**NO ORAL ARGUMENT SET**

**No. 11-1251**

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**In the**
**United States Court of Appeals**
**For The District of Columbia Circuit**

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

***Petitioner,***

**v.**

**UNITED STATES DEPARTMENT OF TRANSPORTATION, FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION; RAYMOND H. LAHOOD, Secretary of the U.S. Department of Transportation; ANNE S. FERRO, Administrator of the Federal Motor Carrier Safety Administration; and THE UNITED STATES OF AMERICA,**

***Respondents*.**

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**PETITION FOR REVIEW OF AN ORDER**
**OF THE FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION**

# PETITIONER'S REPLY BRIEF

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# GLOSSARY

| | |
|---|---|
| CDL | Commercial driver's license |
| DOT | Department of Transportation |
| FHWA | Federal Highway Administration |
| FMCSA | Federal Motor Carrier Safety Administration |
| LFC | Licencia Federal de Conductor |
| MOU | Memorandum of Understanding |
| NAFTA | North American Free Trade Agreement |
| NEPA | National Environmental Policy Act |
| OIG | Office of Inspector General |
| OOIDA | Owner-Operator Independent Drivers Association, Inc. |
| OOS | Out-of-Service |
| PASA | Pre-Authorization Safety Audit |

## SUMMARY OF ARGUMENT

FMCSA's opposition brief promotes a recurring theme – that OOIDA ignores historical fact and longstanding international agreements (MOUs). FMCSA insists that decades-old MOUs must be honored notwithstanding the subsequent enactment of unambiguous statutory provisions that nullify relevant and conflicting terms in those MOUs.

Prior to the pilot program at issue here, (and the short-lived 2007 Demonstration Project), and with only limited exceptions, Mexican domiciled motor carriers were allowed to operate in the United States only along the U.S.-Mexico border. These Mexican motor carriers operated drayage service – essentially a local delivery service hauling trailers from the Mexican side of the border to drop-off locations in the border zone and picking up trailers bound for Mexico from the border zone. This is a valuable service because very few U.S. domiciled motor carriers have had any interest in risking their equipment by bringing it into Mexico. OOIDA provided extensive comments to FMCSA about the dangers of operating in Mexico due to drug wars, political corruption, and pervasive criminality rampant in Mexico.[1] Mexican drivers operating drayage services in the border zone using Mexican LFCs and without U.S. issued medical certificates have posed no significant problems for U.S. motor carriers or drivers –

[1] FMCSA-2011-0097-1906 at 9-13, JA___.

regardless of its lawfulness. FMCSA's pilot program represents a significant departure from this historical context.

Under the pilot program, rather than continuing to serve as a border delivery service, Mexican trucking companies have become long-haul motor carriers operating throughout the United States. FMCSA's grant of nationwide operating privileges under the pilot program represents a completely new legal environment within which the status of decades-old MOUs must be evaluated.

FMCSA does not respond directly to OOIDA's position that it lacks discretion under 49 U.S.C. §13902(a)(1) and (4) to issue operating authority to motor carriers unwilling or unable to obey all U.S. safety statutes and regulations. Pet.Br. at 17-22. Section 13902(a) precludes the waiver of statutory requirements or the conditioning of grants of operating authority on regulatory waivers, either *de facto* or *de jure*.

Granting operating privileges to Mexican drivers who have no CDLs or valid medical certificates is contrary to unambiguous statutory provisions enacted long after the MOUs governing operations in the U.S. border zones were signed. Under the pilot program *de facto* exemptions have been granted without making the proper record, thereby depriving OOIDA and other interested parties of important procedural protections. Section 6901 of Pub. L. 110-28 requires FMCSA to publish a list for public comment and an analysis of the differences

between U.S. and Mexican safety regulations at issue in the pilot program. FMCSA failed to follow those procedures. What scant information FMCSA made available was published long after the deadline for public comment had passed. The administrative record fails to demonstrate safety equivalency between Mexican and U.S. CDL, drug testing and medical certification standards. OOIDA has associational standing to challenge final agency action implicating these issues.

## ARGUMENT

### I. OOIDA HAS STANDING

OOIDA has solidly established the elements necessary for both constitutional and prudential standing. OOIDA introduced substantial evidence on the record in connection with its participation in the protracted regulatory and federal court proceedings related to FMCSA's efforts to implement cross border trucking under NAFTA. 76 Fed.Reg. 20807, 20809-20811 (April 13, 2011), JA___; 76 Fed.Reg. 40420, 40422-40423, 40432-33 (July 8, 2011), JA___. The challenged pilot program is the latest in this continuing effort.

#### A. Prudential Considerations

OOIDA is a "party aggrieved" entitled to mount this challenge to the pilot program. 28 U.S.C. § 2244. OOIDA has participated at every stage in the agency proceedings related to cross border trucking, most recently submitting comments on the proposed pilot program, the draft Environmental Assessment, and several

preauthorization safety audits for Mexican carriers.[2] OOIDA participated in the agency proceeding related to the 2007 Demonstration Project;[3] and pursued a Hobbs Act challenge to the Demonstration Project.[4] OOIDA members have independently participated in these agency proceedings.[5] OOIDA has been found to be a "party" under similar circumstances. *Owner-Operator Independent Drivers Ass'n v. FMCSA,* 656 F.3d 580, 585 (7th Cir. 2011).

