ADVOCATES
FOR HIGHWAY
AND AUTO SAFETY

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Qualification of Drivers; Exemption Applications; Vision
Notice of Petitions and Intent to Grant Applications for Exemption
64 Fed. Reg. 54948, October 8, 1999

Advocates for Highway and Auto Safety (Advocates) files these comments in response to the Federal Highway Administration's (FHWA) notice of petitions and intent to grant applications for exemptions from the vision waiver standard, 49 C.F.R. § 391.41(b)(10).[1] 64 Fed. Reg. 54948 et *seq.,* October 8, 1999. Advocates does not comment on the merits of the individual applications or the specific qualifications of the 40 drivers except as necessary to exemplify problems in the quality and quantity of the information provided regarding the applications, the agency's presentation of the information to the public, and the process adopted by the agency for evaluating the petitions and for making determinations to grant the exemptions. The agency has reviewed the applications and has already made preliminary determinations to grant the requested exemptions.

More than 5,000 people are killed annually in commercial motor vehicle (CMV or truck and bus) related crashes and recent data shows that the fatality total has been increasing in the last 5 years. In addition, many thousands of motor carriers are unrated by the Office of Motor Carriers and Highway Safety and timely information about operator records is poor. A number of crashes involving motor coaches has also heightened awareness regarding motor carrier and operator safety. In light of these and other concerns about safety, Advocates opposes the policy of granting exemptions from the federal motor carrier safety regulations including the driver qualification standards. Rather than granting exemptions, the agency should focus on scientific research that will establish whether current safety standards are appropriate or exceed the level of safety required to ensure safe motor carrier operations, and on research to develop a rational basis for conducting individualized testing. Granting exemptions based on substitute criteria does not ensure that deviations from the motor carrier safety standards will provide equivalent or

[1] Although this notice was issued by FHWA the authority to carry out functions pursuant to 49 U.S.C. §§ 3 13 15 and 3 1136(e) was re-delegated to the Director of the Office of Motor Carriers by the Secretary of Transportation. See 64 Fed. Reg. 56270, 56271, Oct. 19, 1999.

750 First Street, NE Suite 901 Washington, DC 20002 Tel: 202/408-1711 Fax: 202/408-1699
World Wide Web: http://www.saferoads.org

greater levels of safety. More specifically, Advocates comments for several reasons: in order to clarify the consistency of the exemption application information provided to the public; to object to the agency's misplaced reliance on conclusions drawn from the vision waiver program; to point out an important flaw in the criteria used by the agency for granting exemptions; to underscore the procedural inadequacy of this notice and previous, similar notices; to address the agency's misinterpretation of existing law regarding the statutory standard governing exemption determinations; and, to advise the agency of a recent Supreme Court decision that directly affects the legal validity of vision exemptions.

Consistency of Information Presented to the Public

At the outset, Advocates seeks clarification regarding the information supplied by FHWA in the notice of intent. Advocates has reviewed the accompanying background information as to each of the drivers as reported by FHWA. There are a number of inconsistencies and differences in the types of information provided in the notice.[2] For example, the agency clearly believes that the number of miles driven by an applicant is an important factor in determining to grantfhe application for exemption, yet the mileage driven is reported only for 34 of the 40 applicants. If mileage driven is one of the criteria used by the agency to make its determination then the mileage should be indicated for all applicants. Moreover, the mileage varies greatly among the applicants, a number having driven more than 2 million miles while others have driven half a million miles or less. This disparity raises an issue as to how well qualified some of the applicants are especially if the agency is using the drivers in the vision waiver program as the basis for this judgment. While Advocates does not believe that data obtained from the now-defunct vision waiver program can be used for this or any other purpose (an issue addressed in greater detail below), it does appear that the drivers in that program had far more driving miles than some of the applicants considered for exemptions in this notice.

The notice also indicates whether each applicant has been involved in an accident or received a citation within the three years preceding the date of the application, another important criteria used by FHWA in determining whether to grant the application for exemption.

