CONSOLIDATED CASE NOS. 18-73488, 19-70323, 19-70329, 19-70413

in the

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, ET AL.,

Petitioners,

v.

FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION, ET AL.,

Respondents.

On Petitions for Review of
Federal Motor Carrier Safety Administration
Determination of Preemption
Docket No. FMCSA-2018-0304

BRIEF OF INTERVENOR IN SUPPORT OF PETITIONERS

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a private citizen who has not issued debt securities to the public

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I. Jurisdiction

The court's jurisdiction is as stated in the Petitioners' briefs except as challenged in Part VII-E below.

II. Statement of Issues

1. Whether the agency's failure to consider its impact on driver health makes the Determination of Preemption, 83 F.R. 67470-80, ER1-11, arbitrary and capricious;

2. Whether the use of tracking devices to enforce a preemption of health and safety laws triggers the protections of the Due Process Clause;

3. Whether a person lacking professional experience required under The Motor Carrier Safety Improvement Act has authority to preempt state law;

4. Whether This Court's jurisdiction is limited to the design and construction of commercial motor vehicles.

III. Statement of the Case

In 2004, the DC Circuit Court of Appeals vacated the Federal Motor Carrier Safety Administration's truckers' hours of service rules promulgated under 49 C.F.R. 395, A14, because the agency failed to consider their impact on driver health. ER22. For instance, bus drivers (unable to stop for breaks) were found to have an increased risk of bladder cancer, while men able to drink additional fluids had

reduced risk.[1]

> "It may be the case, for example, that driving for extended periods of time and sleep deprivation cause drivers long-term back problems, or harm drivers' immune systems. The agency may of course think that these and other effects on drivers are not problematic…but if so it was incumbent on it to say so in the rule and to explain why." *Public Citizen v. FMCSA,* 374 F.3d 1209, 1217 (D.C. Cir. 2004)

These vacated rules did not pose a problem until the 242nd anniversary of the Boston Tea Party on December 16th 2015. On that date, the agency re-promulgated (with minor changes) an electronic logging devices rule vacated by the 7th Circuit because the agency failed to ensure that electronic monitoring would not be used to harass drivers. 49 C.F.R. § 395.8 et seq., 80 F.R. 78383. See *Owner-Operator Independent Drivers Ass'n v. FMCSA*, 656 F.3d 580 (7th Cir. 2011).

Although the agency claimed that the purpose of monitoring citizens with tracking devices was to improve safety, electronic monitoring resulted in the greatest one year increase in truck fatalities since 2002. As shown in Intervenor's comments before the agency, C1, 28% more truckers were killed on the job in 2017 than in 2014 and 68% more than in 2009 (before tracking devices were required) because they forced truckers to violate speed limits whenever delayed by weather or traffic, racing against the clock to arrive at a safe pace to park before running out of driving

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[1] R.C. Reulen et al., "A meta-analysis on the association between bladder cancer and occupation"; M. Brinkman, M.P. Zeegers, "Nutrition, total fluid, and bladder cancer," *Scandinavian Journal of Urology and Nephrology*, Sept. 2008

time; then fall asleep immediately at a time determined by a computer. *See also* ER21. Other than hypnotism, the only known method for human beings to sleep on command is to take powerful sedatives or drink dangerous amounts of alcohol. It is no surprise that alcohol related truck fatalities jumped sixty percent in just one year when this politically motivated rule went into effect in 2017—harming both highway safety and driver health.[2] Therefore, the agency's claim that Section 395 is a "safety regulation" pursuant to 49 U.S.C. § 31136, ER4, is contradicted by the statistical evidence. To be considered a safety regulation, it must obey a Congressional command: "At a minimum, the regulations shall ensure that…the operation of commercial motor vehicles does not have a deleterious effect on the physical condition of the operators." 49 U.S.C. § 31136(a)(4). A7. As the DC Circuit ruled, "Its failure to do so, standing alone, requires us to vacate the entire rule as arbitrary and capricious." *Public Citizen* at 1217. A6.

It is well known that the Tea Party Movement began with a nationwide trucker strike on the 200th anniversary of the Boston Tea Party in 1973.[3] Because participating in a political protest would be considered a type of rest break under California law, the chart on C1 proves that the true purpose of preempting California Meal and Rest Break Rules, A15-44, is not to improve safety, but rather to allow

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[2] NHTSA, *2017 Fatal Motor Vehicle Crashes: Overview*, p.5

[3] Mike Parkhurst, *Trucker Wars*, Hollywood Continental Films, 2013

any trucker who dares to protest unsafe working conditions to be easily identified and fired. *See* 49 C.F.R. § 390.36(b)(2)("Nothing in…this section shall…prevent a motor carrier from using technology…to monitor productivity of a driver"). B5. It is well known that strikes reduce productivity. Citizens monitored by tracking devices who are forbidden by their employers to stop to rest are unable "peaceably to assemble" as guaranteed by the First Amendment. The real reason for re-promulgating the vacated rule on the 242nd anniversary of the Boston Tea Party and then preempting California's meal and rest break laws (with those of Colorado, Connecticut, Delaware, Illinois, Kentucky, Maine, Maryland, Massachusetts, Minnesota, Nebraska, Nevada, New Hampshire, New York, North Dakota, Oregon, Rhode Island, Tennessee, Vermont, Washington, and West Virginia soon to follow per Note 13 of the Determination, ER10) is to silence the protests of three million citizens unprotected by collective bargaining agreements—not to improve safety.

A. Agency Animus

On April 26th 2006, four students and an employee of Taylor University, a small Evangelical Christian college with only three thousand students, were killed by an overworked trucker who allegedly fell asleep at the wheel near Fort Wayne Indiana. Due to a mix-up by the coroner, a student so horrifically crushed she was unrecognizable was buried in the wrong grave while another was nursed back to

health by the dead girl's parents.[4] Though the mix-up had nothing whatsoever to do with motor carrier safety, three weeks later in response to sensational media outrage, on May 16th 2006, President Bush appointed an alumnus of Taylor University to lead the Federal Motor Carrier Safety Administration in violation of the *Motor Carrier Safety Improvement Act of 1999,* which required him to appoint "an individual with professional experience in motor carrier safety" to head the agency. 49 U.S.C. § 113(c). B1.

Though John H. Hill's performance as a law enforcement officer was impeccable prior to his joining the Bush Administration, he never met the minimum standard for employment in the motor carrier safety profession—an above average safety record driving 18-wheelers. Nor did he publish anything demonstrating expertise designing trucks or testing safety devices as any reasonable person would expect of someone with professional experience in motor carrier safety. As head of Indiana's Motor Carrier Enforcement Division, he regularly fined truckers who equipped their trucks with modern safety features that violated size and weight regulations. As victims of presidential animus voted with their feet to escape dangerous working conditions, large truckload carriers replaced 117% of their

[4] www.taylor.edu/news/taylor-university-observance-of-2006-crash-is-next-week

drivers the following year.[5] When they realized that "two-week wonders" or "steering wheel holders," as the scabs were called, could not repair or maintain their vehicles like truckers do, states set up a system of searches without search warrants to detect breakdowns—effectively banning research and development because no provision was made to protect truckers' trade secrets. Without an army to enforce its Order, the DC Circuit could only re-vacate the previously vacated rules when they were re-promulgated (with minor changes) in violation of the *Administrative Procedures Act*. See *OOIDA v. FMCSA*, 494 F.3d 188 (D.C. Cir. 2007).