OOIDA is "arguably within the zone of interests" regulated by FMCSA in connection with the pilot program. *Association of Data Processing Serv. Orgs., Inc. v. Camp,* 397 U.S. 150, 153 (1970); *International Brotherhood of Teamsters v. Peña*, 17 F.3d 1478, 1483-84 (D.C. Cir. 1994); *OOIDA v. FMCSA*, 656 F.3d at 585. A petitioner falls outside the zone of interests only if its "interests are so marginally related to or inconsistent with the purpose implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Nuclear Energy Institute, Inc. v. Environmental Protection Agency*, 373 F.3d 1251, 1279-80 (D.C. Cir. 2004). As detailed in OOIDA's opening brief, procedures to enforce the

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[2] Comments of the OOIDA, FMCSA-2011-0097-1906 (May 13, 2011), JA___; FMCSA-2011-0097-2163 (August 11, 2011), JA___; FMCSA-2011-0097-2182 (September 22, 2011), JA___; FMCSA-2011-0097-2185 (September 26, 2011), JA___; FMCSA-2011-0097-2207 (March 12, 2012), JA___.

[3] Comments of OOIDA, FMCSA-2007-28055-1521 (May 31, 2007), JA___.

[4] *Owner-Operator Independent Drivers Association, Inc. v. U.S. Dept. of Transportation, et. al*., Appeal No. 07-73987, U.S. Court of Appeals Ninth Circuit.

[5] Comments of Frank Owen, FMCSA-2011-0097-2078 (May 23, 2011), JA___; Comments of Danny Schnautz, FMCSA-2011-0097-1736 (May 12, 2011), JA___.

statutory and regulatory mandates have not been honored in connection with the pilot program, exposing OOIDA members to an increased risk to safety and unfair competition. Pet.Br. at 14-16, 35-38.

OOIDA's mission and efforts on behalf of its trucker members has been well established in its Opening Brief and before the FMCSA. Comments, FMCSA-2011-0097-1906 (JA___). The disparity in the qualifying standards between the U.S. and Mexico licensing and medical certification of drivers will introduce expose U.S. truckers, including OOIDA members, to an increased risk to their safety on the highways. The pilot program will place Mexican motor carriers and drivers in direct competition with their U.S. counterparts and will thus have a substantial impact on U.S. trucking industry participants' economic interests. Thus, the pilot program threatens OOIDA members' interests both in their safety and their pocketbooks, bringing them within the zone of interests regulated by the Program. *IBT v. Peña*, 17 F.3d at 1483.

### B. Constitutional Considerations

OOIDA members have suffered an injury that is: (1) concrete and particularized as well as actual or imminent, not conjectural or hypothetical; (2) fairly traceable to the challenged action; and (3) likely to be redressed by a favorable decision. *Mountain States Legal Foundation v. Glickman*, 92 F.3d 1228, 1232 (D.C. Cir. 1996), citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562

(1992). Where, as here, procedural rights are at issue, the test for standing is less stringent. *Lujan,* 504 U.S. at 572 n. 7; *City of Dania Beach,* 485 F.3d at 1185. Injury may be established by a showing that disregard of a procedural requirement "could impair a concrete interest." *Id.* As to causation and redressability, a petitioner must demonstrate only "a causal connection between the agency action and the alleged injury." *Id.* Thus, this Court concluded in *IBT v. Peña,* that the American drivers met the criteria for procedural standing, finding that "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." *Peña,* 17 F.3d at 1484. As noted, OOIDA members fit comfortably within the zone of interests created under 49 U.S.C. § 13902(a)(1) and (4), 49 U.S.C. § 31315(b), 49 U.S.C. §§ 31302, 31308 and 49 C.F.R. § 381.300 *et seq.* Thousands of OOIDA members face the same concrete risk of harm through "reductions in highway safety," intended by these sections. Additionally, the reduced standards for qualifying Mexican drivers to operate within the United States creates an unbalanced playing field for American drivers.

OOIDA's concern for the safety of its members is most emphatically not speculative. OOIDA submitted comments in response to FMCSA's pre-

authorization safety audits (PASAs) for two Mexican carriers.[6] OOIDA, as well as other commenters, noted that the agency had failed to make public the kind of comprehensive information on Mexican applicants required by Section 6901, and that the applicants' information collected in conjunction with the earlier Demonstration Project had not been made available. 76 Fed.Reg. 63988, 63989 (October 14, 2011). OOIDA noted that safety inspections for participating vehicles were not posted in the agency's Safety Measurement System. *Id.* Available information established that applicant Grupo-Behr had an out-of-service rate markedly higher than the national average, that the vehicle maintenance rating was 45.8 percent, and that it had 40 vehicle violations in the previous 24 months. *Id.* OOIDA discovered that Grupo-Behr would be using a 1991 vehicle which would not comply with EPA requirements for vehicles of model year 1998 or later. *Id.*[7] As a result of the comments, FMCSA rescinded its preliminary approval of Grupo-Behr, and stated that it "will not issue long-haul operating authority to Grupo-Behr until such time as [an additional] review is completed and the above noted comments are fully addressed in a subsequent Federal Register notice." 76

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[6] Comments, FMCSA-2011-0097-2182, JA___; Comments, FMCSA-2011-0097-2185, JA___.