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[2] Table of information provided in FHWA notice listed by number of applicants:

Years Driving	Mileage	No Accident or Citation *in any vehicle*	No Accident or Citation *in CMV*	No Accident or Citation vehicle unknown	Accident in CMV	Citation in CMV
39	34	23	9	2	3	3

[3] The notice indicates the number of years of driving experience for each applicant except applicant number 3 1. No reason is stated in the notice for these exceptions,

However, the notice uses different terminology in reporting this information. According to the notice, 23 applicants did not have an accident or receive a citation *in any vehicle*, but nine other applicants were reported not to have had an accident or received a citation *in a CMV*.[4] According to the wording used in the notice it appears that the second group of applicants may have had accidents and citations in non-CMV, personal vehicles that appear on their official driving records but are not being reported by the agency to the public. While Advocates understands that an accident or citation in a personal vehicle is not a disqualifying offense, we request clarification from the agency of the different terminology used to characterize the driving records of the applicants. In addition, in eight applications the locution used is that the driver did not have a *'moving violation"* on his official record. Presumably, this is the agency's manner of indicating that the applicant had non-moving violations, but without the need for the agency to make an affirmative statement on this aspect of the applicant's record. The agency should make clear whether the variations in terminology connote differences in the records of the applicants. Advocates is concerned that the agency's notice has been written in an attempt to put the best possible appearance on each petition for exemption, through the use of similar sounding but technically distinguishable terms of art, which fail to disclose the full extent of the information contained in the driving records of the applicants.

Furthermore, after emphasizing that each of 34 drivers did not have an accident or citation in the prior 3 years, the notice explains away or downplays the accidents, citations, or both of the remaining six applicants. While we accept the apparent conclusion of the agency that each of the drivers was not "at fault" in the accidents in which they were involved, the agency presentation, indeed defense, in each case is troubling nevertheless.

First, FHWA alters its position on the importance of citations as an indication of safe driving. The agency stresses the significance of driving records that are clear of any citation with respect to the 34 drivers that have a three year record with neither an accident nor a citation. Even as to those applicants who have an accident on their record, the agency points to the lack of a citation as evidence that the applicant did not cause the crash.[5] However, for the three applicants who did receive citations the agency dismisses the importance or downplays the serious nature of the citations.

In one case, applicant No. 25, the circumstances surrounding the 'failure to obey a sign/traffic control device' are not explained. . It has been FHWA's consistent pattern, in this and past notices, to bolster the application by presenting facts and information that minimize the circumstances under which accidents occurred or citations were issued to applicants. It is,

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[4] The information provided for two applicants, numbers 13 and 23, stated that they had not had an accident or citation in the past three years but did not indicate whether this was true only in CMVs or in "any vehicle."

[5] The notice states on behalf of applicant No. 16, "no citation was issued to him[;]" on behalf of applicant No. 26, "He was not issued a citation for that accident[;]" and, on behalf of applicant No. 37, that he "was not charged with any violation in the accident."

therefore, most unusual that the agency does not provide the particulars of the offense or offer an explanation for the driver's conduct in this instance. While we hesitate to speculate about the circumstances of the violation, it is likely that, given the agency's silence with respect to the underlying event, the citation involved a serious offense such as running a red light or stop sign.

In two other instances, applicants No. 3 1 and 39, citations for speeding (two such citations on the record of the latter applicant) are brushed aside as "non-serious" since they were for driving a CMV at less than 15 miles per hour over the speed limit. This technical use of the "non-serious" designation is not satisfying coming from an agency that is charged with protecting public safety on our highways. These speeding citations could reflect driving a CMV at nearly 80 mph on a highway posted at 65 mph, or driving nearly 35 mph in a school zone posted at 20 mph. Once again, the agency has omitted any details from which the true nature of the speeding violations could be determined.

Second, from the presentations in the notice it appears that the agency has lost both perspective and objectivity in this process. Rather than making an independent determination after receiving public comment, it is evident that the agency has adopted the role of cheerleader for the applicants. This is not only clear from the assertions made by the agency on behalf of the applicants involved in accidents of record, but also from the effort to put before the public only the best possible version of events. The agency appears to be making every attempt to sanitize the record and present information only in the most favorable light in order to rationalize granting vision exemptions to applicants, even those with crashes and citations on their CMV records. It is inappropriate for an agency charged with making objective decisions regarding exemption requests, as well as with protecting the safety of the public, to use *ad hoc* rationalizations and subjective arguments in order to justify its determinations to grant the applications despite countervailing information.