When Hill chose not to legalize modern safety devices found on cars such as roll bars, crash absorbent bumpers, and under-ride beams, I filed a petition under 49 U.S.C. 30162, B1, requiring the Secretary of Transportation to explain the reason for the ban within 120 days or to begin a rulemaking to replace the obsolete vehicle size and weight limits with cargo size and weight limits that did not ban modern safety features. Rather than admit to criminal negligence, the Secretary and the Federal Highway Administrator both resigned. When Hill stopped the head of the Highway Administration's Size and Weight Division from responding by promoting him to head FMCSA's Enforcement Division, the House Transportation Committee summoned Hill to appear on the day the response to my petition was due.

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[5] www.truckinginfo.com/news/news-print.asp?news_id=76627

Due to the medical aspects of the case, on July 10th 2007, the day before the Secretary's response was due, former Surgeon General Richard Carmona testified before the Committee on Oversight and Government Reform, "[a]nything that doesn't fit into the political appointee's ideological, theological, or political agenda is ignored, marginalized, or simply buried." The following day, Hill claimed before Congress that "2005 enjoyed one of the lowest large-truck fatality rates in 30 years" when in fact the number of truckers killed on the job increased 17% from 2002 to 2005 and the number of pedestrians and bicyclists killed by trucks increased 29%—a 14 year high. C1. Truckers killed in daytime multi-vehicle crashes doubled![6]

B. The Cover Up

On May 30th 2006, one month after appointing Hill, President Bush appointed his Assistant,[7] a member of the White House staff responsible for ensuring Hill possessed the statutory qualifications, to sit on the United States Court of Appeals for the District of Columbia Circuit. When I filed litigation to enforce my petition under Section 30162(d), B1, the President's former Assistant transferred my case (DC-07-1327) to District Court even though the *Hobbs Act* requires courts of Appeals to review all cases pursuant to Section 31136(a). 28 U.S.C. § 2342(3)(A) ("all rules, regulations, or final orders of…the Secretary of Transportation issued

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[6] Fatality Analysis Reporting System, NHTSA, www-fars.nhtsa.dot.gov

[7] www.cadc.uscourts.gov/internet/home.nsf/Content/VL+-+Judge+-+BMK

pursuant to…Subchapter III of Chapter 311"). After my case was predictably dismissed, the President's former Assistant denied my appeal (DC-09-5280) even though The Supreme Court ruled in *Caperton v. Massey,* 556 U. S. 868 (2009), that "no man can be a judge in his own case" and "no man is permitted to try cases where he has an interest in the outcome" (*In re Murchison*, 349 U. S. 133, 136). *See also* 28 U.S.C. 47 (prohibiting judges from reviewing appeals of their own decisions).

In consolation, a co-Chairman of the Senate Commerce Committee who confirmed Hill without a hearing was convicted of failing to report gifts (USA v. Stevens, DDC-08-0231(10/27/08)(my 49th birthday); but charges were abruptly dropped after I sent the FBI a complaint alleging that a dozen truckers killed in Texas had a greater than fifty-fifty chance of being victims of wrongful death.[8] The chief of the station that processed my complaint resigned from the FBI two months later. Like the Surgeon General, Hill blew the whistle upon leaving office claiming, "I thought I would have a lot of say in truck safety in this country [but] political people tell the appointed people what they're going to do."[9]

C. The California Rules

Tractor trailer occupant fatalities in California fell 60% between 2002 and

[8] www.truckingvideo.com/litigation/complaint.pdf
[9] www.truckinginfo.com/news/news-detail.asp?news_id=73580

2010 when a California court ruled that truckers had to receive meal and rest breaks. C2. *Cicairos v. Summit Logistics, Inc*., 133 Cal App.4th 949 (2006). I demanded and obtained a settlement agreement in 2009 to enforce the DC Circuit's orders and implement the California rules nationwide when the Department of Justice refused to defend the agency (*Public Citizen v. FMCSA,* DC-09-1094). However, within hours of reaching our agreement and before it was announced publicly, the Senate Commerce Committee confirmed Anne Ferro, President of the Maryland Motor Truck Association, as President Obama's Federal Motor Carrier Safety Administrator.

Like Hill, Ferro did not meet the minimum standard for employment in the motor carrier safety profession—an above average safety record driving eighteen-wheelers. Nor did she demonstrate experience designing trucks or testing safety devices as required under Section 113(c). B1. Blowing the whistle, Hill claimed, "I can assure you that Anne Ferro is getting marching orders."[9] His allegation was not without support. According to the University of Michigan Transportation Research Institute, Maryland reported only one truck crash after Ferro took over,[10] compared to 114 crashes per month when Hill ran the agency. Also, the National Highway Traffic Safety Administration reported that trucks drove one-third more miles under

[10] csa.fmcsa.dot.gov/Documents/Evaluation-of-the-CSA-Op-Model-Test.pdf

Ferro[11] than under Hill.[12] Obviously, if crashes are under-reported and miles driven are exaggerated, an administrator with no apparent qualifications can appear to improve safety. Defying both court orders, Ferro re-promulgated the twice vacated rules with changes that the Inspector General of the Department of Transportation later determined were insignificant.[13]

In response, I circulated draft legislation proposing an automatic system[14] with rules similar to Section 11090 of the California Labor Code. C4. Congress enacted this as the *Commercial Motor Vehicle Safety Enhancement Act of 2012*—requiring the agency to equip trucks with electronic logging devices "capable of recording a driver's hours of service and duty status accurately and automatically," 49 U.S.C. § 31137(f)(1)(A)—removing language permitting the devices to "be used to monitor productivity of the operators"(31137(a)-superceded). Significantly, the agency failed to redact Section 390.36(b)(2) allowing carriers "to monitor productivity [or strike participation] of a driver." B5.

D. Judicial Corruption

When we filed suit to enforce our settlement agreement, President Bush's former Assistant ordered us to edit our briefs to half the length of those of our

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[11] www-nrd.nhtsa.dot.gov/Pubs/811628.pdf
[12] www-nrd.nhtsa.dot.gov/Pubs/811158.pdf
[13] www.oig.dot.gov/library-item/35549
[14] www.truckingvideo.com/hos.htm

employers—removing lengthy arguments of standing. When I accused the court of bias (DC-12-1092, Doc. 1381410, 6/30/2012), he was replaced by the former Legal Affairs Secretary of California Governor Pete Wilson, who ruled that truckers like myself represented by the former Ralph Nader organization Public Citizen lacked standing to challenge the agency's rules despite having won the two previous cases. *American Trucking Ass'ns v. FMCSA*, 724 F.3d 243, 249 n.7 (D.C. Cir. 2013) ("Trescott offers nary an argument in his briefs as to why his lobbying activities would establish standing. For this reason, we need not reach the merits of his arguments.")(Cert. denied, US-13-509, January 13th 2014). Rather than be impeached for the resulting increase in fatalities, C1, ER21, this judge was allowed to retire and keep her pension, but was not given senior status.

Because only one DC Circuit judge could be sued on grounds of bad faith under 42 U.S.C. 1986, the odds of President Bush's former Assistant being randomly assigned to three consecutive truck safety cases were less than one percent. I therefore filed complaints of judicial misconduct (DC-14-90026, DC-14-90027) alleging that it was 99% certain that the former assistants of politicians were assigned to our cases in a non-random manner—strongly supporting the former Administrator's claim that "political people tell the appointed people what they're going to do."[9] According to the court's Deputy Circuit Executive, the electronic filing system was supposed to assign cases to pre-assembled panels of judges in the

order they came in, but paper briefs arrived in a big pile, giving clerks some discretion over which pleadings arrived first.[15] The Chief Judge responded by issuing a new handbook requiring all cases to be filed on paper. Only the Federal Circuit is allowed to change the way courts assign judges to cases, 28 U.S.C. § 46(b), so I filed additional complaints alleging that chief judges covered up nonrandom panel assignments (DC-15-90023, DC-15-90024).