[7] OOIDA submitted comments on FMCSA's Draft Environmental Assessment. Comments, FMCSA-2011-0097-2163. OOIDA specifically noted in its comments on Grupo-Behr, that the 1991 class 8 vehicle is sold and exported to countries that do not require the same standards for vehicles relevant to the Pilot program. Comments, FMCSA-2011-0097-2182.

Fed.Reg. at 63989.

OOIDA additionally documented the threatened injury to its members in sworn statements submitted in support of its challenge to the 2007 Demonstration Project. *OOIDA v. Dept. of Transportation,* Appeal No. 07-73987 (U.S. Court of Appeals Ninth Circuit). The pilot program challenged here is a continuation of the cross-border trucking program begun by FMCSA with the Demonstration Project in 2007. 76 Fed.Reg. at 20811. Motor carriers which participated in the Demonstration Project are given credit under the pilot program for time in that program toward calculation of the provisional operating authority period. *Id.*

The Declaration of former OOIDA Treasurer Rick Craig[8] submitted in the Demonstration Project legal challenge, sets forth his findings of numerous safety violations by Mexican carriers on U.S. soil. Driver and vehicle inspection data revealed a variety of serious safety problems of those carriers while operating in the commercial zone adjacent to the Mexico border. Mr. Craig's investigation, detailed in his declaration, revealed 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.[9]

The harm faced by OOIDA members is concrete, particularized, and

[8] JA ___. Mr. Craig's Declaration included hundreds of individual inspection reports of Mexico-domiciled motor carriers that he examined. Petitioners have not filed those documents here.

[9] Craig Declaration at ¶6, JA____.

imminent, satisfying all criteria for standing set forth by this Court in *Peña* and *City of Dania Beach.*

## II. FMCSA LACKS LEGAL AUTHORITY TO ACCEPT NON-COMPLIANCE WITH U.S. STATUTES AND REGULATIONS

### A. Commercial Drivers Licenses

FMCSA argues that 49 U.S.C. § 31302 does not require Mexican drivers to obtain U.S. CDLs, and that they are expressly forbidden from doing so under 49 C.F.R. § 383.23(b) n.1. Resp.Br. at 40-41. Neither argument withstands serious analysis.

The statutory provisions governing CDLs are straight-forward. "No individual shall operate a commercial motor vehicle without a valid commercial driver's license issued in accordance with Section 31308." 49 U.S.C. § 31302. FMCSA argues that Section 31308 merely requires the Secretary to prescribe regulations "on minimum uniform standards" and that, since Congress was aware of the 1991 MOU governing Mexican LFC, it must have understood that those LFC's were equivalent. Resp.Br. at 41-42. Of course, FMCSA offers no direct support for its contention as to what Congress "must have known." At the time these provisions were enacted in 1998, Mexican motor carriers were providing only local drayage services in the border area. There is no reason to believe that the licensing of Mexican drivers to conduct long-haul motor carrier operations beyond the border area was in the mind of Congress at that time. At that time a

moratorium was in place on the Mexican truck provisions of NAFTA. *See* 76 Fed.Reg. 20809.

Section 31302 does not say that valid driver's licenses must meet the *standards* of Section 31308. Nor does it say that a valid license may satisfy standards *equivalent* to those in Section 31308. It says that valid driver's licenses must be issued "in accordance with Section 31308." FMCSA fails to address the stringent requirements for a CDL encompassed by Section 31308(2) which mandates compliance with the standards set forth in 49 U.S.C. § 31305 requiring written and driving tests which cover safety standards for a range of conditions and requiring knowledge of FMCSA regulations governing the operation of a commercial motor vehicle. Section 31308(3) requires that both learner's permits and licenses be evidenced by tamperproof documents. Nothing in these sections prohibit a foreign-domiciled driver from obtaining a U.S. CDL. Nor do these provisions exempt Mexican drivers from the requirements of U.S. law. These individual statutory standards did not even exist in 1991 when the original MOU was concluded. Finally, nothing in the single page of legislative history cited by FMCSA (Resp.Br. at 43) establishes any reason for ignoring the plain language of Sections 31302 and 31308.

49 C.F.R. § 383.23(b)(1) does not automatically preclude Mexican drivers from obtaining valid CDLs from the states. This section establishes the conditions

under which persons may obtain a "Nonresidential CDL" from a state. Add. at 102. Residents of foreign jurisdictions for which an equivalency determination has been made are not eligible to obtain a Nonresidential CDL. But the 1991 equivalency determination made in the MOU identified in n.1 of this regulation has no current validity following enactment of Sections 31302 and 31308. Pet.Br. at 22-24. Therefore, there is no current equivalency determination that would serve as a bar to the application of a Mexico-domiciled driver's application for a state CDL under Section 383.23(b)(1).