In addition, in many of the FHWA recitations on behalf of applicants the agency relies on personal statements from opthalmologists or optometrists as to the applicant's ability to safely operate a commercial motor vehicle. While these specialists may be able to provide information regarding visual acuity and other aspects of visual capacity, they are not experts on the driving task and are most probably unfamiliar with the requirements for safe operation of commercial motor vehicles. This is particularly true in light of the fact that the vision standard requires better vision than any of the applicants possess. As such, the opinions of the opthalmologists, and especially the optometrists, are not persuasive and should not be relied on by the agency.

In light of the concerns presented about the quality of the data FHWA has made available to the public, as well as the manner in which the information has been presented, Advocates requests that the agency provide more specific and consistent information regarding these and previous petitions for exemption. We also seek clarification from the agency as to the importance of the differences in the information between applications and the inconsistencies in wording used to describe the prior accident and citation history of the applicants.

Misplaced Reliance on the Vision Waiver Program

The FHWA's Notice of Petitions and Intent to Grant Applications for Exemption, in concluding that the 40 drivers' petitions for exemptions should be granted, relies, in part, on the purported results obtained from the ill conceived and illegal vision waiver program. According to the agency, "[t]he 40 applicants represented here have qualifications similar to those possessed by the drivers in the waiver program." 64 Fed. Reg. 54953. The agency then goes on to assert that "we believe that we can properly apply the principle to monocular drivers because the data from the vision waiver program clearly demonstrate the driving performance of monocular drivers in the program is better than that of all CMV drivers collectively." *Id.* Advocates disagrees with this use of data collected from the now-defunct vision waiver program. The agency's conclusion *"that other monocular drivers, with qualifications similar to those required by the waiver program, can also adapt to their vision deficiency and operate safely." Id.* (emphasis added). No such conclusion, however, is tenable since the vision waiver program did not use a valid research model nor did it produce results that could legitimately be applied to any drivers other than those participating in the original vision waiver program.

Indeed, FHWA was strongly criticized by a number of independent researchers and research organizations for ignoring basic principles of scientific methodology in its conduct of the vision waiver program. In the wake of the federal court decision that invalidated the vision waiver program, *Advocates for Highway and Auto Safety v. Federal Highway Administration, 28* F. 3d 1288 (D.C. Cir. 1994), the agency admitted the inadequacy of the study methodology and design. "The FHWA recognizes that there were weaknesses in the waiver study design and believes that the waiver study has not produced, by itself, sufficient evidence upon which to develop new vision and diabetes standards." 61 Fed. Reg. 13338, 13340 (Mar. 26, 1996).[6] In fact, the data collected in the vision waiver program are worthless as scientific information and conclusions regarding the safety of any other individual driver or group of drivers who did not participate in the vision waiver program are neither credible nor scientifically valid. The agency cannot extrapolate from the experience of drivers in the vision waiver program to other vision impaired drivers who did not participate in the program. This point was made repeatedly to the agency in comments to the numerous dockets spawned by the agency's determination to grant vision waivers. It was made quite clear at the time the agency undertook to grant waivers to drivers in the vision waiver program that the data accumulated in that program could not be used to serve any other purpose. That data collected in that program has been comprehensively repudiated as a basis for drawing any conclusions about non-participant drivers. FHWA, therefore, is obligated to re-evaluate the merits of the petitions, and reconsider its preliminary determination to grant the exemption petitions, without any reliance on, or reference to, the experience of the drivers who participated in the vision waiver program.

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[6] *See also Qualification of Drivers; Vision Deficiencies; Waivers -- Notice of Final Determination and change in research plan,* 59 Fed. Reg. 59386, 59389 (Nov. 17, 1994) ("The agency believes that the observations made by the Advocates, the ATA, the IIHS and others regarding flaws in the current research method have merit").

Preliminary Determinations to Grant the Applications for Exemption

Advocates also objects to FHWA issuing this notice requesting comments only subsequent to the agency having already made "preliminary" determinations to grant the exemptions. This is not truly a fair and unbiased attempt to solicit comment and views on the application for these exemptions. Rather, like an interim final rule in which the agency has already made its decision, the agency has predetermined its view of the merits prior to soliciting and evaluating public comment on the petitions. This procedure places an undue burden on the public and the raises the evidentiary bar for those opposed to the agency's "preliminary" determination. Although the agency may claim that the determination is only an initial determination on the merits, it is evident that the agency has decided to grant such petitions and has already determined the outcome without awaiting public comment.