When I confronted Anne Ferro about this, she was gob-smacked and resigned a month later. Fearing that we might organize a trucker strike, her counsel, T.F. Scott Darling III, re-promulgated the vacated electronic logging devices rule on the 242nd anniversary of the Boston Tea Party, requiring citizens who had committed no crime to install tracking devices on our vehicles. 49 C.F.R. § 395.8 et seq. 80 F.R. 78383. The automatic system I proposed had no tracking feature and would have reported a driver's location only if a violation of the simplified California meal and rest break rules had been detected. C4.

Although Darling implemented some automatic features of my proposed system, my testing of his revised system revealed that it was incapable of accurately recording duty status as required under Section 31137(f)(1)(A), B4, unless Section 395 was changed to resemble Section 11090 of the California Labor Code. My

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[15] similar to 5th Cir. R. 34.13 I.O.P. *Non Preference Cases* ("The oldest cases in point of time of availability of briefs are ordinarily calendared first")

December 8th 2015 log, for example, shows his system failed to recognize that someone other than myself was driving when a mechanic drove my truck into a shop for repairs. As a result, it logged my off-duty time incorrectly as driving time. My December 24th 2015 log shows my truck traveled three miles without anyone driving—concealing an hours of service violation. On April 13th 2016, my logging device recorded twenty-eight minutes of driving time with the engine turned off. See *Public Citizen* at 1220("We cannot fathom, therefore, why the agency has not even taken the seemingly obvious step of testing existing [electronic on-board recorders] on the road…").

Obviously, Darling could not test his system because he could not legally drive a truck. When the Owner-Operator Independent Drivers Association filed suit to enforce the 7th Circuit's Order in *OOIDA v. FMCSA,* 656 F.3d 580 (2011), I filed a motion to intervene on January 7th 2016, claiming that Darling's rule was invalid because he had not been confirmed by the Senate. 5 U.S.C. § 706(2)(C). Acting quickly after the Chief Judge of the DC Circuit recused himself, an Acting Chief Judge dismissed my complaints exactly one week later on January 14th. Though this dismissal was not made public and could not have become known to them through official channels, the Senate Commerce Committee coincidentally announced a confirmation hearing for Darling on the same day. The Deputy Circuit Executive said he did not know why the Opinion had not been released immediately, but

promised to call me when he received it. His secretary called me approximately ten minutes after the Commerce Committee confirmed Darling as Administrator in violation of Section 113(c). The Department of Justice equally coincidentally filed an Opposition to my Motion to Intervene on the same day.

Without waiting for them to serve me papers or allowing time to file a reply as required by FRAP 25(c) and 27(a)(4), two weeks later on January 27th 2016, the 7th Circuit denied my motion to intervene by right in violation of 28 U.S.C. § 2348 —suppressing my evidence of Darling's tracking device malfunctions. Three weeks later on March 16th 2016, the day after the Judicial Council upheld the opinion of the Acting Chief Judge, President Obama rewarded the Chief Judge who recused himself with a nomination to the Supreme Court. This was stopped at my request for obvious reasons: the overly coincidental coordination of the Judicial Council, the Senate Commerce Committee, the White House, and The Department of Justice could not have been achieved without ex-parte communication contrary to the principle of Constitutional separation of powers—strongly supporting former Federal Motor Carrier Safety Administrator and head of the Indiana Department of Homeland Security John Hill's allegation that "political people tell the appointed people what they're going to do."[9]

Although he considered a 6th Circuit judge from my alma mater (University of Michigan) who could not be sued for causing additional deaths, it is thought that the

Senate Majority Leader's desire to protect his wife (the Secretary of Transportation) from being sued unduly influenced President Trump to reward President Bush's former assistant with an appointment to the Supreme Court. This court must now decide whether the agency's twice-vacated rules are a valid basis for preempting California law, or whether a violation of California law has occurred.

IV. Standard of Review

The court reviews the challenged agency action to determine if it was arbitrary, capricious, or contrary to constitutional or statutory right according to the standards of the motor carrier safety profession. 5 U.S.C. § 706(2).

V. Standing

As a trucker by trade, I was granted five patents for inventing safer intermodal technology.[16] As a safety professional, I appeared on more radio programs than any other truck safety expert, passing the *Motor Carrier Safety Improvement Act of 1999* (which created the FMCSA) in only one month without a single opposing vote. In 2009, I obtained a settlement agreement[17] which resulted in the thirty minute rest break the agency claims is responsible for "FMCSA's

[16] US Patents 6494313, 6776299, 6840724, 6910844, & 7070062
[17] *Public Citizen v. FMCSA* (DC-09-1094)

departure from the 2008 Decision," ER5, ER90; 76 FR 81134, 81186; 49 CFR 395.3(a)(3)(ii). A14.

As an employee of Swift Transportation, the nation's largest motor carrier, I drove approximately 350,000 miles without a crash from my first day of work, many within the State of California, becoming a "Diamond Driver" eligible for top pay in record time, accumulating over 750,000 miles without a preventable crash. Because Swift used a Qualcomm™ electronic logging system, requiring that I race against the clock, sleeping at times determined by a computer, I developed hypertension due to job stress and was prescribed Lisinop/Hctz 10-12.5mg to be taken as needed to treat swelling in my ankles when driving. My blood pressure peaked at 175/108 on January 20th 2015 when I became the victim of a parking scam. On advice of Swift's company doctor, my prescription was changed to Lisinopryl 5mg taken daily to prevent life-threatening spikes in blood pressure. When I took time off from driving to write another book[18] my blood pressure returned to normal and my doctor ordered me to stop taking Lisinopryl. In 2018, I was pronounced cured of high blood pressure and was issued a two-year DOT medial certificate.

Because I had no symptoms of hypertension prior to being monitored by tracking devices, the two year medical certificate issued after resuming a normal

[18] *How To Get Things Done In the Dark World of Corrupt Government*, www.truckingvideo.com, 2019, www.amazon.com/dp/1793069794

lifestyle proves that the agency's rules had "a deleterious effect" resulting from its failure to obey the orders of the DC Circuit. Because life threatening symptoms of job stress affecting my ability to earn a living are likely to return after this case is concluded and I resume work as a long haul trucker, an occupation that requires that I pick up and deliver freight within the state of California, I am disadvantaged by the agency's preemption of meal and rest break laws intended to prevent life-threatening job stress.

VI. Summary of Argument

The administrator lacks the statutory right under the Motor Carrier Safety Improvement Act of 1999 as well as the Commerce Clause, exposing an underlying problem in the structure of government that can only be remedied by treating the agency's rules as vacated and limiting this court's jurisdiction over Department of Transportation agencies to reviews of the National Transportation Safety Board.

VII. ARGUMENT

A. The court must treat FMCSA's Hours of Service Rules as vacated

The Supreme Court ruled that "due process of law requires an evaluation based on a disinterested inquiry pursued in the spirit of science, on a balanced order of facts [and] the detached consideration of conflicting claims." *Rochin v.*

California 342 U.S. 165 at 172 (1952). As Justice Powell wrote for a unanimous court in *Youngberg v. Romeo,* 457 U.S. 307 at 321 (1982)(quoting 644 F.2d at 178):

> "If there is to be any uniformity in protecting these interests, this balancing cannot be left to the unguided discretion of a judge…the Constitution only requires that the courts make certain that professional judgment in fact was exercised" (internal quotes omitted).

