgrowth,” because the specific elements of the Final Rule could be discerned from the NPRM.⁶ The Court reviewed the Final Rule and then winnowed down the broad range of sleeper berth issues discussed in the NPRM to highlight those that resemble elements of the Final Rule. The Court cited to this portion of the NPRM:

FMCSA will consider a *variety of possible changes* to the sleeper-berth provisions, including but not limited to: (1) Not permitting any split sleeper-berth use to count toward the minimum 10-hours off duty, (2) allowing one continuous sleeper-berth period of less than 10-hours, such as 8 hours, to substitute for the otherwise minimum 10 hours, (3) eliminating split-sleeper-berth periods or establishing a minimum time for one of the two “splits,” such as 5 hours, 8 hours, or some other appropriate level, (4) revising the manner in which sleeper-berth periods affect the calculation of the 14-consecutive-hour period, and (5) restricting variations on permissible sleeper-berth use to team drivers only.⁷

The court characterized number (3) as an “option” in which it finds the main

⁵ *Home Box Office, Inc. v. F.C.C.* 567 F.2d 9, 36 (D.C. Cir. 1977)

⁶ *OOIDA et al., v. FMCSA*, 06-1035, 06-1078, Slip op. at 36 (D.C. Cir. July 24, 2007), Addendum at Tab 1.

⁷ *Hours of Service of Drivers; Notice of Proposed Rulemaking and Request for Comments*, 70 FR 3339, 3349-50 (Jan. 24, 2005) (“NPRM”) (emphasis added) Add. at Tab 2.

element of the final sleeper berth rule: a mandatory period in the sleeper berth for at least eight hours.⁸

This exercise, however, underestimated the number of possible changes to the rule put at issue. The list of “options” cited to by the Court is not a list of five possible formulations of the sleeper berth rule, but a list of five different variables, each with at least two options applicable to the sleeper berth rule. Multiplying the minimum possible combinations of these five aspects of the rule (2^5), produces at least 32 possible Final Rules, each combination having a potentially different impact on truck drivers. Given the undefined possible variations of time suggested in (2), (3), and (4), the potential number of variations of the rule suggested by the NPRM would be some multiple of 32.

Not only was this merely a list of potential changes to different variables of the rule rather than concrete options, they were a small part of the NPRM’s request for comments concerning the sleeper berth rule. The “Summary” and “Legal Basis for the Rulemaking” section of the NPRM suggested that the purpose of the notice was to ask what changes, “*if any*,” were required.⁹ The NPRM also posed ten different “Requests,” F-3-1 through F-3-10, each one posing multiple questions

⁸ Slip op. at 35

⁹ NPRM at 3350 (emphasis added). Add. at Tab 2.

concerning the use of the sleeper berth rule as well as posing hypothetical questions about possible changes to the rule.¹⁰ Finally, the NPRM did not state any favored policy goal or objective to inform the public's expectation for what changes to the rule, "if any," the agency was likely to make. The agency appeared to be on a fact-finding mission more characteristic of an advance notice of proposed rulemaking.

The sleeper berth subject was embedded in a very broad and complex NPRM concerning the entire hours-of-service rulemaking. The NPRM presented at least 99 specific questions and requests for comments. The sheer scope of comments sought by the agency presented an enormous burden on a public given only 45 days to comment.

The broad scope of potential rule changes, the wide-open inquiry into the "sleeper berth" rule, a lack of a stated policy goal or preference among the possible rule changes, the presentation of the issues as a component of a much larger rulemaking, and the express statement that it was seeking comments that may inform this or future rulemakings related to the hours-of-service,¹¹ did not give the

¹⁰ *Id.*

¹¹ *Id.* ("Please provide supplemental information or data on any topic discussed in the NPRM that could augment existing information for a final rule or
(continued...)")

public notice that the agency was on the verge of making dramatic changes to the sleeper berth rule as published as part of the Final Rule. The Court's technical application of the logical outgrowth test shields these defects in the NPRM. The final sleeper berth rule was not so much a logical outgrowth as it was a random outgrowth of a proposal having too many possible outcomes.

The Court's holding is hard to reconcile with the fact that the agency received no comment on the combination of variables the agency picked from the proposed rule and published as its final sleeper berth rule. The public response to the Final Rule demonstrates the failure of the notice in this rulemaking to fulfill the first purpose of notice outlined by the *Small Refiner* Court: to ensure the proposed rule is tested by exposure to public comment.