The procedure used by FHWA is objectionable under the requirements specified in 49 U.S.C. § 313 15, and the dictates of the Administrative Procedures Act, 5 U.S.C. § 553. The statutory language governing treatment of exemption applications states that:

> *[u]pon receipt* of an exemption request, the Secretary [FHWA] shall publish in the Federal Register a notice explaining the request that has been filed and shall give the public an opportunity to inspect the safety analysis and any other relevant information known to the Secretary and to comment on the request.

49 U.S.C. § 3 13 15(4)(A) (emphasis supplied). There is no mention that any determination or "preliminary" determination should be made by the Secretary or FHWA after receiving the request and prior to obtaining public comment.[7] The statutory section that immediately follows, which governs the granting of requests for waivers, exemptions, and pilot programs, clearly indicates that the granting of such a request is subsequent to the publication of notice and opportunity for public comment. 3 13 15(4)(B). Thus, as a matter of statutory construction, as well as procedural due process, FHWA should not undertake to make "preliminary" determinations of requests for waivers, exemptions, and pilot programs prior to notifying the public of the details of the request and soliciting and evaluating the public comment.

FHWA has argued that the its preliminary determination "is much more akin to a notice or proposed rulemaking" than an interim final rule. Notice of Final Disposition, DOT Docket No. FHWA-99-5578, 64 Fed. Reg. 5 1568, 5 1572, Sept. 23, 1999. This characterization is inaccurate and not applicable to exemption petitions. The appropriate procedural approach is for FHWA, after screening applications to ensure that they are complete, to publish such petitions in the *Federal Register* and request public comment without having made a prior determination

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[7] Indeed, the words "[u]pon receipt" imply that publication of a notice in the Federal Register, accompanied by the mandated opportunity for public comment, should occur promptly after receipt of the exemption application and does not allow for a review of the request on the merits.

(whether preliminary or otherwise) as to the merits of the application.* The agency is not given the leeway to conduct research, investigate issues and then draft a proposed rule. The statute requires that exemption requests must be published "upon receipt," before the determination to grant or deny has been made.

The clear meaning of the statute is that all petitions for exemptions are published along with any factual information submitted by the requestor or known to the Secretary. Only after the facts are made known to the public and the public has an opportunity to comment, does the agency then determine whether to grant or deny the petition. That is why the statute has three separate subdivisions governing how the agency is to proceed.. The first requires publication "[u]pon receipt," the second addresses the subsequent granting of a request, and the third requests that are denied. See 49 U.S.C. (B)(4) subsecs (A) through (C). Thus, FHWA is entirely incorrect in stating that "[i]t is only when the agency proposes to grant a petition that it publishes the proposal." 64 Fed. Reg. 5 1572 col. 1.

Nothing in the statute indicates that the agency, on behalf of the Secretary, is to delay publication of the petition so that the agency has time to determine whether to grant the petition and to fashion arguments in support of it. While the public is entitled to know whether the agency intends to grant or deny a exemption application, that agency should engage in that process only after public comment has been solicited and received, so that the agency can address concerns raised in the public comment with an open mind. Agency personnel in charge of determining whether to grant or deny requests for waivers, exemptions, and pilot programs should not pre-determine the outcome before evaluating public comment on the request. Rather than requiring the agency to conduct a "plebiscite" for each application, as FHWA asserts (64 Fed. Reg. 5 1572), the process urged on the agency by Advocates would only require that the agency follow applicable statutory procedures in publishing and reviewing exemption applications, and that the agency abide by legal requirements and concerns for fundamental fairness and due process by refraining from making any judgment as to the merits of a petition seeking an exemption until after the public has been accorded the required notice and opportunity for comment.