Thus, in denying standing to truckers who had obvious standing in *American Trucking Ass'ns v. FMCSA*, 724 F.3d 243 (2013), the DC Circuit Court of Appeals failed to satisfy the due process requirement that it "make certain that professional judgment in fact was exercised" in a "disinterested inquiry pursued in the spirit of science" according to the standards of the motor carrier safety profession.

When the DC Circuit satisfied this due process requirement in *Public Citizen v. FMCSA,* 374 F.3d 1209 (2004)(*see* Part III above), it vacated the hours of service rules promulgated under 49 C.F.R. 395, not once, but twice! See *Owner-Operator Independent Drivers Ass'n v. FMCSA*, 494 F.3d 188 (D.C. Cir. 2007). While this court is not required to follow the precedents of the DC Circuit, when a court has ruled inconsistently on a particular question, courts must consider cases wherein the Supreme Court's due process requirement was satisfied to be of greater precedent than a case wherein valid claims of litigants with obvious standing were disposed of without due process. Because the number of pedestrians and bicyclists killed by trucks increased 29% from 2002 to 2005 when most of the hours of service rules

presently in effect were first promulgated, C1, C3, and every member of the former Ralph Nader organization was without doubt a pedestrian, Public Citizen Group had obvious standing regardless whether it represented truckers or not. Legal principles of stare decisis and res judicata ensure that courts may not deny standing to a party that has twice won its case. Therefore, until the FMCSA satisfies the due process requirement imposed by the DC Circuit that it consider the effects of its hours of service rules on driver health, *Public Citizen* at 1217, This Court must treat Section 395 as vacated and reverse the Determination of Preemption because the agency "entirely failed to consider an important aspect of the problem." *Motor Vehicle Manufacturers v. State Farm*, 463 U.S. 29, 43 (1983). 5 U.S.C. § 706(2)(A).

B. The determination violates the Fourteenth Amendment

Allowing an alumnus of Taylor University who had never driven a truck for a living to impersonate a motor carrier safety professional so soon after the tragic deaths of four Taylor University students were sensationalized in the media shocks the conscience because, by enforcing obsolete size and weight laws preventing us from equipping our trucks with modern safety features found on cars, Hill violated the Equal Protection Clause in retaliation for the negligence of a single individual who was himself hospitalized due to injuries. The Supreme Court has recognized "that deliberate indifference is egregious enough to state a substantive due process claim." See *County of Sacramento v. Lewis,* 523 U.S. 833 (1998):

> "conduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level… Historically, this guarantee of due process has been applied to deliberate decisions of government officials to deprive a person of life, liberty, or property" (quoting *Daniels v. Williams*, 474 U.S. at 331).

Justice Rehnquist wrote in *DeShaney v. Winnebago County Dept. of Social Servs*., 489 U.S. 189, 200 (1989):

> "it is the State's affirmative act of restraining the individual's freedom to act on his own behalf—through…restraint of personal liberty [such as weighing trucks to detect the presence of safety devices or prohibiting rest breaks and union meetings by equipping trucks with tracking devices]—which is the 'deprivation of liberty' triggering the protections of the Due Process Clause."

Obviously, one way to eliminate the heath effects of long haul trucking would be to legalize intermodal vehicles so truckers would no longer be required to drive long distances. Yet, when I filed suit to decriminalize modern safety features and replace obsolete 18-wheelers with modern vehicles (DC-07-1327), neither the appellate or the district court considered my claim that the Federal Highway Administration violated the *Regulatory Flexibility Act*, 5 U.S.C. §§ 603(c)(3) & 604(a)(2), by including intermodal vehicles in its revised definition of commercial motor vehicle: "a vehicle designed or regularly used to carry freight." Federal agencies are required to obey the statutory definition mandated by Congress: "a vehicle used on the highways in commerce." 49 U.S.C. § 31101(1). While no one disputes that intermodal vehicles carry freight, they are not normally "used on the highways in commerce." Congress expressly prohibited the Secretary from

regulating intermodal vehicles. 49 U.S.C. §§ 13503(b)(1) & 13506(a)(11).

The agency's claims that California's meal and rest break laws would lengthen the workday and aggravate the parking problem, ER7-8, are circular because the Secretary banned vehicles that would both shorten the workday and eliminate the parking problem. The agency created the parking problem when it refused to legalize alternatives to long haul trucks. The Supreme Court ruled that a "somewhat different standard [is] appropriate for the failure to provide for a resident's safety…such a failure must be justified by a showing of substantial necessity." *Youngberg* at 313 quoting 644 F.2d at 164 (internal quotes omitted). Thus, when Congress stipulates that rules must be "*needed*" in the statutes granting the agency regulatory authority, 49 U.S.C. §§ 31136(c)(2)(B) & 31502(b)(2), A7, B2, the burden of proof falls on the respondent agency, not the petitioners. Therefore, this court must vacate the determination because in refusing to respond to my petition as required under 49 U.S.C. § 30162(d), B1, the Secretary failed to provide due process as required by the 14th Amendment. 5 U.S.C. § 706(2)(B).

C. The Administrator lacks the statutory right

Now here comes Raymond Martinez, whose two convictions for drunk driving in September 1987 in Fairfax County, Virginia and in August 1989 in Nassau County, New York (as reported by Overdrive Magazine) prevented him from pursuing a career in motor carrier safety as required under Section 113(c). B1.

When he was supposedly accumulating an above average safety record driving 18-wheelers, he was actually working as an assistant to First Lady Nancy Reagan.[19] As Chairman and chief administrator of the New Jersey Motor Vehicle Commission and Commissioner of the New York State Department of Motor Vehicles,[20] Martinez turned a blind eye to commercial drivers licenses being issued to scabs exploited by wealthy-beyond-their-dreams non-union carriers who "are about 3 times more likely than a veteran driver to be involved in an accident." 72 F.R. 71268. According to the University of Michigan Transportation Research Institute, the agency's *Driver Fitness* scores are negatively correlated with crash risk[21]—meaning drivers the agency considers qualified are more likely to crash than those the agency considers unqualified. Now, like *Abignale* in "*Catch Me If You Can,*" this imposter without portfolio has conspired to systematically violate Sections 226, 516, and 11090 of the California Labor Code.

This court must inquire into Mr. Martinez's qualifications to "make certain that professional judgment in fact was exercised" according to the standards of the motor carrier safety profession. *Youngberg* at 321. Because he provided no regulatory impact analysis as required under Section 31136(f)(1)(A) & (2)(B), A8,

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[19] James Jaillet, *Overdrive*, November 6th 2017

[20] www.fmcsa.dot.gov/mission/leadership/administrator-0

[21] Paul E. Green, Daniel Blower, *Evaluation of the CSA 2010 Operational Model Test,* csa.fmcsa.dot.gov/Documents/Evaluation-of-the-CSA-Op-Model-Test.pdf p.41

comparing the relative benefits of intermodalism vs. long haul trucking or of an automatic system that would not conflict with California law as required under Section 31137(f)(1)(A), B4, with the agency's own defective system; if the court finds that he lacks an above average safety record driving eighteen-wheelers or articles, videos, or patent applications demonstrating expertise designing trucks or testing safety devices as any reasonable person would expect of someone with "professional experience in motor carrier safety" required under Section 113(c), it must vacate his determination on grounds that he lacked the statutory right under the *Administrative Procedures Act*. 5 U.S.C. § 706(2)(C). See *Public Citizen* at 1220("This directive, in our view, required the agency, at a minimum, to collect and analyze data on the costs and benefits…").

