No. _____

IN THE

Supreme Court of the United States

William B. Trescott
Petitioner

v.

The Federal Highway Administration
and
The Secretary of Transportation
Respondents

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether truckers have a right to install safety devices on their trucks despite statutory size and weight limits that prohibit safety features.

2. Whether a State transgresses substantive limits on state action set by the Due Process Clause when it restrains citizens' ability to equip vehicles with safety features.

3. Whether the Federal Highway Administration violates civil rights by threatening to cut off federal highway funds to states that permit truckers to have safety features like motorists and industrial workers have– hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws.

PARTIES

Petitioner is William B. Trescott, a trucker by trade who has not issued debt securities to the public. Respondents are The Federal Highway Administration and Ray LaHood, the Secretary of Transportation.

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INTRODUCTION

The Motor Carrier Act of 1935 regulated the trucking industry as a public utility with significant barriers to competition. Under the protection of the Interstate Commerce Commission, truckers could easily negotiate the size and weight of their cargo to comply with vehicle size and weight laws.

The Motor Carrier Act of 1980 legalized competition. Due to competitive pressures, truckers are now required to haul huge intermodal shipping containers weighing fifty thousand pounds. If they equip their trucks with heavy safety features like cars have such as collapse resistant roofs or crash absorbent bumpers, they will be fined for violating the statutory eighty thousand pound vehicle weight limit. Because the containers are eight and one half feet wide, the same width as the statutory eight and one half foot width limit, truckers are required to carry these giant corrugated steel boxes in an unsafe top-heavy manner sometimes causing their trucks to roll over, rather than safely between the wheels. If they equip their trucks with safety devices that project outward more than a few inches from the side of the vehicle, such as rear view video cameras, they will be fined. Intermodal vehicles used in the same manner as locomotives are prohibited from complying with locomotive safety standards.

Anyone having common sense will recognize that punishing a victim has the opposite effect of punishing a perpetrator. Truckers have no way of knowing how much their cargo weighs. Requiring states to fine truckers if their trucks are overweight increases the number of violations because shippers who intentionally overload trucks know that truckers cannot report the crime. Truck size and

weight limits were first imposed by the Federal Aid Act of 1956 and have not been substantially changed since the Motor Carrier Act of 1980. They were enacted long before there was a clear understanding of the causes of highway damage and the means of preventing it. Requiring truckers to avoid federal highways when overloaded just shifts pavement wear and tear onto state and county roads where the likelihood of being injured in a collision is greater.

Intermodalism eliminates pavement wear by replacing dangerous high speed long haul trucks with safer low speed short haul intermodal vehicles. According to a recent study by the Federal Railroad Administration,[1] intermodalism is up to five times more fuel efficient than long haul trucking. The shock of fuel prices exceeding four dollars per gallon triggered a recession in 2008– harming the nation.[2] The statutory authorities cited in the opinions below apply only to regulations that are "needful." *See* 23 U.S.C. § 315; 49 U.S.C. § 104(c). A regulation cannot be needful if it harms the nation or has the opposite effect intended. "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 v. Romeo*, 457 U.S. 307 at 313 (1982) quoting 644 F.2d at 164, (internal quotes omitted).

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[1] Comparative Evaluation of Rail and Truck Fuel Efficiency on Competitive Corridors, ICF International http://www.fra.dot.gov/Downloads/Comparative_Evaluation_Rail_Truck_Fuel_Efficiency.pdf

[2] Driven to the Brink: How the Gas Price Spike Popped the Housing Bubble and Devalued the Suburbs, Joseph Cortright. http://www.movingforwardtogether.net/2008/04/28/housing-bubble-popped/

OPINIONS BELOW

The order of the Court of Appeals for the District of Columbia Circuit that oral argument will not assist the court is reproduced in the Appendix on page 1.

The order of the Court of Appeals for the District of Columbia Circuit transferring the case to the District Court is reproduced in the Appendix on page 2.

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The orders of the Court of Appeals for the District of Columbia Circuit granting summary affirmance and denying a petition for rehearing en banc are reproduced in the Appendix on page 11.

JURISDICTION

The Judgment of the Court of Appeals was entered December 9th, 2009. A petition for Rehearing En Banc was filed January 20th, 2010, which was denied on March 9th, 2010. This Court has Jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution states:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

49 U.S.C. § 31136(a)(4) provides:

> 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. § 113(c) provides:

> The head of the Administration shall be... an individual with professional experience in motor carrier safety.

42 U.S.C. 1985 provides:

> If two or more persons...conspire or go in disguise...for the purpose of preventing or hindering...the equal protection of the laws... the party so injured or deprived may have an action for the recovery of damages.