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8 Another modal administration within the Department of Transportation provides a shining example of how this procedure can be conducted in a proper and fair manner. The National Highway Traffic Safety Administration (NHTSA) frequently receives petitions requesting exemption, pursuant to 49 U.S.C. § 30118(d), from the requirements for notification and remedy of defects and noncompliance under 49 U.S.C. §§ 30118 & 30120. NHTSA invariably publishes the application for a decision of inconsequential noncompliance and requests public comment without making an initial or preliminary determination of the merits of the application. For example, in a recent application for a decision of inconsequential noncompliance, NHTSA stated that "[t]his notice of receipt of an application is published under 49 U.S.C. 30118 and 30120 *and does not represent any agency decision or other exercise ofjudgment concerning the merits of the application." 64* Fed. Reg. 27032 col. 2 (May 18, 1999) (emphasis supplied). This typifies NHTSA's treatment of the plethora of exemption applications handled by the agency annually, and provides a fair , unbiased means of making determinations on the merits of each application.

Interpretation of Statutory Standard for Granting Exemptions

Although it is not argued by FHWA in this particular notice, the agency has asserted in several other regulatory notices that it has more flexibility to grant exemptions under current law than it did to grant exemptions under prior law. See, e.g., 64 Fed. Reg. 27025 (May 18, 1999); 63 Fed. Reg. 67600 (Dec. 8, 1998).[9] Advocates disagrees with the agency's view on this issue and its interpretation of the controlling law.

The current law on exemptions permits granting an exemption if that exemption "would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption." 49 U.S.C. § 3 13 15(b)(1). FHWA believes that Congress "changed the statutory standard to give the agency greater discretion to consider exemptions." 64 Fed. Reg. 27025 (1999). Indeed, the agency interprets the term "equivalent" to allow for a "more equitable resolution of such matters." *Id.* There is no basis in fact or law for this view.

The level of safety required in order for the Secretary of Transportation to grant waivers and exemptions is governed by the statutory language contained in section 4007 of the Transportation Equity Act for the 21st Century (TEA-21), Pub. L. 105- 178, 112 Stat. 107 (1998) (codified at 49 U.S.C. § 31315). The statute requires that the Secretary, prior to issuing waivers and exemptions, determine whether granting a waiver or exemption "is likely to achieve a level of safety *that is equivalent to or greater than,* the level of safety that would have been achieved" absent the waiver or exemption. 49 U.S.C. § 31315 (a) & (b)(l) (emphasis added).[10] By its express terms, the law requires the Secretary, based on evidence in the record, to find that any waiver or exemption will not reduce safety, but will achieve a safety result that is equal to or greater than the level of safety that would have been experienced had the waiver or exemption not been granted.

This statutory language of equivalent or greater safety sets a very high standard that is no less stringent than the previous statutory standard which required that waivers be consistent with safety. See 49 U.S.C. § 31136(e) (1997). The standard of safety in section 31515 (a) & (b) is not a lower or more flexible standard than the prior legislative mandate that waivers must be "consistent with . . . the safe operation of commercial motor vehicles."[11] The express wording of section 3 13 15 requires a degree or level of safety that is at least equal to the degree or level of safety that existed prior to the granting of the waiver or exemption, *i.e.,* no reduction in safety is

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[9] See comments filed by Advocates for Highway and Auto Safety to DOT Docket Nos FHWA-99-5473 (filed June 17, 1999), and FHWA-98-4 145 (filed Feb. 8, 1999), respectively.

[10] In order to grant a waiver the Secretary must also find that it is in the public interest. 49 U.S.C. § 313 15(a).

[11] Indeed, the language of the prior waiver provision, that a waiver must be "consistent with the public interest and the safe operation of commercial motor vehicles," (49 U.S.C. § 3 1136(e) (1997)), provides a less strict safety standard than the current statutory terminology.

countenanced. Any attempt to gloss the standard of safety established in section 3 13 15 as a less demanding safety standard than the prior waiver standard is a misinterpretation of the unambiguously clear statutory language.

The FHWA relies on legislative history addressing section 3 13 15 asserting that "Congress changed the statutory standard to give the agency greater discretion to consider exemptions." 64 Fed. Reg. 27025. According to the agency's reasoning, requiring that an "'equivalent' level of safety be achieved by the exemption, [ ] would allow for more equitable resolution of such matters, while ensuring safety standards are maintained." *Id., citing* H.R. Conf. Rep. No. 105-550, 105th Cong., 2d Sess. 489 (1998). This legislative history asserts that "[t]o deal with the [court's] decision, this section substitutes the term "equivalent" to describe a reasonable expectation that safety will not be compromised." *Id.* Neither these statements by the agency, nor the cited legislative history, support the agency's interpretation that section 3 13 15 reflects a lower or more flexible standard.