C. The record demonstrates that the public did not have adequate notice of the new rule.

Despite the intense public interest and scrutiny of this rulemaking, neither the Petitioners nor the government can cite to one public comment that anticipated the elements of the NPRM that became the final sleeper berth rule. The agency received no comments to its NPRM that described the serious safety impact that the final "sleeper berth" rule would have on truck drivers. The absence of any public

¹¹(...continued)
other agency action regarding hours of service in the future.")

comment on these subjects was in no way caused by a lack of public interest, diligence, or participation.

Over the ten year period since the hours-of-service rulemaking was initiated, DOT has received tens of thousands of comments. In the 45 days allotted for comment by the 2005 NPRM, the agency received approximately 1,800 public comments. By the time the agency published its Final Rule, it had received at least 200 additional comments. After publication of the Final Rule, FMCSA received three applications for exemptions,¹² five petitions for reconsideration,¹³ and over 250 unsolicited comments regarding the final sleeper berth rule.¹⁴ These post-Final Rule submissions to the agency demonstrate the failure of the 2005 NPRM to give

¹² See Application for Exemption by Institute of Makers of Explosives, Docket No. FMCSA-2006-24005-1; Add. to Petitioners Opening Brief at 45; Application for Exemption by Landstar System, Inc., Docket no. FMCSA-2005-22936-1; Add. to Petitioners Reply Brief at 1; Application for Exemption by Summit Helicopters, Inc., Docket no. FMCSA-2005-22937-1, Add. to Petitioner's Reply Brief at 6.

¹³ Petition of OOIDA, Docket No. FMCSA-2004-19608-2255, J.A. Vol. 5 at 1834; Petition of the International Brotherhood of Teamsters, Docket No. FMCSA-2004-19608-2379, J.A. Vol. 5 at 1947; Petition of Honeywell, Docket No. FMCSA-2004-19608-2380, J.A. Vol. 5 at 1954; Request for Clarification or, in the alternative, Petition for Reconsideration of the American Trucking Associations, Docket No. FMCSA-2004-19608-2381, J.A. Vol. 5 at 1958; Petition of ISOICHEM Inc., Docket No. FMCSA-2004-19608-2383, J.A. Vol. 5 at 1959.

¹⁴ J.A. Vol. 5 at 1711; 1730-1833; 1846-1946; 1962-2001; 2004-2006; 2009-2029; 2035-2045.

interested parties adequate notice.

The court dismissed the post-Final Rule comments as only evidence that commenters “strenuously oppose” the rule and stated, without explanation, that these comments “tell us little about what was reasonably foreseeable.” Although these comments certainly do contain strenuous opposition to the final sleeper berth rule, they detail serious safety concerns and conflicts of law that the agency did not foresee or consider in devising its Final Rule.

These comments describe how the new sleeper berth rule forces team drivers to operate in a manner they believe is unsafe. For example:

It is my opinion that this change will be the most unsafe rule to ever be put into effect and will cause untold numbers of accidents for teams that try to drive compliant and satisfy the company that they driver for.... It makes the roads a much more dangerous place to be now. You will have trucks driven by tired and sleepy drivers that have no choice but to drive 8 consecutive hours or pull over and sleep. The truck can not now be driven by the other driver until his/her 8 consecutive hours in the sleeper berth.¹⁵

My wife and I have been running team coast to coast for 16 years, using the 5 and 5 split. We strongly feel that requiring us to stay behind the wheel for 8 or 10 hours straight is very unsafe. The current rules allow us to change drivers when we are feeling sleepy...The new rules would cause use to be late with our loads, due

¹⁵ Comments of Donald H. Harris, FMCSA-2004-18806-2352, Add. at Tab 3, J.A. at 1922-23.

to stopping to sleep because our co-driver has not recertified, or driving while we are tired, which is very unsafe.¹⁶

Other comments came from drivers who haul explosives and other dangerous materials. Under other federal rules, drivers are required to be in constant attendance of their load, and being in the sleeper berth is not being in attendance with the load.¹⁷ These rules create conflicting demands on drivers:

There will also be a major problem when hauling A&E, Hazmat, or high security loads that require 24 - hour surveillance. If a driver has to get fuel, go to the restroom, or for any other reason needs to leave the vehicle the co-driver must be woke. On a 5/5 split most of these stops can be better planned around this schedule. If I get tired in the middle of the night I can't just stop and wake up my co-driver. So, now I'm driving down the road at 4:00 am with 1.1 explosives, behind your family trying to get to Disney World and I can't stop because I can't wake up my co-driver and there are no places that just let you park on there property with explosives. Would you want to go to work and pull a 10-hour shift and not be able to leave your desk? You can't get a snack, eat lunch, take a break or go to the restroom. This is what you're telling an A&E, Hazmat driver that they will have to do.¹⁸

These are precisely the type of comments envisioned by the APA. The

¹⁶ Comments of Gary D. Cottrell, Docket No. FMCSA-2004-18806-2237, Add. at Tab 4, J.A. at 1816.

¹⁷ 49 C.F.R. § 397.5

¹⁸ Comments of Richard C. Bean, FMCSA-2004-19608-2238, Add. at Tab 5, J.A. at 1817. *See also* the Comments of David Barnett, FMCSA-2004-19608-2201, Add. at Tab 6, J.A. at 1783.

agency created its Final Rule without taking into account serious safety issues and conflicts of law, and the purpose of the APA notice requirement was defeated. If the Court's technical application of the logical outgrowth test is allowed to stand public participation will be diluted into a meaningless formality and such uninformed rulemakings may become the norm.

D. The Court's decision could have a dramatic effect on agency rulemaking.

Under the Court's holding, if an agency were to propose or suggest every possible revision related to a regulation at issue, the Final Rule will pass the logical outgrowth test regardless of whether the Final Rule was exposed to public comment. Agencies could hide their agenda in a notice and request for comments on a blizzard of issues and regulatory possibilities. The opportunity to submit meaningful and complete comments would be foreclosed to all but those with the time and resources to anticipate and draft a response to every possible rulemaking outcome. Most of the public would be discouraged from submitting comments altogether. Agencies would get fewer comments, and those they receive would be less thorough, less focused, and less meaningful. Agencies will no longer have the benefit of considering, or burden of responding to, diverse public comment on its proposed rules. Agencies will be less likely to promulgate the most effective and

least burdensome rules possible.

The NPRM did not achieve these goals with respect to the final “sleeper berth” rule. The logical outgrowth test failed as an analytical tool to identify and address the deficiency in the NPRM. The fact that a good lawyer with a sharp pencil can, in hindsight, connect the dots between the Final Rule and one of dozens of possible options in an NPRM should not be used as a shield to defend the inadequacy of the notice at issue. The public should be given another opportunity to comment on this rule now that the Final Rule has effected the notice that should have been in the proposed rule. This Petition presents an opportunity for the Court to reexamine the efficacy of the logical outgrowth test in light of the salutary objectives of the APA.

III. Petition for Rehearing by Panel: The Court’s opinion now requires the agency to reconsider the issue of short rest breaks and naps.

The Court held that the agency, in the promulgation of its Final Rule, adequately considered the problem of drivers obtaining short rest breaks and naps under the 14 hour rule and noted that FMCSA had:

acknowledged driver comments that "the consecutive duty time requirement caused them to skip meals or naps." Id. at 50,013. FMCSA concluded, however, that several *other considerations*

minimized or outweighed this disadvantage.¹⁹

It is very possible that the “other considerations [that] minimized or outweighed this disadvantage” included the 11th hour of driving or the 34 hour restart provisions of the agency’s Final Rule.²⁰ The Court found, however, that the agency did not have a rational basis on which to support an 11th hour of driving or the 34 hour restart. Now that a new rule must be written, the “disadvantage” faced by drivers may no longer be “minimized or outweighed.” Therefore, when the agency proposes a new rule, it must again invite and consider public comment on the short rest break and nap issue. This issue simply cannot be untangled from the positions of the Final Rule vacated by the Court.

Nothing in the record reveals how the agency would consider this issue in light of the Court’s decision. The Final Rule does not explain what or how aspects of the Final Rule “outweighed or minimized” the disadvantage of drivers discouraged from taking short rest breaks or naps. Did the agency provide for the

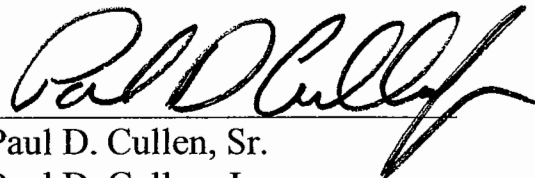
¹⁹ Slip op. at 32 (emphasis added).