STATEMENT OF THE CASE

Motor Carrier Safety is an applied science relying on accurate data and precise mathematical formulae. By detecting and eliminating workplace hazards, occupational safety professionals prevent injuries and fatalities in the same way that other health care providers diagnose and treat disease. It takes just as long for a trucker to accumulate the hundreds of thousands of crash free miles and numerous safety awards needed to qualify for employment as a motor carrier safety professional as a doctor takes to attend college and graduate from medical school. Allowing a former state police officer who had never driven a truck for a living to impersonate a motor carrier safety professional in violation of 49 U.S.C. § 113(c) shocks the conscience because state police have been preventing truckers from equipping their trucks with safety features. As Justice Rehnquist wrote for the Court in *DeShaney v. Winnebago County Dept. of Social Servs.*, 489 U.S. 189 at 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– which is the 'deprivation of liberty' triggering the protections of the Due Process Clause."

On April 26th, 2006, four students and an employee of Taylor University, a small evangelical Christian college, were tragically killed in a crash involving a heavy truck near Fort Wayne Indiana. The crash received nationwide media attention because, due to a mix up by the coroner, a victim who was crushed so horrifically as to be unrecognizable was buried in the wrong grave while a similarly injured victim who survived the crash was nursed by the dead girl's parents. In response to this outrage,

three weeks later on May 16th, 2006, President Bush appointed an alumnus of Taylor University, former Indiana State Police officer John H. Hill, to become the Federal Motor Carrier Safety Administrator in violation of 49 U.S.C. § 113(c).

On July 11th, 2007, Hill claimed in sworn testimony before the House Subcommittee on Surface Transportation that "2005 enjoyed one of the lowest large-truck fatality rates in 30 years" when in fact the number of truck drivers 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.[3] Despite record rates of seat belt use and improvements in trauma care, the number of heavy truck occupants killed on the job in 2007 remained 16% higher than in 2002 even though passenger car fatalities decreased 20% during the same period– a 36% difference in fatal outcomes.[4] While changes to truckers' hours of service limits imposed in 2003 can explain 13% of this difference, the reasonable person must conclude that approximately 23% or 185 of the 805 heavy truck occupants killed in 2007 and 115 of the 677 heavy truck occupants killed in 2008 died as a result of being denied the modern safety features that had improved the safety of passenger car occupants.

District Court ruled in *Trescott v. Peters*,

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[3] Fatality Analysis Reporting System, NHTSA, http://www-fars.nhtsa.dot.gov/finalreport.cfm?title=Trends&stateid=0&year=2005&title2=Large_Truck_Related;

[4] Large Truck Fact Sheet, Traffic Safety Overview (p.2), www.nhtsa.dot.gov/portal/nhtsa_static_file_downloader.jsp?file=/staticfiles/DOT/NHTSA/NCSA/Content/TSF/2007/810993.pdf; www.nhtsa.dot.gov/portal/nhtsa_static_file_downloader.jsp?file=/staticfiles/DOT/NHTSA/NCSA/Content/TSF/2007/810989.pdf

D.D.C. No. 05-678 (Mar. 2, 2007 slip op. at 8), "even where Congress has not expressly stated that statutory jurisdiction is 'exclusive,'... a statute which vests jurisdiction in a particular court cuts off original jurisdiction in other courts in all cases covered by the statute," quoting *Telecomms. Research & Action Ctr. v. Fed. Communications Comm'n*, 750 F.2d 70, 77 (D.C. Cir. 1984). "Congress has provided for exclusive review of agency decision making under [the Motor Carrier Safety Act] by the court of appeals." See *City of Rochester v. Bond*, 603 F.2d 927, 931 (D.C. Cir. 1979). For this reason, and because only the Secretary's decision not to legalize modern safety features was being challenged, not the statutory mandates, the 14th Amendment claims that "Congress established a procedural requirement that only a person with professional experience in motor carrier safety may promulgate rules related to motor carriers or motor carrier safety" and "Americans may not be deprived of life, liberty, or property without due process of law" were filed in the Court of Appeals for the District of Columbia Circuit as the court of first instance under the Hobbs Act. 28 U.S.C. § 2342(3)(A).

On April 22nd, 2008, the DC Circuit ordered the question transferred back to the District Court on grounds that the Hobbs Act only grants the courts of appeals exclusive jurisdiction if the action is taken pursuant to authority transferred from the Interstate Commerce Commission. On June 8th, 2009, the District Court dismissed the case for failure to state a claim.

On August 13th, 2009, the District Court decision was appealed on grounds it conflicted with prior decisions of the DC Circuit such as *Public Citizen v. FMCSA*, 374 F.3d 1209 (D.C. Cir. 2004)

("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"). On December 9th, 2009, the Circuit granted summary affirmance.