The plain meaning of the statutory language is unambiguous. The statutory standard, that an "exemption would likely *achieve a level of safety that is equivalent to, or greater than, the level of safety that would be obtained in the absence of the waiver,"* requires no elucidation. 3 13 15(b)(1) (emphasis added). The term 'equivalent' indicates a condition which is "equal in force, amount, or value" and is "corresponding or virtually identical esp. in effect or function."[12] Nothing whatever in the use of the word 'equivalent' in section 3 13 15, as a substitute for the expression 'consistent with' used in the prior statutory provision, can be distorted to connote or imply any increased flexibility, diminution, or other abridgement of the enacted safety standard for granting and administering waivers and exemptions. Where Congress has addressed the issue in clear and unambiguous terms that ends the inquiry. *See Chevron U.S.A., Inc., v. N.R.D. C., 467* U.S. 837 (1984).

Even if the standard set forth in section 3 13 15 were not clear and unambiguous, reliance on the legislative history in this instance is unavailing. First, the statute makes no reference to providing a more flexible safety standard than had existed in the past. While "legislative history may give meaning to ambiguous statutory provisions, courts have no authority to *enforce* alleged principles gleaned solely from legislative history that has no statutory reference point." *International Brotherhood of Electrical Workers, Local Union No. 474, AFL-CIO, v. N.L.R.B.,* 8 14 F.2d 697, 699 (D.C. Cir. 1987) (emphasis in original). Second, the cited legislative history relied on by FHWA in its interpretation of the statute is taken from the Senate amendment to the original House bill, but was not restated in the Conference substitute adopted with enactment of TEA-21 and, as such, is not the applicable legislative history accompanying the law.[13] See H.R.

[12] See Webster's New Collegiate Dictionary (197 1).

[13] It is evident, from an examination of the wording of the Senate amendment when compared with the provision enacted by Congress, that the report language which accompanied the Senate amendment is not applicable

(continued.. .)

Conf. Rep. 105-550 at 490-9 1. Indeed, the Conference legislative history makes no mention of granting greater discretion to the Secretary to grant waivers and exemptions nor does it reflect any intent to overturn a judicial decision. Therefore, the legislative history relied on by the agency is not authoritative. To the extent that the legislative history openly conflicts with and contradicts the will and purpose of Congress as clearly expressed in the statute, the legislative history carries no legal weight or analytic value at all. Finally, according to the legislative history relied on by the agency for its reasoning, the term 'equivalent' was selected by Congress for exactly the contrary purpose espoused by the agency, *viz.*, to provide "a reasonable expectation *that safety will not be compromised."* H.R. Conf. Rep. 105-550 at 489 (emphasis added).[14] Thus, reliance on the appropriate conference report language actually bolsters the clear and unambiguous meaning of the statute that no decrease in safety is contemplated.

Supreme Court Decision on Vision Waivers

Advocates for Highway and Auto Safety (Advocates) filed comments on the above-captioned docket with the Federal Highway Administration (FHWA) on June 16, 1999. Those comments raised an issue regarding the agency's reliance on conclusions drawn from the defunct Vision Waiver Program. In our comments, Advocates requested the agency to "re-evaluate the merits of the petitions, and reconsider its preliminary determination to grant the exemption petitions, without any reliance on, or references to, the experience of the drivers who participated in the vision waiver program." Comments of Advocates to DOT Docket No. FHWA-99-5578, p. 2, June 16, 1999.

Since Advocates filed its comments, the U.S. Supreme Court rendered its decision in *Albertsons, Inc. v. Kirkingburg,* No. 98-591 (June 23, 1999), a case which is directly relevant to the issue raised in our prior comments to this docket, and which is highly instructive with regard to the issuance of waivers and exemptions by FHWA.[15]

In *Albertsons,* the Supreme Court specifically rejected vision waivers as a regulatory modification of the vision standard in the Federal Motor Carrier Safety Regulations (FMCSRs).

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[13] (...continued)
to section 3 13 15. The wording of the Senate amendment did not extend the scope of an exemption to applications by individuals, but was "limited to a class of persons, vehicles or circumstances." H.R. Conf. Rep. 105-550 at 490. The statute as enacted, however, allows for exemptions to be granted to "a person or a class of persons." 49 U.S.C. § 3 13 15(b)(1). Thus, Congress did not adopt the Senate amendment -- and cannot be said to have adopted, by its silence, a gloss contained in legislative report language accompanying an amendment that was not enacted into law.

[14] In fact, the rigorous controls of section 3 13 15 are a paradigm shift in the level of procedural adequacy required to be observed by FHWA and the Office of Motor Carriers and Highway Safety in reviewing the legitimacy of and for awarding waivers and exemptions.

[15] Advocates realizes that waivers and exemptions issued by the Federal Highway Administration are based on analyses and recommendations developed by the Office of Motor Carriers and Highway Safety.

"[W]e think it was error to read the regulations establishing the waiver program as modifying the content of the basic visual acuity standard. . . ." *Albertsons, slip op.* at 15. The Court refuted the view that "the regulatory provisions for the waiver program had to be treated as being on par with the basic visual acuity regulation, as if the general rule [vision standard] had been modified by some different safety standard made applicable by grant of a waiver." *Id.* The Court reached this opinion based on the FHWA's own assertion that it had no facts on which to base a revised visual acuity standard either before *or after* the vision waiver program. "The FHWA in fact made it clear that it had no evidentiary basis for concluding that the pre-existing standards could be lowered consistently with public safety." *Id.* at 19. According to the Court, "there was not only no change in the unconditional acuity standards, but no indication even that the FHWA then had a basis in fact to believe anything more lenient would be consistent with public safety as a general matter." *Id.*

In making these statements and reaching its conclusion, the Supreme Court relied heavily on the administrative record compiled and the decision of the Court of Appeals rendered in *Advocatesfor Highway Safety v. FHWA,* 28 F.3d 1288 (CADC 1994). The Supreme Court summed up the agency's basis for the Vision Waiver Program as follows:

> the regulatory record made it plain that the waiver regulation did not rest on any final, factual conclusion that the waiver scheme would be conducive to public safety in the manner of the general acuity standards and did not purport to modify the substantive content of the general acuity regulation in any way. The waiver program *was simply an experiment with safety,* however well intended, resting on a hypothesis whose confirmation or refutation in practice would provide a factual basis for reconsidering the existing standards.

Albertsons, slip op. at 20 (emphasis added) (citation omitted).

Indeed, although the *Advocates* case was not before it, the Supreme Court went out of its way to endorse the decision reached by the Court of Appeals, noting that is was "hardly surprising that . . . the waiver regulations were struck down for failure of the FHWA to support its formulaic finding of consistency with public safety. *See Advocates for Highway Safety v. FHWA,* 28 F.3d 1288, 1289 (CADC 1994)." *Id.,* at note 21. The Court went on to emphasize that the agency has tried to have things both ways.

> It has said publicly, based on reviews of the data collected from the waiver program itself, that the drivers who obtained such waivers have performed better as a class than those who satisfied the regulation. [Citations omitted]. It has also noted that its medical panel has recommended 'leaving the visual acuity standard unchanged,' see 64 Fed. Reg. 165 18 (1999) [citations omitted], a recommendation which the FHWA has concluded supports its 'view that the present standard is reasonable and necessary as a general standard to ensure highway safety.' 64 Fed. Reg. 165 18 (1999).

Id.

The Supreme Court concluded that employers do not have the burden of defending their reliance on existing safety standards in the FMCSRs in the face of FHWA waivers. According to the Court, were it otherwise,

> [t]he employer would be required in effect to justify *de novo* an existing and otherwise applicable safety regulation issued by the Government itself. The employer would be required on a case-by-case basis to reinvent the Government's own wheel when the Government merely had begun an experiment to provide data to consider changing the underlying specifications.

Id. at 22.