²⁰ The Agency stated, “As noted earlier, a number of commenters, drivers in particular, reported that the consecutive duty time requirement causes them to skip meals or naps when they are needed, and generally increases stress and leads to speeding and more aggressive driving. After a thorough evaluation of the data and comments, FMCSA has decided to allow drivers to drive up to 11 hours within a 14-hour window after coming on duty.” Hours of Service of Drivers; Final Rule, 70 Fed. Reg. 49978, 50013 (Aug. 25, 2005) (“Final Rule”).

11th hour of driving, the 34-hour restart, or some other consideration to outweigh or minimize this disadvantage? The Final Rule is silent. Perhaps the “other considerations” will have to be adjusted to accommodate the changes that the agency must now make to the rule.

Although the parties and the Court may be tempted to guess at how the agency may reconsider this issue as it rewrites its rule, this issue may only be resolved with deference to the agency.²¹ Only further comment from drivers can inform that analysis. These issues await resolution at the agency level. FMCSA should be directed to reconsider the short rest-break and nap issue when it promulgates a new hours-of-service rule in conformance with the Court’s ruling.

Respectfully submitted,



Paul D. Cullen, Sr.

Paul D. Cullen, Jr.

Cullen Law Firm, PLLC

1101 30th Street, NW, Suite 300

Washington, DC 20007

(202) 944-8611

Counsel for Petitioner Owner-Operator

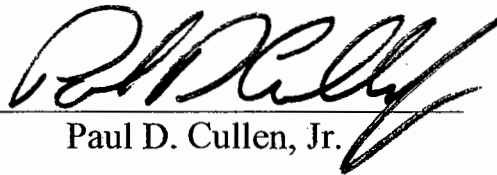
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²¹ *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 863-864 (1984); *Food and Drug Admin. v. Brown and Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000).

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on September 7, 2007, I filed with the Clerk's Office of the United States Court of Appeals for the District of Columbia, via Federal Express, the original and 19 copies of the foregoing Petition For Rehearing, Combined Petition For Panel Rehearing and Rehearing En Banc and further certify that I served, via U.S. Mail, postage prepaid, 2 copies of the same to the following:



Paul D. Cullen, Jr.

Jeffrey A. Rosen
General Counsel
U.S. Department of Transportation
400 7th Street, S.W.
Washington, D.C. 20590

Suzanne M. Te Beau
Chief Counsel
Federal Motor Carrier Safety
Administration
400 7th Street, S.W.
Washington, D.C. 20590

The Honorable Alberto R. Gonzalas
Attorney General
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530

Robert Stephen Greenspan, Attorney
Matthew M. Collette, Attorney
Edward Himmelfarb, Attorney
U.S. Department of Justice
Civil Division, Appellate Staff
950 Pennsylvania Avenue, NW
Washington, D.C. 20530-0001

James Arthur McCall
International Brotherhood of
Teamsters, AFL-CIO
Office of the General Counsel
25 Louisiana Avenue, NW
Washington, DC 20001

Kenneth Eric Siegel
Strasburger & Price, LLP
1800 K Street, NW, Suite 301
Washington, DC 20006-2225

Nicholas James DiMichael
Karyn A. Booth
Thompson Hine
1920 N Street, NW
Suite 800
Washington, DC 20036

Bonnie I. Robin-Vergeer
Brian Wolfman
Public Citizen Litigation Group
1600 20th Street, N.W.
Washington, DC 20009

Erika Z. Jones
Adam C. Sloane
Mayer, Brown, Rowe & Maw
1909 K Street, N.W.
Washington, DC 20006

Robert Digges, Jr.
Deputy General Counsel
American Trucking Associations
2200 Mill Road
Alexandria, VA 22314

John M. Cutler, Jr.
McCarthy, Sweeney & Harkaway
2175 K St., NW Suite 600
Washington, DC 20007

C. Fairley Spillman
Akin, Gump, Strauss, Hauer, & Field
1333 New Hampshire Avenue, NW
Washington, DC 20036

Michael McDowell Fields
Insurance Institute for Highway
Safety
1005 N Glebe Rd.
Suite 800
Arlington, VA 22201