On January 20th, 2010, a petition for rehearing en banc was filed on grounds that one of the judges deciding the case had a possible conflict of interest. Although most courts assign judges to cases randomly, there is a 95% probability that President Bush's Staff Secretary[5] at the time he appointed the unqualified administrator from Taylor University had been assigned to both panels hearing the case in a non random manner. 42 U.S.C. 1986 provides:

> Every person who, having knowledge that any of the wrongs conspired to be done... are about to be committed, and having power to prevent or aid in preventing the commission of the same... shall be liable... for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented...

The President's Counsel and Staff Secretary could with reasonable diligence have prevented the 300 deaths that resulted from denying truckers the modern safety devices that had improved the safety of passenger car occupants. On March 9th, 2010, the petition for rehearing was denied.

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

REASONS FOR GRANTING THE WRIT

I. The DC Circuit has entered a decision that has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power.

A. Judges who are potentially liable through discovery or have a personal interest in a particular case should recuse themselves. "[D]ue 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). Therefore, in denying discovery, A-1, the DC Circuit 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.

The government employee who promulgated the challenged rule had no apparent motor carrier safety qualifications. The appellant/petitioner was recommended to head the Federal Motor Carrier Safety Administration by his Congressman for five patents on safer intermodal technology, a Bill before the House Transportation Committee, a book and

numerous articles and videos on the subject of commercial motor vehicle safety,[6] and several safety awards for driving 18 wheelers more than 400,000 miles without a preventable crash– having been self employed since 1987. Because a qualified professional presented the court with mathematical formulae indisputably proving that commercial motor vehicle safety duties and powers in Chapter 311 of Title 49 (A-2, 5, 6, 8, & 10) are related to motor carrier safety, there should have been no doubt in the mind of any judge that 49 U.S.C. §§ 113(f)(1) & (g) prohibit the Federal Highway Administration from promulgating regulations under this chapter. "[C]ourts must show deference to the judgment exercised by a qualified professional, whose decision is presumptively valid." *Youngberg* at 307 (per curiam). "Rule 12(b)(6) does not countenance ... dismissals based on a judge's disbelief of a complaint's factual allegations" *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) quoting *Neitzke* v. *Williams*, 490 U.S. 319 at 327 (1989). "Because the complaint was dismissed for failure to state a claim, [the Court] must take as true [its] pro se allegations." *Estelle v. Gamble*, 429 U.S. 97, 99 (1976) quoting *Cooper v. Pate*, 378 U.S. at 546.

The District Court decision should have been summarily reversed because it failed to show professional deference. A-5 & 9. Neither Congress or the courts can overrule the laws of physics. The

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[6] *Self-loading Vehicle for Shipping Containers* (U.S. Pats. 6,910,844 & 6,840,724), *Automatic Intermodal Railway Car Coupler* (U.S. Pats. 6,776,299 & 7,070,062), *Stackable Open Front Grocery and Goods Bin* (U.S. Pat. 6,494,313); *Creation of a Minority Group– The New Danger in America's Trucks*; *The Safer Truck Act'*(HR 2083, HR 1248, 107th & 108th Congress).

specious argument cited in the summary affirmance, A-11, that "Appellant has not demonstrated [size and weight limits] are arbitrary, capricious… etc." is irrelevant to the question of whether the Secretary made a "professionally acceptable choice" (see *Youngberg* at 321) because the Secretary had the option of promulgating cargo weight limits and additional width exceptions under 49 U.S.C. §§ 31113(b) & 31136(a) to permit truckers to equip their vehicles with modern safety features without exceeding statutory size and weight limits.

B. Denying truckers occupational health shocks the conscience because it is a form of collective punishment inflicted upon all citizens who drive trucks in retaliation for the actions of a single individual who was himself hospitalized due to his injuries. Even if the President's staff knew nothing about trucking or the standards of the motor carrier safety profession, the President had the same obligation as any health care provider to appoint a qualified professional. That the Federal Highway Administration found it *needful* under 23 U.S.C. § 315 to promulgate the challenged regulations, A-5, because an unqualified Federal Motor Carrier Safety Administrator neglected to do so does not excuse the Secretary from obeying civil rights laws. 42 U.S.C. 1983-1986. One would not allow a police officer from Virginia Tech to impersonate a doctor and withhold health care from Koreans because a Korean shot students at Virginia Tech, for example. See *County of Sacramento v. Lewis,* 523 U.S. 833 (1998) quoting *Daniels v. Williams,* 474 U.S. at 331 ("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").