It is clear from the Supreme Court's opinion that whatever validity the Vision Waiver Program may have had (and Advocates does not concede that it ever had any scientific validity), was based on the premise of collecting empirical data in order to revise the visual acuity standard. This was the announced purpose of the program and the basis for data collection methodology. The Vision Waiver Program was not conceived or designed to serve any other legitimate scientific purpose. Since the program was subsequently discontinued by court order, and since the agency has acknowledged that the data collected is not sufficient to revise the existing standard, there is no appropriate use to which the data can properly be applied. Advocates does not accept, and FHWA has not proven, that data collected about drivers who voluntarily participated in the Vision Waiver Program can be used as the basis for granting exemptions (waivers) to drivers who did not participate in that program. There is no credible basis for making such an extrapolation, particularly when the FHWA claims it is making individual assessments of each applicant. The Supreme Court's discussion in *Albertsons* supports Advocates' view that the agency cannot fairly and credibly rely on data collected in the discredited Vision Waiver Program. The Supreme Court was eloquent in its conclusion that the vision waivers were not a credible substitute for the underlying standard. Since the data collected in the program cannot be used for its intended purpose to rewrite the vision standard, it cannot be used for any other legal, regulatory, or policy purpose including to justify the issuance of additional exemptions from the vision standard.

In our previous comments to this docket, Advocates did not raise the issue of FHWA's persistent invocation of the Americans with Disabilities Act (ADA) as the rationale for the Vision Waiver Program and the subsequent issuance of vision waivers, now referred to as exemptions. During the Vision Waiver Program litigation and even after the Court of Appeals nullified that program, the agency steadfastly maintained that the issuance of vision waivers was required in order to comply with the ADA. Advocates has long contended that the ADA does not override existing safety standards contained in the FMCSRs, and that the issuance of waivers is not a viable means of addressing requirements in the vision standard and other medical and physical qualifications for commercial drivers that are purported to be overly stringent. The appropriate procedure is to revise the standards based on relevant and sufficient medical and

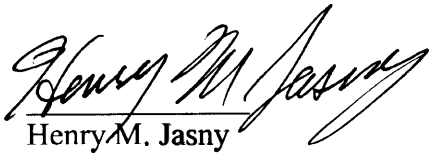
safety information. In *Albertsons,* the Supreme Court unanimously agreed with this position which has long been held by Advocates.

In reaching its decision, the Supreme Court discussed the legislative history of the ADA. As Advocates previously contended, the Court concluded that "[w]hen Congress, enacted the ADA, it recognized that federal safety rules would limit application of the ADA as a matter of law." *Albertsons, slip op.* at 18. The Court cited the understanding of Congress that " 'a person with a disability applying for or currently holding a job subject to [DOT standards for drivers] must be able to satisfy these physical qualification standards in order to be considered a qualified individual with a disability under Title I of the legislation.' S. Rep. No. 101-l 16, pp. 27-28 (1998) [sic]." *Id.* The relevant Congressional committees did request that the Secretary of Transportation conduct a thorough review of knowledge about disabilities and make required changes within 2 years of enactment of the ADA. While FHWA and OMC failed to conduct such a review of the FMCSRs and medical qualifications in general, a review of the vision standard found no empirical evidence on which to base any change in that standard. Thus, the waiver program did not fulfill the Congressional request to make necessary changes to the standards following a review because "the regulations establishing the vision waiver program did not modify the general visual acuity standards." *Albertsons, slip op.* at 18. It cannot be contended that Congress, in enacting the ADA, sought to undermine existing safety standards on an *ad hoc* basis by permitting the employment of persons who do not meet the extant safety requirements mandated by the FHWA.[16] As a result, the Supreme Court concluded that it

> is simply not credible that Congress enacted the ADA (before there was any waiver program) with the understanding that employers choosing to respect the Government's sole substantive visual acuity regulation in the face of an experimental waiver might be burdened with an obligation to defend the regulation's application according to its own terms.

Id. at 22.

In light of the decision in *Albertsons,* FHWA and OMC should re-evaluate the significance of the lower court decision in *Rauenhorst v. U.S. DOT, FHWA, 95* F. 3d 715 (1996), and reconsider the agency's policy of issuing experimental vision exemptions based on non-visual criteria.



Henry M. Jasny
General Counsel

[16] Vision waivers or exemptions are not appropriate methods of providing a reasonable accommodation for persons who do not meet the requirements of the underlying safety standard.