D. The Determination undermines the structure of government

The Supreme Court ruled that "[a]ny police power to regulate individuals as such, as opposed to their activities, remains vested in the States." *National Federation of Independent Business v. Sebelius,* 567 U.S.____(2012)(slip op. at 26). By utilizing tracking devices to restrict truckers' personal freedom instead of merely auditing motor carriers to ensure we are not overworked, the vacated rule, "nor shall any such driver drive…unless the driver complies with the following requirements," found under 49 C.F.R. § 395.3(a), A14, is an individual mandate that violates "liberty interests in freedom of movement and in personal security [that] can

be limited only by an overriding, non-punitive state interest." *Youngberg* at 313 (internal quotes omitted). What interest does the State of California have in violating the Equal Protection Clause? None! *The Motor Carrier Act of 1935* only allows the agency to regulate "maximum hours of service of employees of, and safety of operation and equipment of, a motor carrier" under Section 31502(b), B2, not the First Amendment rights of citizens to join unions or protest unsafe working conditions. Because "the employer need not ensure that no work is done," *Brinker v. Superior Court of San Diego,* 273 P.3d 513 (Cal. 2012), a meal or rest break is not a "maximum hours of service" that the agency has authority to regulate. "The power to regulate commerce presupposes the existence of commercial activity to be regulated." *Sebelius* at 18. Eating, sleeping, and protesting for better working conditions are not commercial activity, so the individual mandate cannot be sustained under Congress's power to "regulate Commerce." *Sebelius* at 3.

This case confirms the worst fears of the dissenters in *Sebelius* who warned, "it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision" (slip op. at 35, citations omitted). Three weeks after it dismissed my petition to the 7th Circuit (15-1263, June 6th 2016), the Supreme Court threw out the conviction of the former Governor of Virginia for receiving $175,000 in gifts on grounds that an "official act…must involve a formal

exercise of governmental power…To qualify as an official act, the public official must make a decision." *McDonnell v. United States,* 577 U. S. ___ (June 27th 2016) (slip op. at 21, internal quotes omitted). The 7th Circuit responded by refusing to "make a decision" on whether our amicus briefs would be admitted—publishing its opinion on Halloween! As a consequence of leaving the Supreme Court short-handed after similar irregularities in the *Citizens United* case prompted all of the Protestants to resign, two months to the day after the Supreme Court dismissed the last of our three petitions (15-1263, 16-1294, 16-1228), Virginians protesting the acquittal of their former governor, some wearing "totenkopf" Halloween masks, chanted "Jews will not replace us" when they learned that half of the justices who overruled the majority Christian jury (and 4th Circuit Court of Appeals) were Jewish[22]—a substantive Article VI violation ("no religious test shall ever be required"). Though the protest was successful insofar as the 7th Circuit judge who suppressed evidence was not rewarded with a Supreme Court nomination and the DC Circuit judge who denied us standing in 2013 announced her retirement three weeks later, a Marine was dishonorably discharged, an employee of a defense contractor was fired,[23] and a top rated television show was abruptly cancelled when

[22] From the death of Antonin Scalia on February 13th 2016 until Neil Gorsuch was sworn in to replace him on April 10th 2017

[23] *Frontline*, "Documenting Hate: Charlottesville," PBS, ProPublica, 8/7/18

its star[24] criticized the White House staffer responsible for inter-governmental relations at the time of the suspected ex-parte communication (*see* part I-D above). When we tried to fix the problem legislatively,[25] my congressman was almost immediately accused of sexual harassment and forced to resign even though our Legislative Counsel made a more serious allegation against another Member of Congress that was never investigated.[26] Several journalists covering Tea Party issues were also fired after receiving similar accusations.[27] Prohibitions against harassment in Section 390.36(b) notwithstanding, B5, like those who lost their jobs opposing judicial corruption, truckers have a reasonable fear of retaliation, not just harassment, if the preemption of meal and rest break laws is not reversed.

Although the President tried to defuse the conflict by declaring (with the Secretary of Transportation standing beside him ad sinistra) that citizens protesting judicial corruption were "fine people," media interests characterizing Virginians and even the President himself as "racist" for not supporting the view that rewarding public officials for not doing their duty should be legal provoked a disgruntled trucker to murder eleven Jews at a synagogue near Pittsburgh—the deadliest attack

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[24] money.cnn.com/2018/05/29/media/abc-disney-roseanne-barr

[25] www.truckingvideo.com/judicialcronyismbill.pdf

[26] Rachel Wolbers, *The Hill*, 12/20/17 thehill.com/blogs/congress-blog/politics/365749-standing-up-for-blake-farenthold-as-he-always-stood-up-for-me

[27] thedailybeast.com/how-the-era-of-the-big-name-news-anchor-crashed-to-an-end

on Jews in the history of the United States.[28] This was followed by a copycat killing near San Diego exactly six months later. Though these deaths are insignificant beside the additional 1,457 truckers and 3,242 motorists killed since tracking devices were first required, C3, ER21, it is unlikely that any of these deaths would have occurred if our First Amendment rights "peacefully to assemble" had been respected.

E. The court must uphold the Seventh Amendment

This court has a "responsibility to declare unconstitutional those laws that undermine the structure of government established by the Constitution." *Sebelius* at 28. To end the long-standing practice of suppressing evidence[29] by abusing courts of appeals as courts of first impression with non-randomly-assigned politically connected judges whose orders are simply ignored if they do not do what they are told and are rewarded with Supreme Court nominations if they do, this court should limit its jurisdiction over Department of Transportation agencies to decisions of the National Transportation Safety Board on grounds that the Federal Motor Carrier Safety Administration did not exist when the transfer of authority from the Interstate Commerce Commission to the NTSB, both quasi-judicial bodies equivalent to a jury for Seventh Amendment purposes, occurred in 1966, therefore, appellate courts are

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[28] Rich Lord, *Pittsburgh Post Gazette*, 10/29/2018

[29] Robert Caro, *Means of Ascent*, Knopf 1990, p.380

not constitutionally adequate to review its administrator's decisions. The *Department of Transportation Act* states that only authority "specifically assigned to the Administrator…may be reviewed judicially…in the same way as…before the transfer or assignment." Pub. L. 89-670, 80 Stat. 931, 49 U.S.C. § 351(a). B1. See *Aulenback v. FHWA*, 103 F.3d 156 (D.C. Cir. 1997)(holding that courts of appeals have jurisdiction to review actions of Department of Transportation agencies only if the action is taken pursuant to authority that was transferred from the Interstate Commerce Commission); *Owner-Operator Independent Drivers Ass'n v. Pena*, 996 F.2d 338 (D.C. Cir. 1993)(same). Authority in Section 31141 of title 49, a provision of the *Motor Carrier Safety Act of 1984*, was not specifically assigned by Congress to the FMCSA Administrator. This Court's jurisdiction under Section 31141(f)(1) is therefore limited to the safe design and construction of commercial motor vehicles under Section 31136, not to regulations of the personal lives of citizens promulgated under Sections 31502 and 390.36(b)(2)("to monitor productivity [or strike activity] of a driver") proven to have no safety benefit (*see* Part III above). Trucks do not have constitutional rights. Truckers do!