Police inspections violate "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). While heavy or oversize safety devices could pose a hazard on poorly maintained roads and bridges, "liberty interests require the State to provide minimally adequate or reasonable training to ensure safety and freedom from undue restraint." *Id*. at 319. The Administration's driver training standards have already been ruled arbitrary and capricious. See *Advocates for Highway & Auto Safety v. FMCSA*, 429 F.3d 1136 (D.C. Cir. 2005). Therefore, the Federal Highway Administration cannot just ban safety devices nationwide because an untrained truck driver might damage a structurally deficient road or bridge. States have a duty to teach truckers where it is safe or unsafe for vehicles with large or heavy safety features to travel.

C. Neither court considered the claim raised in the briefs 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") in contradiction of the statutory definition in 49 U.S.C. § 31101(1) ("[a] vehicle used on the highways in commerce"). Intermodal vehicles are a type of material handling equipment used to load and unload trains and barges. They are not normally *used on the highways* nor are they used in interstate commerce, therefore the commercial vehicle width limitation cited in the summary affirmance, 49 U.S.C. § 31113(a)(1), A-12, should not apply to them. Congress expressly prohibited the

Secretary from regulating intermodal vehicles. See 49 U.S.C. §§ 13503(b)(1) & 13506(a)(11). The other statute cited by the Circuit, 23 U.S.C. § 127(a)(2), applies only to vehicles "using The Dwight D. Eisenhower System of Interstate and Defense Highways." Intermodal vehicles use local roads to make pickups and deliveries, not the national highway system. The question District Court was asked to consider is whether an intermodal vehicle crossing a road (or driving a short distance on it to reach a customer that cannot be reached in any other way) is using the highway system.

In *Holrail v. Surface Transportation Board* (D.C. Cir. No. 07-1088, February 22, 2008), the Circuit ruled that even if it is necessary for a carrier to "use [a] right-of-way for a quarter of a mile" in order to cross it, that the word "cross" has a different meaning than "use" as long as a carrier is "not seeking to use [the] property to attract new customers or reach new markets, but only to continue to access its own shippers… " (slip opinion at 9, quoting *Burlington Northern & Santa Fe Railway Co.*, 6 S.T.B. 862, May 9, 2003). Unlike in *Holrail* where one railroad sought to use the private property of another, public highways are state owned like the Pennhurst State School and Hospital described in *Youngberg*. Truckers who decide to replace their obsolete long haul trucks with modern intermodal vehicles to eliminate the "driving for extended periods of time and sleep deprivation" described in *Public Citizen v. FMCSA* therefore have "constitutionally protected liberty interests under the Due Process Clause [to] freedom from unreasonable bodily restraints, and such minimally adequate training as reasonably may be required by these interests." *Youngberg* at 307 (per curiam).

II. The DC Circuit has decided an important question of federal law in a way that conflicts with relevant decisions of this Court.

A. Whenever a government kills its own citizens, there is inevitably a claim that decision makers had no choice in violating human rights. Judges appointed by such persons often dismiss such complaints without hearing evidence on grounds that they are implausible. The United States District Court for the District of Columbia has now ruled that this Court gave its blessing to dismiss such cases in *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544 (2007)– an anti trust case. District Court's opinion that "Trescott's complaint, however, contains essentially no factual allegations," A-8, reveals that the judge did not believe the allegation raised in the initial brief that a 23% increase in seat belt use contributed to a 17% increase in fatalities i.e. that seat belts are an "unreasonable bodily restraint" as described in *Youngberg.* As a Ford Motor Company engineer acknowledged in a letter obtained by the Ralph Nader organization Public Citizen:

> "It is obvious that occupants that are restrained in upright positions are more susceptible to injury from a collapsed roof than unrestrained occupants who are free to tumble about the interior of the vehicle. It seems unjust to penalize people wearing effective restraint systems by exposing them to more severe injuries than they might expect with no restraints."[7]

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[7] *The Hidden Failures of Belts in Rollover Crashes,* p.9 & p.30,

Until recently, seat belts were seldom used on vehicles that lack roll over protection. One would not want screaming children dangling upside down inside a burning school bus falling on their heads trying to get out, for example. In the past, truckers wore only lap belts because their air-ride seats, needed to prevent the "long-term back problems" described in *Public Citizen v. FMCSA*, could slam their heads against the ceiling with a force equal to their own weight if their trucks rolled over while restrained in a vertical position. When former police officers began impersonating safety professionals at the Federal Motor Carrier Safety Administration, state police began ticketing truckers for not wearing shoulder belts even though many, if not most, were wearing lap belts that the police could not see. This harassment influenced many to wear shoulder harnesses to avoid being fined, and truck occupant fatalities skyrocketed to a 16 year high, topping 800 per year.[8]