FMCSA offers no authority to contest the well-established proposition that the unambiguous provisions of a later-enacted statute trumps conflicting provisions of earlier international agreements. *See* Pet.Br. at 23. Thus, subsequently enacted statutes dealing with CDLs and Medical Certificates trump previously enacted MOUs with conflicting provisions.

Nor does FMCSA attempt to contest the authorities cited by OOIDA for the proposition that the language of Section 6901, an appropriations rider, does not support repeal by implication. Pet.Br. at 21. Section 6901(b)(2)(B)(v) establishes a publication requirement. It authorizes nothing and repeals nothing either directly or by implication. There is no support for the proposition that Section 6901 evidences Congressional approval of excusing Mexican drivers from existing statutory provisions governing CDLs, Medical Certificates or anything else.

### B. Medical Certificates

The statutory requirements for the medical certification of drivers are direct and straight-forward. "The Secretary…shall…require each [commercial motor vehicle] operator to have a current valid medical certificate." 49 U.S.C. § 31149(c)(1)(B). "The Secretary…(3) shall accept as valid only medical certificates issued by persons on the national registry of medical examiners." *Id.* at § 31149(d)(3). "The Secretary…shall establish a Medical Review Board…" *Id.* at § 31149(a). The Secretary's decision to affirmatively authorize Mexican commercial motor vehicle operators to access our highways without a "current valid medical certificate" is a clear violation of these statutory provisions. Pet.Br. at 24-26.

FMCSA argues that the Secretary's statutory obligation under Section 31149(d)(3) becomes effective only after he creates the national registry of medical examiners. Resp.Br. at 46, citing 49 U.S.C. §31136(a)(3). But Section 31136(a) is a directive to the Secretary to prescribe regulations. It says nothing about making the Secretary's statutory obligations under Section 31149(c)(1)(B) and (d)(3) contingent upon promulgation of such regulations. Further, 49 U.S.C. §31136(d) prescribes the consequences that follow if the Secretary does not prescribe regulations. Add. at 63.

Section 31136(d) appears to anticipate the kind of foot-dragging that the Secretary has done here. If one accepts FMCSA's argument on its face, it says that

the Secretary may skirt his statutory obligations under Section 31149 by ignoring his statutory obligation to prescribe regulations under Section 31136(a). Congress did not give the Secretary the authority to do this.

The statutes on medical certificates were enacted over six and a half years ago. Pub.L. 109-59, August 10, 2005, 119 Stat 1144. The Secretary has had almost 7 years to prescribe regulations and establish a national registry of medical examiners. OOIDA raised this issue when FMCSA's Demonstration Project was before the Ninth Circuit in 2007.[10] Still, no action has been taken to honor the mandate created under Section 31149. Granting an affirmative and permanent exemption for Mexican drivers from the requirement that all operators of commercial motor vehicles have a current valid Medical Certificate flies in the face of the plainly written words of the statute.

### C. Drug Testing

In its pilot program Notice, FMCSA announced that it would be accepting Mexican drug testing rules related to "Random Testing," "Collection of Samples" and "Laboratory Testing" as being equivalent to collection procedures provided under 49 C.F.R. Parts 40 and 382. *See* 76 Fed.Reg. 20815, Table 1.

Neither in its Notice nor in its brief does FMCSA cite any legal authority to accept non-compliance with these U.S. rules. Nor does FMCSA respond to

[10] Supplemental Declaration of Paul D. Cullen Sr., Exh. 5 at 31-33, JA ____. (ECF No. 1323686).

OOIDA's argument that Part 40 drug testing rules are not among the rules for which FMCSA has authority to grant exemptions under 49 U.S.C. §§ 31315(b) & (c). Instead, FMCSA urges the Court to consider "historical fact and longstanding international agreements." Resp.Br. at 48. FMCSA argues that under a 1998 Memorandum of Understanding (MOU), Mexico has agreed to comply with same "substantive standards" and that Mexico has a drug-collection program "with protocols that are at least equivalent to U.S. protocols." Resp.Br. at 50.

FMCSA does not identify what legal authority the agency had in 1998 to enter into an MOU with Mexico that permits something other than compliance with U.S. drug testing rules. Nor does FMCSA identify what authority it has today to continue to rely upon that MOU for the purposes of the pilot program. Even if the agency did have legal authority in 1998 to enter into such an MOU, that document became obsolete when the Department of Transportation materially revised their Part 40 drug testing rules in 2001. Procedures for Transportation Workplace Drug and Alcohol Testing Programs, 65 Fed. Reg. 79462-01 (December 19, 2000). In its opening brief, OOIDA outlined many of the new 2001 rules and their purposes. Pet.Br. at 55-59. Nowhere in the administrative record or in its opposition brief is there any assertion that FMCSA has updated or incorporated these 2001 changes to Part 40 into any MOU with Mexico.