The threshold amount triggering 7th Amendment protections is far exceeded by the loss of additional pay allowed under California law if meals are skipped, A15, A41, not to mention the approximately thirty percent reduction in wages

resulting from our inability to bargain collectively[30]—which benefited the co-Chairman not convicted of receiving gifts (Presidential Candidate John McCain)(*see* Part III-B above) who owned a trucking company that distributed beer. Because safety determinations require special expertise not possessed by ordinary persons, not unlike courts of law, when an impostor impersonates a safety professional (or a judge), an impostor's decision does not carry the same weight as a valid court order to be appealed and is in fact just an ordinary tort which should be reviewed by the NTSB or district court. Therefore, to uphold the Seventh Amendment, this court should not reach the question of whether a qualified safety professional would of had the same authority as a judge to preempt a state law proven to be dangerous as that could tie the hands of future administrators preempting obsolete size and weight laws that ban modern safety features on trucks. The question here is whether an impostor like Mr. Martinez had authority to enforce a twice-vacated regulation that had not survived legal challenge because a court disposed of valid claims presented by litigants with obvious standing without due process. *American Trucking Ass'ns v. FMCSA*, 724 F.3d 243, 249 n.7 (D.C. Cir. 2013)("Trescott offers nary an argument in his briefs as to why his lobbying activities would establish standing. For this reason, we need not reach the merits of his arguments.")(Cert. denied, 13-

[30] Michael Belzer, *Sweatshops on Wheels*, Oxford, 2000, p.122

509, January 13th 2014). *See* Part V above.

A few bad apples must not be allowed to spoil the bunch. The Supreme Court ruled that courts must uphold due process requirements even if other courts do not. *Rochin* at 174. As the Advocates for Highway and Auto Safety protested after they too were denied standing in *American Trucking Ass'ns,* except for the 30 minute rest break under Section 395.3(a)(3)(ii), A14, ER23, Congress suspended enforcement of all of the 2011 reforms upheld by the DC Circuit in the *Consolidated Appropriations Act of 2014* (Pub. L. 113-235, 128 Stat. 2712)—restoring the vacated rules! Therefore, to restore confidence in the nation's judicial system and bring the impostors to justice for causing thousands of easily preventable deaths, this court should now enforce the DC Circuit's previous Orders by reversing the Preemption on grounds that those parts of 49 C.F.R. 395.3 cited at 83 F.R. 67471 & 67476, ER2, ER7 (*see* Part VII-D above), have been vacated and may not be used as a basis to preempt Sections 226, 516, and 11090 of the California Labor Code. As the American Association for Justice (formerly Trial Lawyers of America) suggests, ER43, the constitutional right to trial by jury should be preserved. Thus, questions arising from authority not transferred from the Interstate Commerce Commission should be remanded to district court so that a jury of Californians can decide under 5 U.S.C. § 704, 28 U.S.C. § 1331 if they want overworked foreign or out-of-state truckers with only two weeks of training racing against the clock

through their communities without stopping to eat or taking breaks.

CONCLUSION

I urge this Most Honorable Court to reverse the challenged Determination of Preemption for the reasons stated above, or in the alternative, transfer questions not already decided by the DC Circuit to district court.

_____

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STATEMENT OF RELATED CASES

I am unaware of any related cases other than those consolidated with this case.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing by using the appellate CM/ECF system on August 23rd 2019. CM/ECF users shall be served by the CM/ECF system.

I further certify that I have mailed the foregoing document by First Class Mail, to:

Nancy Jackson
Federal Motor Carrier Safety Administration
Office of Chief Counsel (MC-CCE)
1200 New Jersey Avenue, S.E., Suite W60-300
Washington, D.C. 20590

I further certify under penalty of perjury that the above is true and correct.

_____

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

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9th Cir. Case Number(s) 18-73488, 19-70323, 19-70329, 19-70413

I am the attorney or self-represented party.

This brief contains 6,995 **words**, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

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INTERVENOR'S ADDENDUM

CONSOLIDATED CASE NOS. 18-73488, 19-70323, 19-70329, 19-70413

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, ET AL.,

v.

FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION, ET AL.,

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Addendum A is found in the
Brief of the International Brotherhood of Teamsters, Local 848 et al.

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INTERVENOR'S ADDENDUM

49 U.S.C. § 113(c) Administrator.—
The head of the Administration shall be the Administrator who shall be appointed by the President, by and with the advice and consent of the Senate, and shall be an individual with professional experience in motor carrier safety. The Administrator shall report directly to the Secretary of Transportation.

49 U.S.C. § 351(a) Judicial review. --
An action of the Secretary of Transportation in carrying out a duty or power transferred under the Department of Transportation Act (Public Law 89-670, 80 Stat. 931), or an action of the Administrator of the Federal Railroad Administration, the Federal Motor Carrier Safety Administration, or the Federal Aviation Administration in carrying out a duty or power specifically assigned to the Administrator by that Act, may be reviewed judicially to the same extent and in the same way as if the action had been an action by the department, agency, or instrumentality of the United States Government carrying out the duty or power immediately before the transfer or assignment.

49 U.S.C. 30162
(a) Filing.—Any interested person may file a petition with the Secretary of Transportation requesting the Secretary to begin a proceeding—

(1) to prescribe a motor vehicle safety standard under this chapter; or
(2) to decide whether to issue an order under section 30118(b) of this title.

(b) Statement of Facts.—
The petition must state facts that the person claims establish that a motor vehicle safety standard or order referred to in subsection (a) of this section is necessary and briefly describe the order the Secretary should issue.
(c) Proceedings.—
The Secretary may hold a public hearing or conduct an investigation or proceeding to decide whether to grant the petition.
(d) Actions of Secretary.—
The Secretary shall grant or deny a petition not later than 120 days after the petition is filed. If a petition is granted, the Secretary shall begin the proceeding promptly. If a petition is denied, the Secretary shall publish the reasons for the denial in the Federal Register. (Pub. L. 103–272, §?1(e), July 5, 1994, 108 Stat. 967.)

INTERVENOR'S ADDENDUM

49 U.S.C. § 31502(b) Motor and Private Requirements.—
The Secretary of Transportation may prescribe requirements for—

(1) qualifications and maximum hours of service of employees of, and safety of operation and equipment of, a motor carrier; and

(2) qualifications and maximum hours of service of employees of, and standards of equipment of, a motor private carrier, when needed to promote safety of operation.

49 U.S.C. § 31137. Electronic logging devices
and brake maintenance regulations

(a) Use of Electronic Logging Devices.—Not later than 1 year after the date of enactment of the Commercial Motor Vehicle Safety Enhancement Act of 2012, the Secretary of Transportation shall prescribe regulations—

(1) requiring a commercial motor vehicle involved in interstate commerce and operated by a driver subject to the hours of service and the record of duty status requirements under part 395 of title 49, Code of Federal Regulations, be equipped with an electronic logging device to improve compliance by an operator of a vehicle with hours of service regulations prescribed by the Secretary; and

(2) ensuring that an electronic logging device is not used to harass a vehicle operator.

(b) Electronic Logging Device Requirements.—

(1) In general.—The regulations prescribed under subsection (a) shall—

(A) require an electronic logging device—

(i) to accurately record commercial driver hours of service;

(ii) to record the location of a commercial motor vehicle;

(iii) to be tamper resistant; and

(iv) to be synchronized to the operation of the vehicle engine or be capable of recognizing when the vehicle is being operated;

(B) allow law enforcement to access the data contained in the device during a roadside inspection; and

(C) except as provided in paragraph (3), apply to a commercial motor vehicle beginning on the date that is 2 years after the date that the regulations are published as a final rule.

(2) Performance and design standards.—The regulations prescribed under subsection (a) shall establish performance standards—

(A) defining a standardized user interface to aid vehicle operator compliance and law enforcement review;

(B) establishing a secure process for standardized—

(i) and unique vehicle operator identification;

(ii) data access;

(iii) data transfer for vehicle operators between motor vehicles;

(iv) data storage for a motor carrier; and

(v) data transfer and transportability for law enforcement officials;

(C) establishing a standard security level for an electronic logging device and related components to be tamper resistant by using a methodology endorsed by a nationally recognized standards organization; and

(D) identifying each driver subject to the hours of service and record of duty status requirements under part 395 of title 49, Code of Federal Regulations.