No one argues that truckers should not wear seat belts– only that if state laws require shoulder belts, truckers have constitutionally protected liberty under the Due Process Clause of the Fourteenth Amendment to install collapse resistant roofs and any other devices they need to be safe without being penalized. While it may seem implausible to a judge

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Tapley, Turner, MacCleery, Lynn, Pelkey, Ricci, Public Citizen, 2004, http://www.citizen.org/documents/belt_report.pdf

[8] Fatality Analysis Reporting System, NHTSA, http://www-fars.nhtsa.dot.gov/finalreport.cfm?title=Trends&stateid=0&year=2005&title2=Large_Truck_Related;

that a 23% increase in seat belt use could cause an increase in fatalities, the question before the Court is not whether the allegations make sense to an unskilled person, but whether the allegations represent a danger to a "person with professional experience in motor carrier safety" as required under 49 U.S.C. § 113(c). The decision of the DC Circuit to grant summary affirmance therefore conflicts with This Court's unanimous decision in *Youngberg* at 307 that "[t]he proper standard for determining whether the State has adequately protected such rights is whether professional judgment in fact was exercised" (per curiam) and also this Court's unanimous decision in *Neitzke* as cited by the majority in *Twombly,* that "Rule 12(b)(6) does not countenance...dismissals based on a judge's disbelief of a complaint's factual allegations."

B. The District Court's many factual errors such as, "He holds five patents for certain safety devices and heavy duty suspension components," A-5, suggest that the judge did not even bother to read the briefs. Petitioner's patents are for an intermodal vehicle and related cargo attachment mechanisms,[9] not safety devices or suspension components. It is not speculative to allege that stronger roofs and crash absorbent body panels proven to decrease fatalities by 20% in cars will also save lives in trucks because, except for air-ride, drivers' seats in cars and trucks are ergonomically identical. As the majority

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[9] *Self-loading Vehicle for Shipping Containers* (U.S. Pats. 6,910,844 & 6,840,724), *Automatic Intermodal Railway Car Coupler* (U.S. Pats. 6,776,299 & 7,070,062), *Stackable Open Front Grocery and Goods Bin* (U.S. Pat. 6,494,313).

agreed in *Twombly,* "[O]nce a claim for relief has been stated, a plaintiff receives the benefit of imagination, so long as the hypotheses are consistent with the complaint." quoting *Sanjuan* v. *American Bd. of Psychiatry and Neurology, Inc.*, 40 F. 3d 247 at 251(CA7 1994) (internal quotes omitted).

While it is conceivable that an overworked judge might mistakenly assume that decade old safety features that reduced car fatalities by 20% were recently invented and unproven, the opinion of the Circuit that "[t]he merits of the parties' positions are so clear as to warrant summary action," A-11, suggests something more than just simple error. District Court's note that due to omissions in the pleadings, "Trescott has limited this action to asking the court to set aside an FHWA regulation," A-9, contradicts the stated cause of action and relief requested in the briefs that the Secretary failed to respond within 120 days to a petition "for promulgation of performance based safety standards" as required under 49 U.S.C. § 30162(d). A-1 & 2. The Circuit's dubious justification for denying subject matter jurisdiction, which was not raised by any party in the case, that the defunct Interstate Commerce Commission hypothetically lacked the power to create exceptions for modern safety devices had they been invented in the 1970's, A-3, not only ignores the plain language of the Hobbs Act, which clearly establishes exclusive jurisdiction of agency decision making under the Motor Carrier Safety Act in the courts of appeals, 28 U.S.C. § 2342(3)(A), it ignores the plain language of the Motor Carrier Safety Act itself which extends jurisdiction to all outmoded commercial vehicle safety regulations promulgated before October 30th, 1984– including the challenged regulations. 49 U.S.C. § 31136(d).

See *Neitzke* at 329 ("[a] complaint that fails to state a claim may not be dismissed for want of subject-matter jurisdiction unless it is frivolous") citing *Hagans v. Lavine*, 415 U.S. at 536-537. This Court long held in *Conley v. Gibson*, 355 U. S. 41 at 48 (1957), that "[t]he Federal Rules reject the approach that pleading is a game of skill in which one misstep by [a pro se litigant] may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." Cf. *Maty v. Grasselli Chemical Co.*, 303 U.S. 197.

