No. 15-2090

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

OWNER-OPERATOR INDEPENDENT DRIVERS ASSOCIATION, INC. (a.k.a. "OOIDA") and KUEHL TRUCKING, LLC,

Petitioners,

vs.

UNITED STATES DEPARTMENT OF TRANSPORTATION, FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION; ANTHONY FOXX, Secretary of the U.S. Department of Transportation; T.F. SCOTT DARLING, III, Acting Administrator of the Federal Motor Carrier Safety Administration; and THE UNITED STATES OF AMERICA,

Respondents,

On Appeal from the Federal Motor Carrier Safety Administration
F.R.Doc. 2015-06817 - Filed 3-25-15

PETITIONERS' OPENING BRIEF

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

July 1, 2015

Counsel for Petitioner

SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT UNDER LOCAL RULE 28.A (i)

The Federal Motor Carrier Safety Administration (FMCSA) published a notice in the Federal Register styled as "regulatory guidance" related to the definition of "accident" under 49 C.F.R. § 390.5. In fact, the notice amended the rule defining accident by creating an exception for a specific type of truck-operation, attenuator trucks. FMCSA did not go through notice and comment rulemaking procedures required by 49 U.S.C. § 31130 (c) and the Administrative Procedures Act (APA) when it promulgated this amendment to the rule. Additionally, FMCSA's action was not the result of reasoned decision making. It was arbitrary and capricious, an abuse of discretion and otherwise not in accordance with law under well-settled standards of review in the APA. FMCSA asserted that the purpose of this new exception is to stop certain accidents from being used to calculate the safety ranking of attenuator trucks. Because FMCSA ranks motor carriers against each other based on accident experience, ignoring certain kinds of accidents for some type of carriers improves their safety rankings and makes other motor carrier's safety rankings worse, even though their accident records may not have changed. Petitioners request that the new rule be vacated. Oral argument would be helpful to the court because FMCSA's rules and safety ranking system are complex, and the agency made no record to support its decision.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Statutes

Federal Regulations

Federal Register Notices

Other Authorities

JURISDICTIONAL STATEMENT

Petitioners seek review of final agency action published by the Federal Motor Carrier Safety Administration in the Federal Register on March 26, 2015. United States Courts of Appeals have jurisdiction to review rules, regulations and final orders of the Secretary of Transportation pursuant to 28 U.S.C. § 2342 (3)(A). Venue is proper in this Court under 28 U.S.C. § 2343 because each of the Petitioners reside in or have a principal office within this Circuit.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the Respondents' Notice constitutes a rule, regulation or final order or an amendment to a rule or regulation or final order subject to Hobbs Act review under 28 U.S.C. §2342 (3)(A).

    - *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199 (2015);
    - *Iowa League of Cities v. E.P.A* 711 F.3d 844 (8th Cir. 2013);
    - *Electronic Privacy Information Center v. U.S. Dept. of Homeland Security*,653 F.3d 1 (D.C. Cir. 2011); and
    - 28 U.S.C. §2342 (3)(A).

2. Whether the Respondents' Notice constitutes the promulgation or modification of a regulation on commercial motor vehicle safety within the meaning of 49 U.S.C. § 31136(a) without following the notice and comment procedures mandated by 49 U.S.C. § 31136(a) and (c), including complying

with the Administrative Procedures Act, 5 U.S.C. § 553, and the Regulatory Flexibility Act, 5 U.S.C. §§ 603 and 604.

- *Paralyzed Veterans of America v. D.C. Arena L.P.*, 117 F.3d 579 (D.C. Cir. 1997);
- *CropLife Am. v. E.P.A.*, 329 F.3d 876 (D.C. Cir. 2003);
- *Electronic Privacy Information Center v. U.S. Dept. of Homeland Security*, 653 F.3d 1 (D.C. Cir. 2011);
- 49 U.S.C. § 31136(a); and
- 5 U.S.C. § 553.

3. Whether the regulatory action promulgated in Respondents' Notice was the result of reasoned decision making or was arbitrary and capricious, an abuse of discretion or otherwise not in accordance with law.

- *Judulang v. Holder*, 132 S. Ct. 476 (2011);
- *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983);
- *Public Citizen v. Federal Motor Carrier Safety Administration*, 374 F.3d 1209 (D.C. Cir. 2004); and
- 5 U.S.C. § 706.

STATEMENT OF THE CASE

A. INTRODUCTION

The Owner-Operator Independent Drivers Association, Inc. ("OOIDA") and Kuehl Trucking, LLC, petition this Court for review of the Federal Motor Carrier Safety Administration's (FMCSA's) decision entitled: *Federal Motor Carrier Safety Regulations; Regulatory Guidance Concerning Crashes Involving Vehicles Striking Attenuator Trucks Deployed at Construction Sites*, March 26, 2015, 80 Fed. Reg. 15913. Add. 1. In that Federal Register notice, FMCSA decided that crashes involving motorists striking attenuator trucks will not be considered accidents under the statutory definition of "accident" found in 49 C.F.R. § 390.5. FMCSA stated that the purpose of this decision was to remove such accidents from counting against the safety ranking of motor carriers operating attenuator trucks. Add. 1.

Petitioners ask the court to vacate FMCSA's amendment of the rule defining "accident" because it was not promulgated through the notice and comment rulemaking process under 5 U.S.C. § 553, and because the decision is arbitrary and capricious under 5 U.S.C. § 706 and has no rational basis in the record.

B. PETITIONERS

Petitioner Kuehl Trucking, LLC, is a regulated motor carrier based in Chippewa Falls, Minnesota. It was involved in six accidents reported in the Safety

Management System (SMS). *See* Declaration of Benn Charles Kingsburg at ¶8. There has been no judicial determination that Kuehl Trucking was at fault in those reported accidents. *Id*. Kuehl's Safety Manager, Benn Charles Kingsbury, asserts that other motorists are often at fault in those types of accidents as in several of the accidents on Kuehl Trucking's record. *Id*. ¶¶9, 10. Kuehl Trucking LLC is a member of the Owner-Operator Independent Drivers Association, Inc., ("OOIDA"). *Id*. ¶4.

OOIDA is a not-for-profit corporation incorporated in 1973 under the laws of the State of Missouri, with its principal place of business in Grain Valley, Missouri. (Declaration of Todd Spencer ¶ 2). OOIDA is the largest international trade association representing the interests of independent owner-operators, small-business motor carriers, and professional drivers. *Id*. The approximately 150,000 members of OOIDA are professional drivers and small-business men and women located in all 50 states and Canada who collectively own and operate more than 200,000 individual heavy-duty trucks. *Id*. Many OOIDA members, including Kuehl Trucking, are motor carriers with operating authority issued by FMCSA and as such are subject to FMCSA's Safety Measurement System (SMS). *Id*. ¶3. The Association actively promotes the views of professional drivers and small-business truckers through its interaction with state and federal government agencies, legislatures, courts, other trade associations, and private businesses to advance an

equitable and safe environment for commercial drivers, including those with their own federal motor carrier operating authority. *Id*. OOIDA's mission includes the promotion and protection of the interests of independent truckers on any issue which might touch on their economic well-being, their working conditions, or the safe operation of their motor vehicles on the nation's highways. *Id*. OOIDA is acting here in a representative and associational capacity.

C. REGULATORY SETTING

The Secretary of Transportation delegated his responsibilities under 49 U.S.C. § 31136 to set minimum standards for motor carriers – i.e. heavy duty trucks and truck operations - to the FMCSA. 49 C.F.R 1.87(f). In furtherance of its duties, FMCSA collects information and maintains the Motor Carrier Management Information System (MCMIS) database related to the safety performance history of each motor carrier company authorized by it to operate in interstate commerce. App. 10 and 11 (§§ 2.2 and 2.3). Accidents that meet the definition set forth in 49 C.F.R. § 390.5 are included in the data collected in the SMS system on each motor carrier. Notice at 15914, Col. 2. Add. 2. That definition provides:

> Accident means—
> (1) Except as provided in paragraph (2) of this definition, an occurrence involving a commercial motor vehicle operating on a highway in interstate or intrastate commerce which results in:
> (i) A fatality;

> (ii) Bodily injury to a person who, as a result of the injury, immediately receives medical treatment away from the scene of the accident; or
> (iii) One or more motor vehicles incurring disabling damage as a result of the accident, requiring the motor vehicle(s) to be transported away from the scene by a tow truck or other motor vehicle.
> (2) The term accident does not include:
> (i) An occurrence involving only boarding and alighting from a stationary motor vehicle; or
> (ii) An occurrence involving only the loading or unloading of cargo.

49 C.F.R. 390.5.

The definition of "accident" under § 390.5 is not qualified by who causes the incident or was at fault, whether a vehicle was stationary or moving at the time of the occurrence, or what the purpose or function being served by the commercial motor vehicle was at the time of the incident.

D. FMCSA'S SAFETY RANKING SYSTEM

FMCSA assembles data, including data about accidents, in its "Carrier Safety Measurement System." *See* Carrier Safety Measurement System (SMS) Methodology, Version 3.0.3, found at https://ai.fmcsa.dot.gov/SMS/ (last accessed June 25, 2015). Accident data is assembled in one category of the SMS called "Crash Indicator." App. 30. The Crash Indicator is defined as "Histories or patterns of high crash involvement, including frequency and severity, based on information from State-reported crash reports." App. 30 (§ 3.7). Motor carriers are ranked on a percentile scale:

> The CSMS assesses the Crash Indicator using relevant State-reported crash data reported in the MCMIS. Individual carriers' Crash Indicator

> measures also incorporate carrier size in terms of PUs [power units] and annual VMT [vehicle miles travelled]. These measures are used to generate percentile ranks that reflect each carrier's safety posture relative to carriers in the same segment with similar numbers of crashes.

Id. at App. 30 (§ 3.7). FMCSA elaborates on the percentile rank analysis:

> Percentile ranking allows the safety behavior of a carrier to be compared with the safety behavior of carriers with similar numbers of safety events. Within each safety event group, a percentile is computed on a 0–100 scale for each carrier that receives a non-zero measure, with 100 indicating the worst performance.

Id. at App. 14 (§ 2.4.9). For example, according to FMCSA's methodology, a motor carrier with a 65% rank is described as having a worse safety record than 65% of other motor carriers in the system. *Id.* The higher the ranking, the worse FMCSA's safety ranking of the motor carriers. *Id.* FMCSA describes its use of accident data in the system as follows:

> The crash history used by the Crash Indicator is not specifically a behavior; rather, it is the consequence of behavior and may indicate a problem that warrants attention.

Id. at 3-17. The "attention" referenced here means that if a motor carrier's Crash Indicator is greater than or equal to the threshold of 65%, then that motor carrier is flagged for several possible interventions, including targeted roadside inspections, warning letters, investigations, and being placed out of service. *Id.* at 1-1, Figure 1-1. CSA Operational Model.

E. AGENCY ACTION UNDER REVIEW

Attenuator trucks "are highway safety vehicles equipped with an impact attenuating crash cushion intended to reduce the risks of injuries and fatalities resulting from crashes in construction work zones." Notice, 80 Fed. Reg. 15913. Add. 1. Motor carriers operating attenuator trucks are subject to the same rules and regulations as other motor carriers regulated by FMCSA.

FMCSA decided that crashes involving motorists striking attenuator trucks "should not count against the safety performance record of the motor carrier responsible for the operation of the attenuator truck." It published this decision styled as "Regulatory guidance for 49 C.F.R. 390.5, Definition of "Accident."" *Id*. In the "Background" section of this decision, FMCSA explained its decision as follows:

> Because these vehicles are deployed to prevent certain crashes through the use of flashing lights and to reduce the severity of crashes through the use of truck-mounted impact attenuators or crash cushions when motorists do not take appropriate action to avoid the obstacles in the construction zone, it is expected that these vehicles will be struck from time to time while the attenuators are deployed. Such events that occur in a construction zone, either stationary or moving, should not count against the safety performance record of the motor carrier responsible for the operation of the attenuator truck.

Add. 2. FMCSA acknowledged "the potential impact on motor carriers' Safety Measurement System (SMS) scores that could result from States uploading reports

about crashes involving attenuator trucks deployed at construction sites into the Agency's Motor Carrier Management Information System (MCMIS)." *Id.*

F. THE EFFECT OF THE NEW RULE

Because FMCSA ranks a motor carrier with other motor carriers based on their accident experience, if a motor carrier's accident experience changes, so does its Crash Indicator percentile rank. When one motor carrier's Crash Indicator percentile rank changes, so does that of other motor carriers. If accidents are eliminated from the records of some motor carriers, the percentile rank of those motor carriers is lowered (improved) and while the percentile rank of other motor carriers is elevated (becomes worse). If a motor carrier's Crash Indicator percentile rank goes below the threshold of 65%, then some other motor carrier's Crash Indicator percentile rank will be pushed greater than or equal to the 65% threshold. Therefore, if FMCSA begins to ignore the accident records of attenuator trucks, their Crash Indicator percentile rank will get better, and those of other motor carriers will become worse – even if they experienced no additional accidents. Motor carriers who are given a higher (worse) percentile scores are therefore, adversely affected or aggrieved by FMCSA's amendment creating an exception to the definition of accident.

FMCSA's Notice amended the regulatory definition of accident by creating an exception for attenuator trucks without promulgating it through notice and

comment rulemaking. The decision is arbitrary and capricious, and not a decision rationally based on the scant record in Federal Register notice.

STANDARD OF REVIEW

The court reviews the question of whether agency action constitutes a legislative rule or some other type of agency action *de novo*. *Iowa League of Cities v. E.P.A.*, 711 F.3d 844, 872 (8th Cir. 2013)

Because the categorization of an agency's action as a legislative or interpretative rule is largely a question of law, a *de novo* standard of review is consistent with the standard of review this Court generally applies to questions of law in similar contexts. *See Qwest Corp. v. Minn. Pub. Utils. Comm'n,* 427 F.3d 1061, 1064 (8th Cir.2005).

SUMMARY OF ARGUMENT

Since at least 1972 the definition of reportable accidents applicable to federally regulated motor carriers has been established under formal rulemaking proceedings. 37 Fed. Reg. 18078 (September 7, 1972). The current definition appears at 49 C.F.R. § 390.5. That provision defines accidents in terms of occurrences involving a commercial motor vehicle resulting in specific levels of personal injury to persons or damage to property without reference to causation or fault by individuals involved in the occurrence. Accidents have a negative impact on a motor carrier's safety ranking without reference to fault.

On March 26, 2015, FMCSA published a Notice in the Federal Register styled "regulatory guidance." That Notice created an exemption from the definition of "accident" for crashes involving a class of vehicles known as attenuator trucks. FMCSA's Notice effectively abandoned its longstanding practice of addressing changes to Section 390.5 by rule and amended that provision without following notice and comment procedures mandated by 49 U.S.C. § 31136(c).

A rule is considered "legislative" requiring notice and comment procedures where it affects a substantive regulatory change to a statutory or regulatory regime. This is especially true where the change has a binding effect on the parties or the agency. *Iowa League of Cities v. E.P.A,* 711 F.3d 844, 862 (8th Cir. 2013). Involvement in accidents is a significant component in FMCSA's safety ranking system for motor carries. Since motor carriers are ranked in relation to one another on a percentile basis, the elimination of accidents involving attenuator trucks has a beneficial impact on the percentile rank of motor carriers operating such trucks and a correspondingly negative impact on the percentile rankings of other motor carriers. Bad safety rankings expose motor carriers to heightened enforcement scrutiny at both the federal and state levels. These serious, enforcement-related consequences of the attenuator truck Notice are a more than sufficient basis for this Court to recognize FMCSA's action as a "legislative" rule. Additionally, federal and state officials are required to remove attenuator truck accidents from a motor

carrier's record through FMCSA's data review process. Because this legislative rule was not promulgated by notice and comment procedures it should be vacated.

FMCSA's final rule was not the result of reasoned decision making and therefore may also be set aside as arbitrary and capricious. FMCSA's two page notice failed to address numerous questions that are relevant to a reasoned regulatory determination. FMCSA's notice does not review the scope of the attenuator truck problem. It does not discuss the definition of accident in Section 390.5, nor does it discuss why some attenuator truck crashes should not appear on the carrier's record even where there is objective evidence of motor carrier fault. FMCSA does not assess the cost of implementing its amended rule or its impact on others including other motor carriers. Without notice and comment rulemaking there is no record before FMCSA upon which it could defend its decision.

Kuehl Trucking and other members of OOIDA are adversely affected or aggrieved by FMCSA's final amended rule and have standing to challenge it here. This Court has jurisdiction to review FMCSA's final rule under the Hobbs Act, 28 U.S.C. § 2342(3)(A) even where the agency attempts to circumvent that review by mischaracterizing its action as regulatory guidance. The Petition for Review should be granted and the agency's March 26, 2015 decision vacated.

ARGUMENT

I. FMCSA's Notice Constituted an Amendment to a Rule Subject to Hobbs Act Review.

The Hobbs Act grants jurisdiction to federal appeals courts to review rules regulations and final orders of the Secretary of Transportation. 28 U.S.C. § 2342 (3)(A). Since legislative rules are rules within the meaning of the Hobbs Act, cases distinguishing legislative rules from interpretative rules are useful in identifying rules subject to this Court's jurisdiction under the Hobbs Act.

FMCSA's Notice amended the current rule defining the term "accident." 49 C.F.R. § 390.5. The amended definition grants rights to motor carriers that operate attenuator trucks, obligates the agency and the states to remove accidents from attenuator truck carriers' safety histories, and results in worse safety ratings for other motor carriers, imposing new enforcement scrutiny upon them and different enforcement obligations upon the states.

Agency action results in a "legislative" rule subject to Hobbs Act review, rather than an "interpretive" rule, where the rule "effects 'a substantive regulatory change' to the statutory or regulatory regime." *Electronic Privacy Information Center v. U.S. Dept. of Homeland Security,* 653 F.3d 1, 6-7 (D.C. Cir. 2011), *citing U.S. Telecom Ass'n v. FCC,* 400 F.3d 29, 34-40 (D.C. Cir. 2005). Where an agency "adopts a new position inconsistent with existing regulations. . . . APA rulemaking is required." *Air Transport Ass'n of America v. FAA,* 291 F.3d 49, 56

(D.C. Cir. 2002); *Paralyzed Veterans of America v. D.C. Arena L.P.*, 117 F.3d 579 at 586 (D.C. Cir. 1997). (APA rulemaking is required where agency interpretation "adopts a new position inconsistent with existing regulations," *citing Shalala v. Guernsey Memorial Hosp.*, 514 U.S. 87, 99 (1995).

The Supreme Court recently reasserted that agencies need not go through notice and comment rulemaking when they issue interpretations of their rules under §4 of the APA. At the same time, however, the Court recognized the continuing obligation of agencies under §1 of the APA to "use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance." *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1206, (2015); *citing F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515, (2009) (the APA "make[s] no distinction ... between initial agency action and subsequent agency action undoing or revising that action"). For the APA's notice and comment procedures to be required, "the later rule would have to be inconsistent with another rule having the force of law, not just any agency interpretation regardless of whether it had been codified." *Warshauer v. Solis*, 577 F.3d 1330, 1339 (11th Cir. 2009) (citation's omitted). "Whether or not a binding pronouncement is in effect a legislative rule that should have been subjected to notice and comment procedures thus depends on whether it substantively amends or adds to, versus simply interpreting the contours of, a preexisting rule." *Iowa League of Cities v.*

E.P.A., 711 F.3d 844, 873 (8th Cir. 2013); citing *U.S. Telecom Ass'n v. FCC*, 400 F.3d 29, 34–35 (D.C. Cir. 2005).

In its attenuator truck notice, FMCSA unambiguously amended its rule defining "accident." 49 C.F.R. § 390.5. Before that decision, there was no category of "commercial motor vehicle" exempted from the definition of accident in Section 390.5. There are no prior regulatory interpretations discussing or expressing exceptions for certain type of motor carriers. The new attenuator truck exception is plainly not permitted under the current rule defining accident.

Respondents have a long and consistent history of defining the term "accident" by formal rulemaking. In 1972 the Federal Highway Administration (FHWA), predecessor to FMCSA, promulgated a major overhaul to the regulations covering reportable accidents, then codified in 49 C.F.R. at Part 394. Federal Highway Administration, Reporting and Recording of Accidents, Doc. No. MC-36; Notice No. 72-14, 37 Fed. Reg. 18078 (September 7, 1972). FHWA explained its purpose in eliminating multiple categories of accidents:

> The second major change is a simplification of the criteria for determining whether an accident is reportable. The present rules provide for eight categories of accident which must be reported. The Director is now reducing the number of categories to three. Under the new rules, an accident must be reported only if it involves death, personal injury, or $2,000 or more in property damage. Special categories of accidents which must be reported regardless of their seriousness, such as rollaway accidents, have been eliminated. By taking this step, the Bureau hopes to simplify the task of the carrier who must decide whether to file a report on a particular accident. Accidents

> which formerly fell into those special categories, such as those involving overturn of a vehicle, fire, or explosion, will continue to be reported if they result in death, personal injury or property damage of $2,000 or more.

37 Fed. Reg. at 18079.

When the definitional language was amended again in 1988, the FHWA announced that "it is not [its] intention…to enter into a large scale program of exceptions." Final Rule, 53 Fed. Reg. 18042, May, 19, 1988. Thus, it has been clear that, before the attenuator truck decision, when FMCSA intended to exclude something from the definition of "accident" based on the function or purpose of a truck, it did so by rulemaking. See subsections (2)(i) and (ii) of the definition of "accident," excluding occurrences "involving only boarding and alighting from a stationary motor vehicle" and "involving only the loading and unloading of cargo." 49 C.F.R. § 390.5. If the agency would like to create a similar exception for attenuator trucks when struck by other motorists, it must follow its own administrative precedent to promulgate, by notice and comments procedures, a new subsection (2)(iii) to the definition of accident.

An interpretive rule is "merely a clarification or explanation of an existing statute or rule" and is "'issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers.' " *Guardian Fed. Sav. & Loan Ass'n v. FSLIC,* 589 F.2d 658, 664–65 (D.C.Cir.1978) (quoting United States Department of Justice, *Attorney General's Manual on the Administrative*

Procedures Act, at 30 n. 3 (1947)). The D.C. Circuit informs us that "[a]n interpretative rule simply states what the administrative agency thinks the statute means, and only 'reminds affected parties of existing duties.' On the other hand, if by its action the agency intends to create new law, rights or duties, the rule is properly considered to be a legislative rule." *See General Motors Corp. v. Ruckelshaus*, 742 F.2d 1561, 1565 (D.C. Cir. 1984) (*en banc*) (quoting *Citizens to Save Spencer County v. EPA*, 600 F.2d 844, 876 n. 153 (D.C. Cir. 1979)). The Seventh Circuit has pointed out that "legislative rules have effects *completely independent* of the statute." *Metro. Sch. Dist. of Wayne Twp. v. Davila*, 969 F.2d 485, 490 (7th Cir.1992) (emphasis in original) (internal quotation marks and citations omitted). *Warshauer v. Solis*, 577 F.3d 1330, 1337 (11th Cir. 2009).

Here, FMCSA's attenuator truck notice is by no means a construction of the existing rule or a reminder to affected parties of existing duties. FMCSA does not state that the purpose of its decision is to clarify the regulatory definition of "accident." FMCSA does not state that its purpose was to resolve some ambiguity in the definition. FMCSA's stated purpose for the decision was to prevent the record of certain accidents from affecting safety records motor carriers that operate attenuator trucks. The purpose and effect of FMCSA' s decision, to grant attenuator truck companies relief from the rule and the effects of it on their safety

records, is completely independent from the meaning of the rule defining "accident." The so-called guidance is a legislative rule.

This Court recently inquired into the nature of regulatory action suggesting that one look to "three factors: (1) the Agency's own characterization of the action; (2) whether the action was published in the Federal Register ....; and (3) whether the action has binding effects on private parties or on the agency." *Iowa League of Cities v. E.P.A.*, 711 F.3d 844, 862 (8th Cir. 2013) quoting *Molycorp, Inc. v. EPA*, 197 F.3d 543, 545 (D.C. Cir. 1999) (internal citation omitted). *Iowa League of Cities* identifies the third factor *Molycorp* as the "ultimate focus" of the court's inquiry: "whether an agency announcement is binding on regulated entities or the agency should be the touchstone of our analysis." *Id*. "[A]n agency pronouncement will be considered binding as a practical matter if it either appears on its face to be binding or is applied by the agency in a way that indicates it is binding." *Id*. quoting *Gen. Elec. Co. v. EPA*, 290 F.3d 377, 383 (D.C. Cir. 2002) (citations omitted).

Iowa League of Cities recognized that an agency's pronouncements can have binding affect when they prospectively restrict the agency's discretion (citing *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1111 (D.C. Cir. 1993)) or have a "present-day binding effect" on regulated entities, thereby "conclusively disposing of certain issues," *Iowa League of Cities v. E.P.A.*, 711

F.3d at 862-63 (citing *McLouth Steel Prods. Corp. v. Thomas"* 838 F.2d 1317, 1321 (D.C. Cir. 1988)) .

Examples of a pronouncement having binding effect include:

- "If an agency acts as if a document issued at headquarters is controlling in the field,"
- "if it treats the document in the same manner as it treats a legislative rule,"
- "if it bases enforcement actions on the policies or interpretations formulated in the document."

Iowa League of Cities, 711 F.3d at 863 citing *Appalachian Power Co.*, 208 F.3d 1015, 1021 (D.C. Cir. 2000). In *Appalachian Power* the court found that agency's guidance binding because it reflected "a position [the EPA] plans to follow in reviewing State-issued permits, a position it will insist State and local authorities comply with in settling the terms and conditions of permits issued to petitioners, a position EPA officials in the field are bound to apply." *Id*. at 1022.

FMCSA's purpose underlying the attenuator truck decision is to change how it makes enforcement decisions. The reason for FMCSA's decision was that "Such events…should not count against the safety performance record of the motor carrier responsible for the operation of the attenuator truck." The purpose of the safety records that FMCSA keeps on motor carriers is to make enforcement decisions.

The Attenuator Truck Notice necessarily affects the enforcement decisions made about all other types of motor carriers. FMCSA's accident database ranks

motor carriers on a percentile score, the number reflecting how many motor carriers have more "accidents" as defined by the §390.5, and how many have fewer. A motor carrier whose score is equal to or greater than 65% has an equal to or greater number of accidents than 65 percent of motor carriers in the database. Such a carrier is considered above the safety "threshold" and is flagged for additional enforcement "intervention" including more roadside inspections, on-site safety audits, fines, and the risk of being placed out of service by FMCSA or a state. App. 7 and 133.

When FMCSA deletes the accidents of attenuator trucks from the database, attenuator truck carriers will receive a better percentile score, and other motor carriers will automatically be given worse percentile scores. The motor carriers just below the threshold for increased enforcement will be pushed over the threshold (subjecting them to increased inspections, fines, and on-site safety audits) even though their accident record did not change (even if, like attenuator trucks – they were struck by other motorists in those accidents). These are serious, enforcement-related consequences of the attenuator truck notice, and more than sufficient basis for the court to recognize this decision as a legislative rule.

Additionally, the attenuator truck notice provided specific instructions demonstrating that FMCSA intends to be bound by the decision and its intent to bind the 50 states to its decision. At the end of the notice FMCSA describes, under

"Procedures," how a carrier may utilize the Agency's data correction procedure under the "DataQ system" "to remove crashes related to this regulatory guidance from their carrier record for the previous 24 months." DataQs is FMCSA's system for the quasi-adjudication of driver and carrier challenges to data in its Motor Carrier Management Information System (MCMIS) database. https://dataqs.fmcsa.dot.gov/ (last accessed July 1, 2015).

The vast majority of data in MCMIS comes from the states, including accident data. See DataQs Users Guide, Sections 4.7 and 4.10. https://dataqs.fmcsa.dot.gov/Data/Guide/DataQs_Users_Guide_and_Best_Practices_Manual.pdf (last accessed July 1, 2015). FMCSA's DataQ procedures require the states to make the final decision on whether or not to change or delete data from the MCMIS database in response to a "Request for Data Review" in the DataQ system. *Id.* The states have all agreed to adopt safety rules that are equivalent to the federal rules, to enforce those rules and use the SMS thresholds to focus their enforcement efforts, and to participate in the DataQ review process as a condition of participation in the Motor Carrier Safety Assistance Program (MCSAP). *See* 49 C.F.R. § 350.201(a) – (e) and (s); and https://dataqs.fmcsa.dot.gov/Data/Guide/DataQs_Users_Guide_and_Best_Practices_Manual.pdf section 4.10 (last accessed July 1, 2015). This system binds the states to comply with FMCSA's attenuator truck decision.

FMCSA also clearly intends that the attenuator truck decision be treated as a legislative rule by publishing it in the Federal Register. Finally, by categorizing it as "Regulatory Guidance," the new rule is made part of a set of governing documents accompanying the publication of each regulation, including the definitions rule at §390.5, on FMCSA's website: http://www.fmcsa.dot.gov/regulations/title49/section/390.5?section (last accessed June 29, 2015).

II. FMCSA's Amendment to a Legislative Rule Failed to Follow the Requirements of 49 U.S.C. § 31136 (c).

FMCSA's notice constitutes a substantive regulatory change amending legislative rule. The amendment process is subject to notice and comment rulemaking procedures under 49 U.S.C § 31136 (c). That section mandates that a regulation under this section shall be prescribed under section 553 of Title 5 of the United States Code (the Administrative Procedures Act). The APA requires in relevant part:

> (b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law.
>
> (c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose.

5 U.S.C. §§ 553(b) & (c). Required rulemaking procedures apply with the same force to the amendment or modification of a rule. 5 U.S.C. § 551(5); *Paralyzed Veterans of America v. D.C. Arena L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997); *Environmental Integrity Project v. EPA*, 425 F.3d 992, 995 (D.C. Cir. 2005). FMCSA never provided public notice of the proposed change in enforcement standards in the Federal Register as required by section 553. FMCSA did not provide any notice except in the final March 26, 2015 Notice. Nor did FMCSA provide an opportunity for interested persons to comment on the change in the definition of "accident." Nor, obviously, did the agency consider the position of interested persons, since such "data, views and arguments" were never received.

The failure to comply with notice and comment rulemaking under similar circumstances has consistently resulted in the invalidation of the deficient rules. In *Croplife*, this Court vacated the regulatory regime announced by the EPA in a press release and reinstated the prior rule until it is replaced by a lawfully promulgated regulation. *CropLife Am. v. E.P.A.*, 329 F.3d 876, 885 (D.C. Cir. 2003). Because the Commission has not complied with such requirements, the interpretation by the Commission must be set aside.").

In *Electronic Privacy Information Center v. U.S. Dept. of Homeland Security*, 653 F.3d 1 (D.C. Cir. 2011), petitioners challenged the decision of the TSA to change the equipment used to screen airline passengers from

magnetometers to advanced imaging technology. 653 F.3d at 314-15. The *Electronic Privacy* Court similarly rejected TSA's argument that the change in equipment was simply a new interpretation of its current statutory charge to detect terrorist weapons. The Court held:

> We conclude the TSA's policy substantially changes the experience of airline passengers and is therefore not merely "interpretive" either of the statute directing the TSA to detect weapons likely to be used by terrorists or of the general regulation requiring that passengers comply with all TSA screening procedures.

Id. at 319.

The same facts supporting the previous section dealing with whether FMCSA's Notice constituted a rule or regulation within the meaning of the Hobbs Act support the conclusion here that its Notice set forth a legislative rule requiring notice and comment rulemaking.

III. FMCSA's Notice Was Not the Result of Reasoned Decision Making and was Arbitrary and Capricious an Abuse of Discretion and Otherwise Not in Accordance With the Law.

A. The Legal Standard For Reviewing Agency Action

Under the Administrative Procedures Act, the reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions found to be-- (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;" and "(E) unsupported by substantial evidence in a case … otherwise reviewed on the record of an agency hearing provided by statute;." 5 U.S.C. § 706.

An agency decision is arbitrary and capricious "…if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *McClung v. Paul*, No. 14-3463, 2015 WL 3540610, at *5 (8th Cir. June 8, 2015). The court will review "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *State Farm*, 463 U.S. at 43. The court will examine "the reasons for agency decisions, or the absence of such reasons." *Judulang v. Holder*, 132 S. Ct. 476, 477-78 (2011). In a rulemaking proceeding, "an agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *State Farm*, 463 U.S. at 43 (citation omitted); *Public Citizen v. Federal Motor Carrier Safety Administration*, 374 F.3d 1209, 1216 (D.C. Cir. 2004); *National Telephone Cooperative Association v. Federal Communications Commission*, 563 F.3d 536, 540 (D.C. Cir. 2009)(if data in the rulemaking record demonstrates that the rule constitutes such an unreasonable assessment of social costs and benefits as to be arbitrary and capricious, the rule cannot stand (citation omitted)).

B. FMCSA Failed To Address Numerous Relevant Factors.

The agency record of attenuator truck decision consists only of the Federal Register notice. FMCSA published no advanced notice, no request for public comment, and no supporting documents. The record provides the court with scant information to support, or for the court to review, the agency's decision. In the Notice, FMCSA states a few facts about attenuator trucks, and then states the opinion that certain accidents "should not count against the safety performance record" of the attenuator truck. The decision is devoid of any analysis of several relevant issues: 1) The connection between the Attenuator Truck problem and FMCSA's safety mission; 2) The scope of the Attenuator Truck problem; 3) Any analysis of the regulatory definition of "accident;" 4) An explanation as to why Attenuator Truck crashes should not be included on their safety record; 5) An assessment of the impact and cost of the rule on others.

1. FMCSA makes no connection between the attenuator truck exception and its safety mission.

FMCSA makes no record as to how this exception serves FMCSA's safety mission. Under the "Legal Basis" section of the Decision, FMCSA outlines its authority and duties "to set minimum standards for motor vehicle safety." Perhaps this lays out FMCSA's authority to regulate in this subject area. But FMCSA is silent as to how the exception furthers the Agency's safety mission, how it furthers

an important governmental goal, or how, conversely, it does not compromise FMCSA's safety mission. Why did FMCSA believe that it was part of its safety mission to relieve attenuator trucks from the impact of the Agency's safety ranking system? Why do attenuator trucks merit special treatment on a fact pattern that routinely applies to other trucking operations? *See* the Declarations of Benn Kingsbury and Todd Spencer establishing that accidents are routinely reported to the SMS system regardless of whether the motor carrier was at fault. App. 136 and 140. The record does not tell us.

2. FMCSA did not review the scope of the Attenuator Truck problem.

Another fundamental issue missing from the FMCSA's Notice is the scope of the problem it is trying to address (and, therefore, the scope of the relief being granted). In the Notice, FMCSA's "Background" section first states that it is responding to questions concerning the definition of "accident," and then poses one question: "Are crashes in which motorists strike the rear of attenuator trucks deployed at construction sites considered recordable accidents?" Notice at 15914. Col 2. Add. 2. Although one might deduce who asked this question, FMCSA does not inform us who and how many people have asked this question. The public is given no information about how often attenuator trucks are in crashes.

How big a problem do accidents involving attenuator trucks present? Are they in crashes at a rate higher than other motor vehicles on the road? Are

attenuator trucks struck by other motor vehicles at a higher rate than other trucks are struck? To what extent do crashes affect attenuator truck rankings in FMCSA's Safety Measurement System? How many carriers will improve their SMS ranking because of this exception and by how much? What are their scores now and what will they be after the exception is adopted? The record is barren as to the definition and scope of the problem being addressed, the scope of the exception being provided, and the likely impact of the exception on the SMS safety ranking system.

3. FMCSA did not discuss the definition of "accident."

Although this Notice is styled as "Regulatory Guidance," the decision spends no time discussing the meaning or scope of the regulatory definition of "accident" under § 390.5. What kind of events did FMCSA originally intend to include or exclude from the definition of accident? How does that meaning inform its "guidance" on accidents involving attenuator trucks? The Notice states:

> FMCSA acknowledges the potential impact on motor carriers' Safety Measurement System (SMS) scores that could result from States uploading reports about crashes involving attenuator trucks deployed at construction sites into the Agency's Motor Carrier Management Information System (MCMIS).

Notice at 15914, col.2. Add. 2. Here the agency acknowledges that it regulates attenuator trucks, that accidents involving attenuator trucks fall within the definition of accident in § 390.5, that reports of such accidents are loaded into its

Motor Carrier Management Information System (MCMIS) database, and that those reports have a negative impact on the SMS scores of attenuator trucks.

The Notice offers no analysis as to how, and under what standard or rule, the definition of accident can be interpreted to exclude such accidents. The Notice does not function to interpret or clarify the meaning of the term "accident." The decision appears to be completely result oriented: to save attenuator truck companies from having certain types of crashes count on their safety records. There is no record to support this new exception as "regulatory guidance."

4. FMCSA did not discuss *why* some crashes should not be on the safety record of attenuator trucks.

FMCSA states in the Background of the Notice: "Such events that occur in a construction zone, either stationary or moving, should not count against the safety performance record of the motor carrier responsible for the operation of the attenuator truck."

Why not? There is scant discussion and no analysis explaining why attenuator trucks should be given a special exception of not having certain types of accidents count against their safety record. The fact pattern presented in the Notice, that sometimes other motor vehicles crash into attenuator trucks and those accidents are counted in FMCSA's safety score for those truckers, is indistinguishable from fact patterns described by Benn Charles Kingbury of Kuehl Trucking and described by small business motor carriers to OOIDA (see

Declarations of Benn Kingsbury and Todd Spencer). FMCSA does not articulate or describe a principle or standard that sets the crash experience of attenuator trucks apart from some of the crash experiences of other types of motor carriers. FMCSA does not explain why it applied this new exception to such a narrow segment of the motor carrier industry. All accidents meeting the definition in Section 390.5 are reported regardless of the fault of the motor carrier. Why should attenuator trucks be treated differently?

FMCSA gives a somewhat conflicting description of about attenuator trucks – that they are both deployed to prevent crashes *and* expected to be crashed into:

> Because these vehicles are deployed to prevent certain crashes through the use of flashing lights and to reduce the severity of crashes through the use of truck-mounted impact attenuators or crash cushions when motorists do not take appropriate action to avoid the obstacles in the construction zone, it is expected that these vehicles will be struck from time to time while the attenuators are deployed.

Notice at 15914. Add. 2. Does this sentence suggest that because attenuator trucks serve a public safety purpose this is an important issue underlying the new exception?

Why does that purpose entitle attenuator trucks to less enforcement scrutiny? Shouldn't their safety ranking be especially sensitive, rather than immunized, to whether they fulfilled their purpose to prevent crashes? Given their purpose, to prevent crashes, shouldn't attenuator trucks be held to a higher accident standard than other motor carriers, rather than lower? FMCSA does not address this issue.

What is the standard used to measure how well an attenuator truck prevents crashes? What are the standards for the proper positioning and illumination of attenuator trucks on the highway? Are those standards different for when attenuator trucks are stationary or moving? Should the new exception apply only to attenuator trucks when they are *properly* deployed? Is it meaningful to safety if an accident occurs when the attenuator truck is stationary or moving? How would FMCSA verify whether an attenuator truck was *properly* deployed at the time of an accident? FMCSA did not address these relevant questions.

Does FMCSA believe that attenuator trucks are *never* at fault in such accidents? A generous reader might interpret the notice to suggest that attenuator trucks are not at fault when they are struck by other motor vehicles. But FMCSA assiduously avoids discussing the issue of fault. FMCSA does not precondition the regulatory relief it is granting to attenuator trucks on a finding of no fault. The definition of accident is silent on the issue of fault.

Whether or not FMCSA should recognize if a motor carrier or driver's fault contributed to a crash is an unsettled question that the agency is wrestling with. At no time has FMCSA expressed an interest in relying upon judicial determinations of fault on whether to use an accident in a motor carrier's safety profile. Instead, in a pending proceeding, FMCSA has asked the public for comment on whether it could unilaterally, without any due process, rely upon the accident reports it

currently receives to assign fault for an accident to a motor carrier's safety rating. See *Crash Weighting Analysis*, 80 Fed. Reg. 3719.

But for now, occurrences when a motor vehicle strikes other types of trucks, even when they are stationary, are routinely recorded as accidents in FMCSA's SMS system. (See Declarations of Benn Kingsbury and Todd Spencer) Why should attenuator trucks receive different treatment from all other trucking companies for the same fact pattern? There is no record that FMCSA analyzed any of these relevant issues. By failing to go through the notice and comment rulemaking process, it denied the public the opportunity to ask the agency to address these important and relevant questions. It failed to gather and review the views of affected and interested parties on these subject.

5. There is no assessment of the cost of the rule or its impact on others.

FMCSA did not review the cost of the regulatory relief granted to attenuator trucks or the impact of the decision on other parties. FMCSA's Safety Management System ranks motor carriers on a percentile score called a Crash Indicator based on the carrier's accidents experience. Because motor carriers are ranked on a percentile scale of 1% to 100%, when one motor carrier's percentile goes up, other motor carrier's percentile will go down, and vice versa. Therefore, the exception will improve the safety ratings of carriers operating attenuator trucks (that is FMCSA's stated goal), but will automatically degrade the safety record of

other motor carriers. This is true even if there were no change in the other motor carriers' accident experience. For motor carriers that are just below the 65% percentile, the change in ranking of attenuator trucks would push them equal to or over the threshold for greater enforcement intervention. A rating past the threshold becomes the reasonable articulable suspicion basis for enforcement officials to perform additional roadside inspections, and the basis for FMCSA to perform additional enforcement investigations, issue fines, and order the motor carrier out of service. App. 7 (Figure 1-1) and App. 133 (Intervention). FMCSA does not discuss at all the important and relevant burden and cost of its decision on other trucking companies.

IV. Petitioners Have Standing to Challenge FMCSA's Notice.

OOIDA is the largest international trade association representing the safety and economic interests of independent owner-operators, small-business motor carriers, and professional drivers. OOIDA's 150,000 members are professional drivers and small-business motor carriers located in all 50 states and Canada who collectively own and operate more than 211,000 individual heavy-duty trucks. Many OOIDA members, including Kuehl Trucking, are motor carriers with operating authority issued by FMCSA and as such are subject to FMCSA's Safety Measurement System (SMS). Kuehl Trucking is a motor carrier and is a member of OOIDA. (Declaration of Benn Charles Kingsbury ("Kingsbury Decl.") (¶¶ 2 –

4). App. 137. As a regulated motor carrier, Kuehl Trucking is subject to the Carrier Safety Management System. *Id*. ¶ 8. App. 138. Kuehl Trucking has received a safety ranking under the CSMS system. *Id*. ¶¶ 8, 11. App. 138.

Kuehl Trucking and other members of OOIDA have suffered and will continue to suffer direct injury from the application of § 390.5 as amended. *Id*. ¶¶ 8 – 11. App. 138. FMCSA's SMS has six reported accidents for Kuehl Trucking, but in none of the six has there been a judicial determination of fault. *Id*. ¶ 8. App. 138. FMCSA ranks motor carriers' accident experience on a percentile scale. When a motor carrier's safety rating gets better, other motor carriers' scores, like Kuehl Trucking, get worse, without any change in their safety behavior. *Id*. ¶ 11. App. 138. As a result of FMCSA's arbitrary system of reporting accidents, Kuehl Trucking has been subjected to increased scrutiny in the form of more frequent and longer inspections. Kuehl Trucking customers have questioned its safety practices because of the report of the accidents on FMCSA's website. *Id*. ¶ 11. App. 138. FMCSA's arbitrary decision, therefore, not to include some accidents in the records of motor carriers that operate attenuator trucks gives attenuator trucks a better safety rating and Petitioners Kuehl Trucking and other OOIDA members a worse safety rating, without any change in any motor carriers' safety behavior. *Id*. ¶ 12. App. 138.

First, Petitioners have suffered injury because they are the objects of the agency action challenged. It is the motor carriers like Kuehl Trucking and other motor carrier members of OOIDA whose safety ratings will be directly impacted by FMCSA's exemption of attenuator trucks from the reporting of accident statistics. The Seventh Circuit found standing for the individual petitioners as well as for OOIDA in similar circumstances in *Owner-Operator Independent Drivers Association, Inc. v. Federal Motor Carrier Safety Administration*, 656 F.3d 580, 585-86 (7th Cir. 2011):

> The three truck drivers are the "objects of the action" here. It is truck drivers who will be required to install EOBRs should they work for a carrier subject to a remedial directive, and the central purpose of the rule is to increase their compliance with HOS regulations. Although compliance is measured at the carrier level, it is the individual truck drivers whose sleep is really at issue under the HOS rules and whose status is being tracked on a day-to-day basis. As a trade association that includes truckers and represents their interests, OOIDA meets the requirements of associational standing; it has Article III standing because the individual truckers do.

Id., citing Hunt v. Washington State Apple Adver. Comm'n, 432 U.S. 333, 343 (1977); *Sierra Club v. EPA*, 292 F.3d 895, 898 (D.C. Cir. 2002).

Second, Petitioners have standing under the doctrine of competitor standing. Motor carrier safety rankings are calculated on a percentile scale. The exemption extended to attenuator trucks by the Final Rule directly impacts the percentile rank for motor carriers like Petitioners here. As attenuator truck rankings improve, other motor carrier rankings become worse. Motor carriers compete, at least in

part, on their safety rankings. "The competitor standing doctrine recognizes that 'economic actors suffer an injury in fact when agencies lift regulatory restrictions on their competitors or otherwise allow increased competition against them.'" *Int'l. Broth. Teamsters v. U.S. Dept. of Transp.*, 724 F. 3d 206, 212 (D.C. Cir. 2013), citing *Sherley v. Sebelius*, 610 F.3d 69, 72 (D.C. Cir. 2010).

Petitioners have standing to pursue this appeal. Unless FMCSA is enjoined, Kuehl Trucking, OOIDA and its members, will suffer injury that is concrete and particularized and is fairly traceable to the FMCSA's actions. It is likely that a favorable decision in this proceeding will redress that injury. *Int'l. Broth. Teamsters*, 724 F. 3d at 211-12.

CONCLUSION

The Petition for Review should be granted and the Respondents' March 25, 2015 notice vacated.

Respectfully submitted,

s/Paul D. Cullen Sr.

Dated: July 1, 2015

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

Counsel for Petitioners

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I hereby certify that the textual portion of the foregoing brief (exclusive of the disclosure statement, tables of contents and authorities, certificates of service and compliance, but including footnotes) contains **8,381** words as determined by the word counting feature of Microsoft Word 2013. The brief otherwise complies with the typeface requirements of F.R.A.P. 32(a)(5)(A), and the type style requirements of F.R.A.P. 32(a)(6).

Pursuant to Circuit Rule 28A(h), I also hereby certify that electronic files of this Brief and accompanying Addendum have been submitted to the Clerk via the Court's CM/ECF system. The files have been scanned for viruses and are virus-free.

Dated: July 1, 2015

By: *s/Paul D. Cullen Sr.*

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

Counsel for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of July, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: July 1, 2015

By: *s/Paul D. Cullen Sr.*

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

Counsel for Petitioners