(3) Exception.—A motor carrier, when transporting a motor home or recreation vehicle trailer within the definition of the term "driveaway-towaway operation" (as defined in section 390.5 of title 49, Code of Federal Regulations), may comply with the hours of service requirements by requiring each driver to use—

(A) a paper record of duty status form; or

(B) an electronic logging device.

(c) Certification Criteria.—

(1) In general.—

The regulations prescribed by the Secretary under this section shall establish the criteria and a process for the certification of electronic logging devices to ensure that the device meets the performance requirements under this section.

(2) Effect of noncertification.—

Electronic logging devices that are not certified in accordance with the certification process referred to in paragraph (1) shall not be acceptable evidence of hours of service and record of duty status requirements under part 395 of title 49, Code of Federal Regulations.

(d) Additional Considerations.—The Secretary, in prescribing the regulations described in subsection (a), shall consider how such regulations may—

(1) reduce or eliminate requirements for drivers and motor carriers to retain supporting documentation associated with paper-based records of duty status if—

(A) data contained in an electronic logging device supplants such documentation; and

(B) using such data without paper-based records does not diminish the Secretary's ability to audit and review compliance with the Secretary's hours of service regulations; and

(2) include such measures as the Secretary determines are necessary to protect the privacy of each individual whose personal data is contained in an electronic logging device.

(e) Use of Data.—

(1) In general.—

The Secretary may utilize information contained in an electronic logging device only to enforce the Secretary's motor carrier safety and related regulations, including record-of-duty status regulations.

(2) Measures to preserve confidentiality of personal data.—

The Secretary shall institute appropriate measures to preserve the confidentiality of any personal data contained in an electronic logging device and disclosed in the course of an action taken by the Secretary or by law enforcement officials to enforce the regulations referred to in paragraph (1).

(3) Enforcement.—

The Secretary shall institute appropriate measures to ensure any information collected by electronic logging devices is used by enforcement personnel only for the purpose of determining compliance with hours of service requirements.

(f) Definitions.—In this section:

(1) Electronic logging device.—The term "electronic logging device" means an electronic device that—

(A) is capable of recording a driver's hours of service and duty status accurately and automatically; and

(B) meets the requirements established by the Secretary through regulation.

Consolidated Appropriations Act, Pub. L. 113-235, 128 Stat. 2712 (2014).

SEC. 133. (a) TEMPORARY SUSPENSION OF ENFORCEMENT.—

None of the funds appropriated or otherwise made available by this Act or any other Act shall be used to enforce sections 395.3(c) and 395.3(d) of title 49, Code of Federal Regulations, and such sections shall have no force or effect from the date of enactment of this Act until the later of September 30, 2015, or upon submission of the final report issued by the Secretary under this section. The restart provisions in effect on June 30, 2013, shall be in effect during this period.

INTERVENOR'S ADDENDUM

49 C.F.R. § 390.36(b) Prohibition against harassment

(1) No motor carrier may harass a driver

(2) Nothing in Paragraph (b)(1) of this section shall be construed to prevent a motor carrier from using technology allowed under this subchapter to monitor productivity of a driver provided that such monitoring does not result in harassment.

INTERVENOR'S APPENDIX: 18-73488, 19-70323, 19-70329, 19-70413

Comment to FMCSA-2018-0304
Pre-emption of California Rest Break Rules

by William B. Trescott
26276 Farm to Market Road 457
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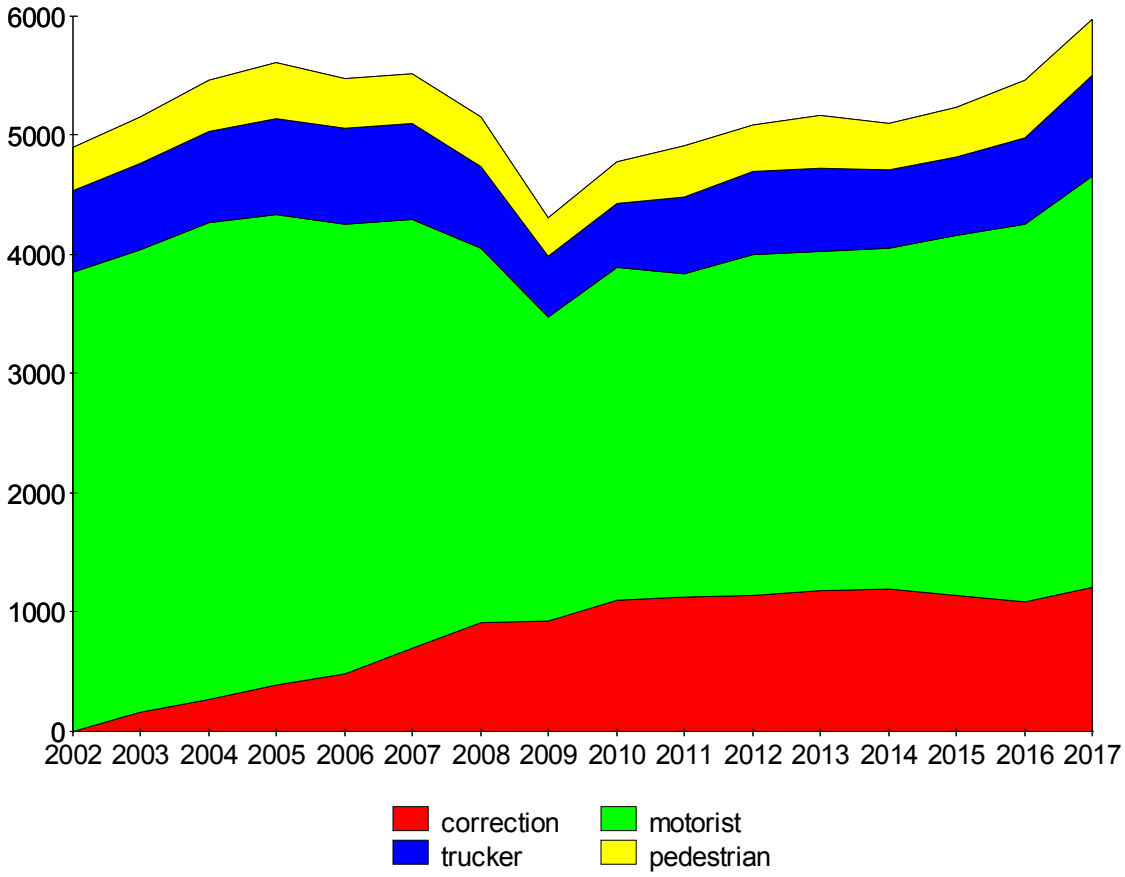
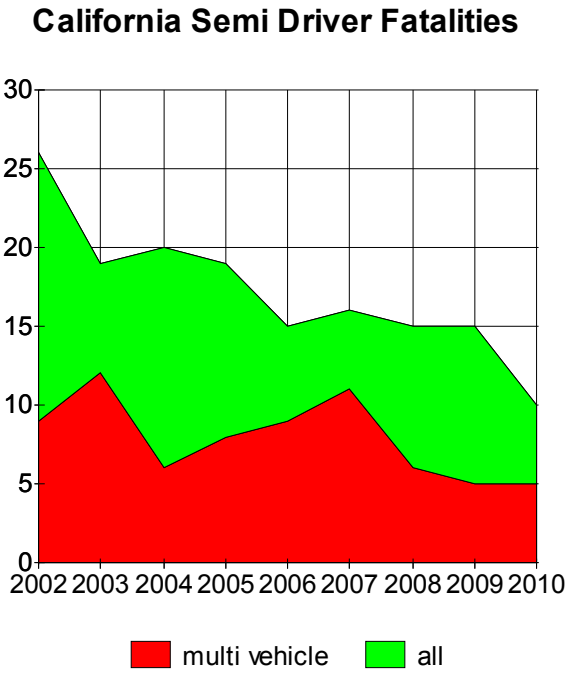
Corrected Heavy Truck Fatalities



As shown above, the ELD mandate on December 16th 2016 has caused the greatest one year jump in heavy truck fatalities since 2002, reaching a fifteen year high. 28% more truckers were killed on the job in 2017 compared to 2014, 68% more since 2009. While a similar jump occurred in 2010, that resulted from an increase in the number of car crashes following the 2008 recession with no significant increase in trucker fatalities attributable to regulatory changes. The correction (shown in red) is calculated by multiplying the number of motorists killed in truck crashes by the percentage decline in passenger car fatalities since 2002 (Source: *Traffic Safety Facts*, www-nrd.nhtsa.dot.gov/Pubs).