District Court's reliance on *Bell Atlantic* is misplaced. The *Twombly* and *Conley* decisions do not contradict each other. They are opposite types of cases. Twombly was attempting to prove collusion without evidence; while Conley had plenty of evidence, but was trying to prove a negative– that his union failed to fulfill its contractual obligations. This Court held in *Twombly* that if a plaintiff is attempting to prove a factual allegation, he should show some evidence because, without anything to refute, the only defense available to defendants like Bell Atlantic is to try to prove a negative, which requires expensive discovery. This Court held in *Conley* that if a plaintiff is trying to prove a negative such as nonperformance of a contract (or an Agency's disobedience to a statute) the defendant should answer the complaint because discovery of specific facts costs little and "the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim." 355 U.S. at 41-42. Showing a set of facts (or the absence of specific facts) sufficient to raise a right to relief above a speculative level without discovery, as the Court required in *Twombly*, would involve an expensive investigation that would make litigation

unaffordable to unemployed victims of racial discrimination like Conley. The only set of facts consistent with a negative is an absence of fact. Thus, this Court decided consistently in both *Conley* and *Twombly* to conserve scarce judicial resources and minimize the cost of litigation. These decisions should therefore co-exist as different pleading standards for different types of cases and should not be construed as being mutually exclusive.

The inability of a pro se litigant to afford effective representation cannot excuse a court of its constitutional obligation to make certain that professional judgment is exercised as this Court required in *Youngberg*.

CONCLUSION

Certiorari should be granted to address the proper standard for pleading a due process claim involving allegations of government misconduct.

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APPENDIX

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-1327 **September Term 2007**
TRAN-49USC30162
Filed On: April 8, 2008

William B. Trescott,
Petitioner

v.

Federal Highway Administration and Secretary of Transportation,
Respondents

BEFORE:
Henderson, Rogers, and Kavanaugh, Circuit Judges

O R D E R

The court concludes, on its own motion, that oral argument will not assist the court in this case. Accordingly, the court will dispose of the petition for review without oral argument on the basis of the record and the presentations in the briefs. See D.C. Cir. Rule 34(j).

Per Curiam

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-1327 **September Term 2007**
TRAN-49USC30162
Filed On: April 22, 2008

William B. Trescott,
Petitioner
v.

Federal Highway Administration and Secretary of Transportation,
Respondents

PETITION FOR REVIEW FROM AN ORDER OF THE FEDERAL HIGHWAY ADMINISTRATION

BEFORE:
Henderson, Rogers, and Kavanaugh, Circuit Judges

J U D G M E N T

This petition for review of an order of the Federal Highway Administration was considered on the agency record and the briefs filed by the parties. See Fed. R. App. P. 34(a)(2); D.C. Cir. Rule 34(j). It is

ORDERED AND ADJUDGED that the petition be transferred to the District Court for the District of Columbia. The petitioner seeks review of regulations issued pursuant to the agency's authority under 23 U.S.C. §§ 127, 315 and 49 U.S.C. §§ 31111, 31112, and 31114. This court lacks subject-

matter jurisdiction because none of these statutes falls within those listed in the Hobbs Act, 28 U.S.C. § 2342(3)(A), and the authority exercised by the Federal Highway Administration was not transferred from the Interstate Commerce Commission to the Department of Transportation. See Aulenback, Inc. v. FHWA, 103 F.3d 156 (D.C. Cir. 1997) (holding that the Hobbs Act only grants the courts of appeals exclusive jurisdiction to review actions of Department of Transportation agencies 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). Therefore, the petitioner must seek review in district court pursuant to the Administrative Procedure Act, 5 U.S.C. § 704, under federal question jurisdiction, 28 U.S.C. § 1331.

The Clerk is directed to transmit the original file and a certified copy of this order to the United States District Court for the District of Columbia. Pursuant to D.C. Cir. Rule 36, this disposition will not be published.

Per Curiam

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action 08-00731 (HHK)

WILLIAM B. TRESCOTT,
Plaintiff,

v.

FEDERAL HIGHWAY ADMINISTRATION and RAY LAHOOD, Secretary, U.S. Department of Transportation,

Defendants.

MEMORANDUM OPINION

Plaintiff William B. Trescott brings this action against defendants Federal Highway Administration ("FHWA") and Ray LaHood, U.S. Secretary of Transportation ("Secretary"), (together, "defendants") under the Administrative Procedure Act, 5 U.S.C. § 704 ("APA"). Trescott claims that the FHWA promulgated certain commercial motor vehicle size and weight regulations that are arbitrary and capricious and contrary to law. *See* 5 U.S.C. § 706(2)(A). Specifically, Trescott contends that these regulations ban certain devices and components based on their size and weight rather than on scientific assessments of their efficacy in reducing injury and highway damage, even though some of these devices and components are permitted for recreational vehicles. Trescott also claims that the FHWA promulgated these rules "without observance of procedure required by law." *See* 5 U.S.C. §

706(2)(D). Before the court is defendants' motion to dismiss [#7]. Upon consideration of the motion, the opposition thereto, and the record of this case, the court concludes that defendants' motion should be granted.