FMCSA describes Mexican drug collection standards as "equivalent" to the

"substance" of U.S. rules. Nowhere does FMCSA assert that pilot program participants in Mexico will comply with U.S. drug testing rules. Regardless of the equivalence of or meritorious effect of using Mexico's drug testing procedures, the only legal authority under which one may avoid compliance with the 49 C.F.R. Part 40 drug testing rules is under the exemption procedure found in 49 C.F.R. § 40.7. This narrowly drawn provision was established in 2001 – three years after the 1998 drug testing MOU with Mexico. Under Section 40.7, only the Secretary has the authority to grant such exemptions (65 Fed.Reg. 79462, 79483) and then, *only* under "special or exceptional circumstances, not likely to be generally applicable … that make compliance with a specific provision of this part impracticable." 49 C.F.R. § 40.7. FMCSA does not respond to OOIDA's argument that it was FMCSA, not the Secretary, that acted improperly to permit an exemption to Part 40 rules in the pilot program. FMCSA also ignored OOIDA's argument that it did not establish that these exemptions were necessary due to "exceptional circumstances…that make compliance with a specific provision of this part impracticable." Pet.Br. 34.

The administrative record does not support a finding of the narrow circumstances required of Section 40.7. Nowhere has FMCSA asserted what "exceptional circumstances" exist that require it to accept drug testing collection in Mexico in the pilot program. OOIDA does not assert, as FMCSA suggests, that

there is a rule that drug collection must be performed in a U.S. facility. But FMCSA admits that, in the 2007 Demonstration Program, the vast majority of participating motor carriers used drug testing collection facilities in the United States Resp.Br. at 49. This demonstrates that requiring pilot program participants to use collection facilities in the U.S., assuring drug testing in compliance with U.S. rules, would not be an impracticable requirement. The pilot program should be vacated because the Secretary failed to follow the procedures and standards established under 49 C.F.R. § 40.7.

## III. THE ADMINISTRATIVE RECORD FAILS TO SUPPORT FMCSA'S ORDER APPROVING THE PILOT PROGRAM

FMCSA's determination that compliance with certain of Mexico's laws would assure an equivalent level of safety as would compliance with U.S. laws was arbitrary and capricious and not supported by the administrative record. Additionally, the administrative record did not comply the requirements of Section 6901 or the requirements for exemptions under 49 U.S.C. § 31135(b) and 49 C.F.R. Part 300 *et seq*.

### A. <u>The Record Does Not Contain Disclosures and Analysis Required by Section 6901</u>

FMCSA failed to comply with the Section 6901 of Pub. L. 110-28[11] which

[11] *See U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act, 2007* Pub. L. 110-28, 121 Stat. 112 (May 25, 2007).

requires it to publish for public notice and comment prior to initiating a pilot program: 1) a list of the laws and regulations for which it will accept compliance with Mexican rules and statutes in place of compliance with U.S. laws and regulations, and 2) an analysis as to how those laws and regulations differ.

FMCSA replies for the first time that it did not need to comply with Section 6901 because "the acceptance of compliance with Mexican LFC's, medical examination, and drug test specimen collections is a part of existing U.S. laws and regulations." FMCSA articulated this position for the first time only after OOIDA's brief exposed its complete failure to comply with the provisions of Section 6901.

In its Federal Register Notices, the FMCSA acknowledged its responsibilities under Section 6901, but its disclosures were so incomplete and analysis so lacking as to make the public's opportunity to comment non-existent. In its 2011 Federal Register Notices, FMCSA broadly described its intent to accept compliance with Mexican rules in lieu of compliance with U.S. CDLs, medical certification, and drug testing requirements. But it listed no statutes and only a fraction of the regulations implicated by this announcement. OOIDA detailed many of the U.S. statutes and regulations governing motor carrier safety, from which it effectively exempted pilot program participants, but that FMCSA did not disclose. Pet.Br. at 11, 22-23, 24-26, 38-43, 48-50, & 56-57.

FMCSA's brief does not defend its failure to list these statutes and rules as required by Section 6901. FMCSA's brief points to a chart of medical qualification rules published in the docket at FMCSA-2011-0097-2148 (JA___). This chart is not only incomplete, it was not put on the docket until July 7, 2011, long after the public comment period closed on May 23. Section 6901 requires that such disclosures be made for public comment. Indeed, its publication did not take place until after final agency action was complete on June 23, 2011. *See* Jurisdictional Statement, *supra* at 1.

FMCSA was required under Section 6901 to publish for public comment an analysis of differences between the U.S. and Mexican laws being substituted for one another under the pilot program. FMCSA's analysis is, first, incomplete due to its failure to acknowledge, disclose, and analyze all of the statutes and rules implicated by the pilot program. Next, FMCSA's April 13 Notice fails because it contains nothing more than very brief summaries of Mexican rules and conclusory statements about their equivalence to U.S. rules. FMCSA's brief did not cite to any analysis in the April 13, 2011, Notice. Instead, FMCSA cited to its July 8, 2011, Notice at 76 Fed.Reg. at 40428-30, a publication that does not comply with Section 6901 because it was published long after the public comment period had closed on May 23, 2011. Resp.Br. at 53.

Both of FMCSA's 2011 Notices on these issues are inscrutable. They

consist largely of conclusory statements of equivalency. Not having published a list of the U.S. and Mexican statutes and rules involved, and not having published any of the source documents relied upon in its analysis, FMCSA denied the public the opportunity to offer comments evaluating its equivalency determinations. OOIDA does not argue, as FMCSA suggests, that FMCSA was necessarily required to provide a translation of all applicable Mexican laws. But unless all of the policy makers and decision makers involved at DOT were fluent in Spanish, they must have either availed themselves of English translations to perform their analysis, (and could have easily fulfilled part of their responsibilities under Section 6901 by their publishing them on the docket), or they relied upon something less to make their decisions. FMCSA's failure to publish the disclosures and analysis required under Section 6901 calls into question the adequacy of FMCSA's efforts to determine the safety equivalency of compliance with these Mexican safety rules and is an independent basis on which to vacate the pilot program order.

### B. FMCSA Did Not Create a Record Required for Granting Exemptions

FMCSA did not comply with the requirements for granting exemptions because, under 49 U.S.C. § 31315(b) and 49 C.F.R. §381.315, the FMCSA Administrator is required to publish for public comment certain information about the exemption being sought, including "any other in relevant information known to agency." If FMCSA had complied with this statutory requirement, then it would

have disclosed all of the information it relied upon to make its equivalency determinations. Instead of creating such a record for public review and comment, the agency's Notices consisted largely of unreviewable conclusory statements.

FMCSA does not resist OOIDA's argument that it is granting exemptions from federal motor carrier safety rules under the traditional sense of the word. It only argues that it is not granting "Exemptions" as provided under Section 31315(b). 49 C.F.R. § 381.300 defines exemption, and the rules provide how an exemption is granted. The pilot program rules at 49 C.F.R Parts 400 and 500 *et seq* contemplate the possibility of granting exemptions during a pilot program, but do not redefine that term.

To distinguish pilot programs, FMCSA suggests to the Court that waivers and exemptions are different because they are initiated by the public, and pilot programs are only initiated by FMCSA. But it overlooked 49 C.F.R. § 381.405(b) which provides, "You may request the FMCSA to initiate a pilot program." In all cases, the public may request a waiver, exemption, or pilot program, but FMCSA has final determination as to whether to grant that request.

FMCSA urges the Court to adopt the "practical conclusion" that Section 31315 provides for "three mutually exclusive mechanisms" for accepting non-compliance with certain motor carrier safety regulations. FMCSA cites no parts of the exemption or pilot program regulations that are in conflict or that are mutually

exclusive. FMCSA suggests that it would not be logical for Congress to permit a pilot program to last three years and an exemption only two years. However, pilot programs are not defined as requiring exemptions to the safety rules. It is logical for the agency to have promulgated two separate procedures for operating exemptions and pilot programs independent of one another. Two-year exemptions may always be extended when necessary or appropriate to continue a pilot program. 49 C.F.R. §381.300(b). It would also be logical to permit a pilot program with exemptions to last only two years.

The Court should remand the issue to require FMCSA to create an adequate record upon which its equivalence determinations can be reviewed.

### C. The Record Does Not Support Findings of Equivalency

FMCSA is required to ensure that the provisions of a pilot program provide for an equivalent or greater level of safety as would compliance with U.S. safety rules. *See* 49 U.S.C. § 31315(c) and 49 C.F.R. § 381.505. Here, FMCSA's findings of equivalence were arbitrary and capricious and not supported by the administrative record.

#### 1. *Commercial Drivers Licenses*

FMCSA contends that OOIDA erred in its assertion that FMCSA did not demonstrate the requisite equivalency under 49 U.S.C. § 31315(c). FMCSA answers OOIDA's demonstration of its failure to comply with statutory

requirements by offerings its very failure as an excuse – the pilot program continues to apply existing laws and regulations which have accepted the Mexican LFC as equivalent since 1991. Resp.Br. at 44-45. But that position ignores the requirements of Section 31315(c) to determine equivalence in the contemporaneous context of a pilot program. As discussed above, the 1991 determination of equivalency reflected in the MOU and 49 C.F.R. § 383.23(b) n. 1, has been voided by subsequent statutory enactment. Essentially, FMCSA argues that it need never address any present differences between the CDL and LFC since it made a determination that the CDL and LFC were equivalent. To approve such an argument would be to rule that a preexisting agency action is permanently exempted from any later enacted statutory requirement and that once an agency stakes out a position by regulation, the ability of Congress to do anything about it is somehow compromised. This is not the law. *Farrell v. United States*, 313 F.3d 1214, 1219 (9th Cir. 2002) (when a regulation conflicts with a subsequently enacted statute, the statute controls and voids the regulation); *National Family Planning v. Gonzales*, 468 F.3d 826, 829 (D.C. Cir. 2006) (a valid statute always prevails over a conflicting regulation).

FMCSA further argues that Section 350, Pub.L. No. 107-87 (requiring confirmation of the validity of individual driver's Mexican LFC) and Section 6901 have been reenacted every year since 2002 and 2007 respectively, without

instruction regarding a contemporaneous finding of equivalency with the U.S. CDL. Resp.Br. at 43. The Supreme Court has held that "there is an obvious trump to the reenactment argument, however, in the rule that 'where the law is plain subsequent reenactment does not constitute an adoption of a previous administrative construction.'" *Brown v. Gardner*, 513 U.S. 115, 120-21 (1994), citing *Mass. Trustees of Eastern Gas and Fuel Associates v. United States*, 377 U.S. 235, 241-42 (1964) (congressional reenactment has no interpretive effect where regulations clearly contradict requirements of statute).

FMCSA never addresses its failures to comply with the statutory requirement under Section 31315(c) to demonstrate that compliance with Mexican LFC requirements achieves an equivalent level of safety as compliance with U.S. CDL requirements. Pet.Br. at 38-40, 42. FMCSA does not address the principal difference between requirements for the U.S. CDL and Mexican LFC resulting from changes in U.S. law subsequent to the 1991 MOU. Today a U.S. domiciled driver's passenger vehicle violations may disqualify him from obtaining a commercial license in the first place. 49 U.S.C. §31310. This was not the case in 1991. Mexico does not examine an applicant for LFC's record while driving passenger vehicles. Further, a driver is granted a Mexican LFC on the basis of testing and his record in Mexico. Under the pilot program, this entitles the Mexican driver to drive in the U.S. until he is disqualified by his actions only on

U.S. roads. FMCSA has failed to meet the statutory requirement to show that present Mexican LFC standards are equivalent to the U.S. CDL.

### 2. *Medical Certificates*

FMCSA similarly argues that the Secretary's previous determination, that Mexican LFC holders would not be required to have a separate medical certificate "because Mexican LFC holders must pass a vigorous medical examination to obtain the license…," is entitled to deference (Resp. Br. at 47). For reasons fully set forth in (Pet.Br. at 22-24) in connection with CDLs, Section 31149's enactment in 2005 trumps the 1991 MOU.

Separate from the issue of FMCSA's unfinished rulemaking regarding medical examiners, FMCSA ignores the numerous requirements for medical examiners already established in the rules. Pet.Br. at 48-50. FMCSA had no response to OOIDA's arguments that it completely failed to analyze whether compliance with Mexico's rules would provide for the same level of safety as compliance with these rules. There is nothing in the record that would allow the public, or the Court, to compare the requirements of officials conducting driver medical examination in Mexico with those in the U.S.

Instead of performing the required safety equivalency determination, FMCSA attempts to dodge this requirement by erroneously asserting that the baseline for measuring the safety of the pilot program is compliance with Mexican

medical certification requirements themselves. Such a self-referential baseline would provide no useful data under the pilot program, and misses the point of the exercise. The purpose of a pilot program is to compare the level of safety achieved by participants in a pilot program with the baseline safety standard of compliance with the U.S. safety rules themselves. 49 C.F.R. §381.400(c). By seeking to compare the level of safety achieved by pilot program participants operating under Mexican medical qualification rules compared to a baseline of compliance with Mexican medical examinations does not serve that purpose.

### 3. *Drug Testing*

FMCSA's brief makes no assertion or argument that, for drug testing collection, the pilot program provides the same level of safety as would compliance with U.S. drug testing collection rules.

FMCSA argues first that historical evidence shows that Mexican facilities collect drug test specimens consistent with the 1998 drug testing Memorandum of Understanding. Meeting the 1998 MOU standard, however, is no indication of equivalence with the safety standards in place today. The 1998 MOU became obsolete when the Department of Transportation significantly revised its Part 40 drug testing rules in 2001. Procedures for Transportation Workplace Drug and Alcohol Testing Programs 65 Fed.Reg. 79462-01 (December 19, 2000) (effective upon dates in 2001). In its opening brief, OOIDA outlined several of the new 2001

rules and their purposes. Pet.Br. at 55-57. These amendments included setting high standards for drug testing personnel (*Id*. at 56) and supervising and disciplining drug testing personnel (*Id*. at 57 – the "Public Interest Exclusion Proceeding"). Nowhere in the administrative record or in its response brief is there any assertion that FMCSA has updated or incorporated these 2001 changes to Part 40 into any MOU with Mexico.

Furthermore, both the United States' and Mexico's actual adherence to the 1998 MOU is questionable given FMCSA's failure to disclose any data or information about activities under the MOU. Under the MOU, the countries agreed to develop and to record data and information. Pet.Br. at 58. OOIDA does not argue that the MOU required the respondents to disclose this information. OOIDA argues that if the countries adhered to the MOU, then such data and documents should be readily available and easy to publish. If the agency performed the a safety equivalency determination required of this pilot program, then such data and documents would have provided critical evidence in such an analysis. Nothing in the record identifies such evidence. FMCSA's citation to the 1998 MOU as proof of equivalence demonstrates nothing more than reliance on a set of *promises* by the two countries to meet certain standards. Promises to meet such standards are not evidence that such standards were met in the intervening years or are equivalent today.

When FMCSA does cite to observations made about Mexico's drug collection standards, that evidence demonstrated that, as of 2008, ten years into the 1998 MOU, Mexico drug testing officials were not in compliance with all U.S. drug testing standards. FMCSA quotes the 2008 Independent Panel Report that "Mexico has a drug collection program with protocols that are at least equivalent to U.S. protocols." Resp.Br. at 50. But FMCSA ignored OOIDA's citations to the Panel report of observations of the Part 40 requirements that were *not* followed by drug testing collection personnel in Mexico, including two "critical elements," that required further efforts by Mexico. Pet.Br. at 54-55. Furthermore, there is nothing in the record indicating that the Independent Panel was tasked to make the same safety equivalence determination that FMCSA is required to make in granting an exemption or in conducting a pilot program. There is nothing in the administrative record that the Panel or the agency considered, for example, the Part 40 requirements for the qualifications, supervision and discipline of drug testing collection personnel.

FMCSA makes no argument and cites to no evidence that Mexico's drug collection personnel are subject to supervisory and disciplinary provisions in 49 C.F.R. §§ 40.31& 40.33. They simply repeat the general conclusion from a 2008 independent panel report that the collectors in Mexico are "licensed medical professionals" and hope, without any analysis or comparison, that this appears to

suffice as equivalent to U.S. standards. Likewise, FMCSA dismisses the importance of their 49 C.F.R. §§ 40.361 through 40.413 rules for supervising and disciplining drug collection personnel for non-compliance with drug testing standards. FMCSA makes no analysis of what, if any, standards Mexico's drug testing personnel are held to, what kind of supervision and discipline they may be subject to, and whether such supervision and discipline bears any resemblance to the requirements for U.S. drug testing personnel under Part 40. FMCSA's failure to disclose that it would be permitting compliance with Mexican rules instead of these U.S. drug testing rules, and its failure to publish an analysis of the differences between these rules are also distinct violations of Section 6901.

Instead, FMCSA asserts broadly, and without any citation to the administrative record, that it has "significantly more ability under the pilot program" to address problems with drug testing collection and "of course" it would work with the Mexican government under the 1998 MOU to ensure its facilities are brought into compliance. If FMCSA intended to exercise any authority to ensure the same level of safety as compliance with these Part 40 safety rules, then it was required to establish such activity as part of its action under the pilot program. 49 C.F.R. § 381.505. There no mention of any such planned supervisory activity in the administrative record. There is also nothing in the record to support the assertion that FMCSA has "significantly more ability" to supervise and take

corrective action of foreign nationals, operating abroad, than it does over U.S. drug collection personnel who are directly subject to their own regulatory scheme and jurisdiction. FMCSA's assertion in a brief that it would "of course" work with Mexican officials to ensure that its facilities are brought into compliance is no substitute for the lack of administrative record establishing the equivalency of Mexico's drug testing rules with all applicable U.S. drug testing rules as required of a pilot program under 49 U.S.C. § 31315(c) and 49 C.F.R. § 381.505.

## IV. *AMICUS CURIAE* BRIEFS

For a period of time the Government of Mexico imposed retaliatory tariffs on its imports of U.S. agricultural products as compensation for the failure of the United States to honor its obligation under NAFTA to provide national treatment for Mexico-domiciled motor carriers and drivers. It is only natural for one to have sympathy for U.S. agricultural exporters who, as innocent bystanders, have been caught up in the pending controversy. But the California Agricultural Issues Forum (CAIF) attempts inappropriately to shift the burden for its problem to the Court: "If the petition for review is granted, the consequences for American agricultural interests would thus be severe." Brief for *Amicus Curiae* CAIF at 1. A better statement would be: "If the United States fails to offer Mexico-domiciled motor carriers national treatment, the consequences for American agricultural interests would be severe." The Executive Branch, not this Court, is responsible

for managing international trade disputes and protecting CAIF's members from retaliatory tariffs. This Court's sole responsibility is to determine whether agency action is supported by the record and is otherwise in accordance with the law. 5 U.S.C. §706(2).

OOIDA does not suggest that this Court must turn a blind eye to the circumstances in which the controversy before it arises. But current circumstances provide no principled way to ignore important statutory and regulatory provisions governing the domestic motor carrier industry and its drivers. Neither FMCSA, nor the Government of Mexico, nor CAIF, takes issue with the proposition that requiring compliance with all U.S. statutes and regulations would be entirely consistent with the obligations of the United States to provide national treatment under NAFTA. National treatment does not require that special treatment be given on CDLs, drug testing or driver medical certification. In its opening brief, OOIDA noted that there is not a single word in FMCSA's final order explaining why special treatment for Mexico-domiciled motor carriers is needed or what policy goals are served by this approach. Pet.Br. at 10. Neither FMCSA nor *amici* respond to this simple yet fundamental question.

While it is beyond the jurisdiction of this Court to deal directly with the dilemma faced by U.S. agriculture interests, it is well within the jurisdiction of this Court to address the concern of U.S. motor carriers and their drivers. Granting

OOIDA's Petition would give FMCSA the impetus it apparently needs to provide national treatment to Mexico-domiciled motor carriers and drivers. This would ensure that all commercial vehicles and drivers using our nation's highways operate under the same rules. It would also eliminate any future grounds for the Government of Mexico to hold U.S. agricultural interests hostage through retaliatory tariffs.

## CONCLUSION

The Petition for Review should be granted and the final order approving the pilot program vacated.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION

This reply brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(C) and Cir. R. 32 (1) in that the brief contains **6,898** words excluding those parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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## CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of March, 2012, an electronic copy of Petitioner's Reply Brief, was served via CM/ECF system to all parties of record. In addition, two copies of the Petitioner's Reply Brief will be mailed via Federal Express upon the individuals listed below:

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