The only similar increase resulted from the introduction of new hours of service limits in 2003. As shown on the chart at left, California trucker fatalities fell almost 60% between 2002 and 2010. It would therefore be irresponsible of the agency to preempt California's highly effective rules in favor of the agency's own rules which have twice proven to be dangerous.

The American Trucking Association's petition should therefore be denied.

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Corrected Heavy Truck Fatalities

(the data contained in FMCSA-2018-0304-0086 in tabular form)

year	correction	motorist	trucker	pedestrian	passenger car	%decline
2002	0	3853	684	360	20569	0
2003	159	3879	726	384	19725	4
2004	268	4006	761	423	19192	7
2005	394	3944	803	465	18512	10
2006	484	3766	805	424	17925	13
2007	694	3608	805	409	16614	19
2008	907	3151	682	412	14646	29
2009	925	2558	499	323	13135	36
2010	1098	2797	530	359	12491	39
2011	1128	2713	640	428	12014	42
2012	1140	2857	697	390	12361	40
2013	1180	2845	695	441	12037	41
2014	1198	2859	656	393	11947	42
2015	1144	3015	665	414	12761	38
2016	1088	3170	725	474	13508	34
2017	1209	3450	841	470	13363	35
Additional since 2009		3242	1457	785	-4598	

The correction is calculated by multiplying the number of motorist fatalities by the percentage decline in passenger car fatalities to compensate for the effect of air bags, crash absorbent body panels, drunk driving enforcement, economic effects, and other improvements in car safety affecting overall truck fatalities since 2002. No correction has been applied to trucker or pedestrian data.

The additional fatality totals are calculated by adding all fatalities from 2010-2017 and subtracting 2009 fatalities eight times to quantify the effect of hiring unskilled truck drivers. The passenger car total is negative because passenger car fatalities declined from 2009-2017.

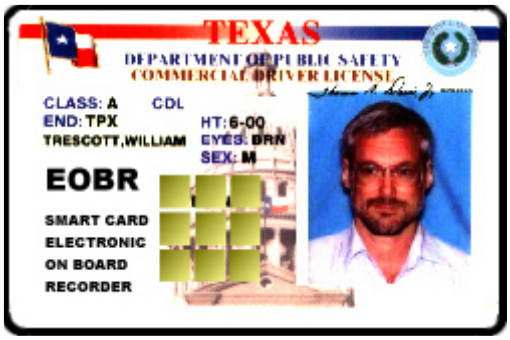
Source: National Highway Traffic Safety Administration
Traffic Safety Facts, www-nrd.nhtsa.dot.gov/Pubs

INTERVENOR'S APPENDIX: 18-73488, 19-70323, 19-70329, 19-70413

(as first posted online, December 2008)

SIMPLIFIED HOURS OF SERVICE RULES

as proposed by
William B. Trescott



1) Commercial motor vehicle operators MUST cease all work for 10 uninterrupted hours after each 14 hours on duty.
2) Commercial motor vehicle operators MUST rest a total of one hour during each 7 hours on duty.
3) Commercial motor vehicle operators may not be dispatched to drive more than 10 hours in a 24 hour period or be on duty more than 70 hours in any time period unless an equivalent number of hours are logged off duty.

ELABORATION

4) No more than six consecutive hours of driving or other labor may be performed without an on duty rest period and no more than 12 hours of driving and/or other labor may be performed within any 24 hour period.

5) Drivers may inspect and count freight, monitor gauges, inspect their vehicles for safety defects, complete paperwork, wait for dispatch, wait for loading or unloading, or wait for repairs during on duty rest periods.

6) Drivers MAY NOT drive, operate material handling equipment, touch or wrap freight, connect hoses, or perform any labor that would prevent eating or sleeping during on duty rest periods. Any task requiring the use of both hands MAY NOT be performed during on duty rest periods.

ELECTRONIC ON BOARD RECORDERS

7) Smart card EOBR's will be issued by each of the 50 States with a new Commercial Drivers License (CDL) permanently laminated to the front with a tamper evident seal.

8) Commercial vehicles will be equipped with an inexpensive magnetic SENSOR capable of recording and transmitting vehicle speed to nearby EOBR's in the same manner as a wireless bicycle cyclometer.

9) ALL movements of the vehicle exceeding 5 minutes and 5 mph will automatically be recorded as ON DUTY.

10) Whenever a vehicle is stationary longer than five minutes, EOBR's will automatically record REST periods and log drivers OFF DUTY from the time of the last vehicle movement 14 hours after the first vehicle movement.

11) Vehicles must remain stationary during REST periods unless a second EOBR is logged ON DUTY (When riding in the sleeper, off duty drivers must carry their EOBR's in a metal sleeve).

12) SENSORS will download and store data from EOBR's to detect violations when a driver operates more than one vehicle.

13) When violations are detected, SENSORS will wirelessly transmit a silent alarm to law enforcement officers and record the alarm on the EOBR to prevent violators from changing vehicles.

14) SENSORS WILL NOT transmit personal information about drivers' activities or whereabouts unless a violation is detected. If ordered by a court of law, EOBR data can be downloaded by law enforcement officials using a smart card reader. A SENSOR not detecting a violation will transmit only the vehicle speed and an identification code to indicate that an EOBR is present and operating properly. Driving without a working EOBR will result in a silent alarm.

15) An EOBR REPEATER may be purchased from major truck stop chains that will display driving and on duty time remaining to warn the driver before the EOBR records a violation. REPEATERS may also be purchased by law enforcement agencies and any concerned citizen to detect silent alarms and report violations.

16) EOBR's will be reprogrammed with a unique status code which will be changed every few weeks and with every violation to prevent the manufacture of bogus EOBR's or hacking into the FMCSA's computer system to alter records or obtain personal information.

EXPLANATION OF CHANGES

A 2004 court order questioned the Federal Motor Carrier Safety Administration's decision to increase consecutive hours of driving time from 10 to 11 hours per day. The above rules limit consecutive hours of driving to 6 with 12 hours as an ABSOLUTE DAILY LIMIT which CANNOT BE EXCEEDED for any reason as in the pre 2003 rules. Because such activities as loading, unloading, fueling, and parking will be recorded as driving time whereas in the past these activities were logged as "on duty not driving," drivers using the above rules cannot be dispatched to drive more than 10 hours per day if the 12 hour limit is not to be exceeded. However, allowing drivers paid by the mile to drive more than 70 hours per week could lead to employer abuse, therefore consistent with the court's opinion, drivers will be returned home before 70 hours of labor in excess of off duty time is accumulated while retaining the flexibility to occasionally work overtime to ensure that all time off other than eating and sleeping is spent at home unless a paid vacation is provided.