I. BACKGROUND

Congress has established an overall gross vehicle weight limit of 80,000 pounds, 23 U.S.C. § 127(a)(2), and a commercial vehicle width limit of 102 inches, 49 U.S.C. § 31113(a)(1), for federal highways. Pursuant to its authority to promulgate regulations concerning highway preservation and safety and to enforce the Congressionally-mandated size and width limitations, 23 U.S.C. § 315 and 49 U.S.C. § 104, the FHWA has promulgated regulations restating the width, 23 C.F.R. § 658.15, and weight, 23 C.F.R. § 658.17, limitations.

Trescott is a trucker and an inventor. He holds five patents for certain safety devices and heavy duty suspension components that may improve commercial motor vehicle safety and reduce highway damage. The problem is that incorporating such devices or components into commercial motor vehicles may cause the vehicles to exceed the limitations set forth in the FHWA's most recently promulgated regulations governing vehicle size and weight restrictions, Size and Weight Enforcement and Regulations, 72 Fed. Reg. 7741 (Feb. 20, 2007), which incorporate the statutorily-mandated size and weight restrictions set forth in 23 U.S.C. § 127(a)(2) and 49 U.S.C. § 31113(a)(1). As a result, Trescott alleges that he has been deprived of the value of his patents. Accordingly, Trescott challenges the newly-promulgated regulations.

After the FHWA had published the challenged regulations in proposed form, defendants concede that Trescott submitted comments criticizing the size and weight restrictions and questioning the FHWA's authority to promulgate rules governing commercial motor vehicle size and weight. (*See* Defs.' Mot. to Dismiss at 3.) The final rule addressed Trescott's comments, explaining that the comments "address[ed] issues that were not raised in the NPRM, and [we]re therefore outside the scope of th[e] rulemaking." Size and Weight Enforcement and Regulations, 72 Fed. Reg. at 7745. The final rule also addressed Trescott's challenge to FHWA authority, explaining that it was predicated on a misinterpretation of a provision of the Motor Carrier Safety Improvement Act, namely 49 U.S.C. § 113(f)(1), which, according to the FHWA, describes the delegation of powers to the Federal Motor Carrier Safety Administrator but does not disturb the delegation of powers to the FHWA to promulgate rules governing commercial motor vehicle size and weight. Size and Weight Enforcement and Regulations, 72 Fed. Reg. at 7745. Trescott filed a petition for reconsideration with the FHWA, which he subsequently withdrew. Then, he filed this petition in the U.S. Court of Appeals for the D.C. Circuit. The Circuit dismissed his petition for lack of jurisdiction and transferred the matter to this court.

II. ANALYSIS

Defendants move to dismiss Trescott's complaint for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) and for failure to state a claim upon which relief may be granted under Federal Rule of Civil Procedure

12(b)(6). Because the court finds that defendants' motion to dismiss under Rule 12(b)(1) is wholly without merit,[1] the court focuses its analysis on defendants' motion to dismiss under Rule 12(b)(6).

"When ruling on a . . . motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint." *Erickson v. Pardus*, 551 U.S. 89, 94 (2007). To survive a motion to dismiss for failure to state a claim, the complaint's "[f]actual allegations must be enough to raise a right to relief above the speculative level . . . on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal quotations and citations omitted). Whether to grant "a motion to dismiss for failure to state a claim upon which relief may be granted is a pure question of law." *Danielsen v. Burnside-Ott Aviation Training Ctr., Inc.*, 941 F.2d 1220, 1230 (D.C. Cir. 1991).

Defendants contend that Trescott's complaint must be dismissed because promulgating motor vehicle size and weight limitations falls squarely within the FHWA's authority and because the specific limitations incorporated into the challenged regulations are mandated by statute. Therefore,

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[1] Defendants contend that Trescott's petition for review is barred by the six-year statute of limitations for civil suits against the United States because Trescott seeks to challenge commercial motor vehicle size and weight restrictions that have been in place since 1984. *See* 28 U.S.C. § 2401(a); *Harris v. FAA*, 353 F.3d 1006, 1009-10 (D.C. Cir. 2004). The court disagrees. Trescott plainly is challenging a final rule that was promulgated in 2007. Size and Weight Enforcement and Regulations, 72 Fed. Reg. 7741. Thus, his petition falls within the six-year limitations period.

according to defendants, the FHWA has authority neither to deviate from the statutory standards nor to grant an exception for the inventions for which Trescott holds patents. Trescott counters that Congress has provided exemptions to these size and weight limitations for safety devices, such as side-view mirrors, 49 U.S.C. § 31113(b), and that Congress has provided a procedure for changing regulations for safety reasons, 49 U.S.C. § 30162. Trescott further contends that the real question is whether the FHWA has followed proper procedures to exempt modern safety devices like the ones he has invented. Defendants rejoin that Trescott has not and indeed cannot point to any statutory provision that empowers the FHWA to modify the statutory size and weight restrictions. To the extent that the FHWA is empowered to make exceptions for "safety and energy conservation devices," 49 U.S.C. §§ 31111(d) and 31113(b), defendants contend that these provisions do not contemplate the exclusion of an entire vehicle, which is what Trescott has invented. Finally, defendants point out that Trescott has identified no action on the part of the FHWA that was procedurally incorrect and thus in violation of the APA.

To survive defendants' motion to dismiss, Trescott must have alleged sufficient facts to raise a claim that the FHWA's actions were arbitrary and capricious or otherwise contrary to law, 5 U.S.C. § 706(2)(a), or without observance of procedure required by law, *id.* § 706(2)(d), above the speculative level. *See Twombly*, 550 U.S. at 555. Trescott's complaint, however, contains essentially no factual allegations: he does not allege that the FHWA failed to respond to the comments he submitted in connection with the rulemaking; nor

does he allege that there was information before the FHWA that it failed to consider. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("[A]n agency rule [is] arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation of its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."). Likewise, Trescott has not alleged what actions, if any, the FHWA took which were inconsistent with procedure required by law.[2] Absent such allegations, the court cannot find that Trescott has raised a right to relief above the speculative level. *See id*. Accordingly, his complaint must be dismissed. *See id*. In any event, the court agrees with defendants that the FHWA has the authority to promulgate the challenged regulations, including the size and weight restrictions therein. *See* 23 U.S.C. § 315; 49 U.S.C. § 104. The court also agrees with defendants that the FHWA lacks the power to modify these statutorily-mandated size and

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[2] Although Trescott suggests in his opposition brief that he may have filed a petition under 49 U.S.C. § 30162 asking the Secretary to promulgate a standard that would allow for his inventions, Trescott has limited this action to asking the court to set aside an FHWA regulation, Size and Weight Enforcement and Regulations, 72 Fed. Reg. 7741, as "arbitrary and capricious [or] contrary to law" or "promulgated 'without observance of procedure required by law.'" (Pl.'s Certificate of Counsel at 2-3.) Trescott does not challenge the Secretary's purported failure to respond to his putative petition. Accordingly, that issue is not before the court.

weight restrictions. *See* 23 U.S.C. § 127(a)(2); 49 U.S.C. § 31113(a)(1). Finally, the court generally rejects the arguments in Trescott's opposition brief because they are irrelevant to the question of whether the factual allegations in his complaint are sufficient to raise a right to relief above the speculative level. *See Twombly*, 550 U.S. at 555.

III. CONCLUSION

For the foregoing reasons, the court finds no basis to hold unlawful or set aside the agency action at issue. Accordingly, the court concludes that defendants' motion to dismiss [#7] must be GRANTED. An appropriate order accompanies this Memorandum Opinion.

Henry H. Kennedy, Jr.
United States District Judge

JUDGMENT

Pursuant to Fed. R. Civ. P. 12(b)(6) and for the reasons stated by the court in its memorandum opinion docketed this same day, it is this 8th day of June 2009, hereby

ORDERED and **ADJUDGED** that judgment is entered in favor of defendants.

Henry H. Kennedy, Jr.
United States District Court

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-5280 **September Term 2009**
1:08-cv-00731-HHK
Filed On: December 9, 2009

William B. Trescott,

Appellant

v.

Federal Highway Administration and Secretary of Transportation,

Appellees

BEFORE:
Garland, Brown, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for summary affirmance, the response thereto, and the reply; the motion for summary reversal, the response thereto, and the reply; and the motion to expedite, it is

ORDERED that the motion for summary affirmance be granted and the motion for summary reversal be denied. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). Appellant has not demonstrated that the Federal Highway Administration's Size and Weight Enforcement and Regulations, 72 Fed. Reg. 7741 (Feb. 20, 2007), are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A), or that the Administration lacks the authority to promulgate the regulations, see 23

U.S.C. § 315; 49 U.S.C. § 104; 49 C.F.R. § 1.48(b)(1); 49 C.F.R. § 1.73(g); 72 Fed. Reg. at 7745-46. To the extent the final rule is related to vehicle size and weight restrictions, it is in accordance with the statutorily prescribed limits. See 23 U.S.C. § 127(a)(2); 49 U.S.C. § 31113(a)(1). Nor has appellant shown that the agency failed to comply with the Administrative Procedures Act's notice and comment requirements. See 5 U.S.C. § 553(b).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

Filed On: March 9, 2010

BEFORE: Sentelle, Chief Judge, and Ginsburg, Henderson, Rogers, Tatel,Garland, Brown, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam