No. 07-1327

(No date for oral argument has been set)

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

WILLIAM B. TRESCOTT

Petitioner,

v.

THE FEDERAL HIGHWAY ADMINISTRATION,
THE SECRETARY OF TRANSPORATION,
and THE UNITED STATES

Respondents.

On Petition for Review of a Final Rule Issued by
the respondent Federal Highway Administration

REPLY BRIEF FOR PETITIONER

William B. Trescott
8028 Farm to Market Road 457
Bay City, Texas 77414
(979) 244-3134

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REGULATORY MATERIALS

MISCELLANEOUS

GLOSSARY

C.F.R.	Code of Federal Regulations
FHWA	Federal Highway Administration
FMCSA	Federal Motor Carrier Safety Administration
FR	Federal Register
MCSA	Motor Carrier Safety Act
MCSIA	Motor Carrier Safety Improvement Act
NCSA	National Center for Statistics and Analysis (NHTSA)
NHTSA	National Highway Traffic Safety Administration
P.L.	Public Law
SAFETEA–LU	The Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users
U.S.C.	United States Code

SUMMARY OF ARGUMENT

Respondents failed to answer the questions posed in my initial brief, "Why should a regulation be promulgated under Title 23 if its authority comes from Title 49?", and in my comments to the proposed rule,

> … why it should be legal for an unskilled motorist, lacking any training whatsoever, to operate a ten or eleven foot wide intermodal rail vehicle for recreational purposes without any kind of permit, when it is illegal for an experienced professional to drive the same vehicle even with a permit—or why, to perform the same function, skilled professionals should be required to drive primitive, top-heavy 1950's era 18 wheelers lacking needed safety features when unskilled motorists without any qualifications are allowed to operate modern vehicles?

Respondents argue that the current weight limitations enacted as part of the Federal-Aid Highway Act Amendments of 1974 limit the overall gross weight of vehicles on interstate highways to 80,000 pounds despite amendments to 23 U.S.C. § 127(a)(2) in *The Energy Policy Act of 2005* (Pub. L. 109–58, 119 Stat. 544). *Res.* Br. at 3. Specifically, they argue that § 127(a)(2)(2) supercedes § 127(a)(1)—note that in *Respondents'* Addendum, A.3, section 127(a)(2)(2) is included in the body of § 127(a)(2) rather than indented as shown in *Petitioner's* Addendum B-3.[1] Subsections of a statute may not be construed to contradict each other.

[1] To avoid confusion, *respondents'* addendum shall be cited with a period and *petitioner's* addendum with a dash.

Respondents further argue that FHWA's authority for highway safety programs, research, and development related to highway design, construction and maintenance under 49 U.S.C. § 104(c)(1) extends to promulgating regulations relating to federal highway preservation rather than merely making recommendations to Congress and State transportation departments as authorized in 23 U.S.C. § 315, A.5, *Res.* Br. at 4, and that the agency' s interpretation of 49 U.S.C. § 113(f) is reasonable, *Res.* Br. at 11, because 49 U.S.C. §§ 31111,31112, and 31114 are located in Subchapter II of Chapter 311 of Title 49, which is titled "Length and Width Limitations." instead of Subchapter III which is titled "Safety Regulation." The laws of physics determine whether a regulation is related to motor carrier safety, not the subchapter they are found in. If a regulation is mathematically or statistically proven to hurt people, then it is indisputably related to safety and this Court has the authority to vacate it.

ARGUMENT

I. The Court has Jurisdiction

Respondents assert that this Court lacks jurisdiction under the Hobbs Act and this case should have been filed in district court under 28 U.S.C. § 1331 or 5 U.S.C. § 704 because coverage of chapter 311 is expressly limited

to subchapter III. 28 U.S.C. § 2342(3)(A). A.9. However, 49 U.S.C. § 31136(a), cited in my Initial Brief at 25 and listed with an asterisk in my Table of Authorities denoting it as a statute upon which I chiefly rely, **is** located in subchapter III. District Court has already ruled:

> "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[.]" [2] *Trescott v. Peters,* No. 05-678 (D.D.C. Mar. 2, 2007 slip op. at 8) quoting Telecomms. Research & Action Ctr. v. Fed. Communications Comm'n, 750 F.2d 70, 77 (D.C. Cir. 1984).

Even if this Court did not have jurisdiction under 49 U.S.C. §§ 30162(d), 31136(a) & (d), 28 U.S.C. § 2342(3)(A), & 5 U.S.C. § 706, it has jurisdiction under 5 U.S.C. §§ 611(a)(1), 604(a)(2), 553, and perhaps 49 U.S.C. § 20104(c) as well because District Court refused to hear my case.

> There is no constitutional requirement that validity of administrative regulation be tested in one tribunal rather than another so long as there is opportunity to be heard and for judicial review which satisfies demands of due process. *Yakus v. United States*, 321 US 414.

They complain in their notes that they could not file a motion to dismiss because the nature of this challenge was unclear at the dispositive motion phase even though a summary of argument and statement of issues was

[2] Congress has provided for exclusive review of agency decision making under MCSA by the court of appeals. See City of Rochester v. Bond, 603 F.2d 927, 931 (D.C. Cir. 1979)

included with my Certificate of Counsel at 4, thus they ask this Court to transfer this petition back to District Court where the outcome of their motion has already been decided.

> …judicial review of final agency action by aggrieved person will not be cut off unless there is persuasive reason to believe such was the purpose of Congress. *Barlow v. Collins*, 397 US 159.

II. The Petition is Timely

Respondents also argue in their notes at 8 that if the Court determines that it has jurisdiction, it should deny my petition because the six year statute of limitations of 28 U.S.C. § 2401(a) may have been exceeded even though the original cause of action stems from the Secretary's failure to respond within 120 days to a petition as required under 49 U.S.C. § 30162(d) to begin a proceeding to prescribe a new motor vehicle safety standard when statutory authority for the old standard, 23 C.F.R. § 658.17(b), B-9, which denies truckers needed safety devices, was amended by *The Energy Policy Act of 2005* (Pub. L. 109–58, 119 Stat. 544). 23 U.S.C. § 127(a)(2)(2). B-3. Similarly, they also argue at 11 that "Congressional acquiescence to longstanding executive interpretation indicates that the interpretation is valid" even though the House Subcommittee on Surface Transportation held its first motor carrier safety hearing in five years on the very day the Secretary 's

response to my petition was due.

III. The Agency Lacks Statutory Authority

A. Basis for Vacatur

Respondents assert in Part II of their Argument that my petition offers no basis for vacating FHWA's Size and Weight Regulations and that my position rests on a "misinterpretation" of Section 113(f)—they say FMCSA's statutory delegation in § 113(f) "is limited to chapter 311 powers and duties 'related to motor carriers and motor carrier safety.' 49 U.S.C. § 113(f)(1)." *Res.* Br. at 10. Not to be a niggling complainer, my version of the MCSIA says powers and duties "related to motor carriers **or** motor carrier safety." 49 U.S.C. § 113(f)(1) (emphasis added). 72 FR 7745. A.22. B-10.

Commercial motor vehicle size and weight is indisputably related to motor carrier safety according to the laws of physics. I have provided the Court with all of the mathematical formulae needed to prove this obvious fact in my Initial Brief at 32, 35, & 45. *Respondents* have offered no authority, argument, or expert opinion to refute this, but instead insist that size and weight limits are not related to safety simply because they were not listed in Subchapter III. **They are not found in Chapter 4 of Title 23 either!** So, Section 113(g) prohibits their transfer. 49 U.S.C. § 104(c). A.10 & 12.

Congress has spoken on this issue. 49 U.S.C. § 31136(a) states:

> "[T]he Secretary of Transportation shall prescribe regulations on commercial motor vehicle safety. The regulations shall prescribe minimum safety standards for commercial motor vehicles. At a minimum, the regulations shall ensure that (1) commercial motor vehicles are maintained, equipped, loaded, and operated safely… (emphasis added)
>
> If the Secretary does not prescribe regulations on commercial motor vehicle safety under this section, regulations on commercial motor vehicle safety prescribed by the Secretary before October 30, 1984, and in effect on October 30, 1984, shall be deemed in this subchapter to be regulations prescribed by the Secretary under this section. 49 U.S.C. § 31136(d)

Because the required safety standards for safety equipment, weight of load, and safer operating methods such as intermodalism were not prescribed as required by § 31136(a) and demanded in my petition filed under § 30162 — and because § 31136(d) **is** located in Subchapter III — any regulation affecting commercial motor vehicle safety promulgated before 1984 is reviewable under the Hobbs Act regardless where in the Code of Federal Regulations it may be found. 28 U.S.C. § 2342(3)(A). A.9.

> The current weight limitations were enacted as part of the Federal-Aid Highway Act Amendments of 1974...The current width limitation was enacted as part of the Surface Transportation Assistance Act of 1982... *Res.* Br. at 3.

Respondents argue at 11 that the agency' s interpretation of § 113(f) is reasonable despite § 31136(d) and deserves deference by this Court citing

Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.., 467 U.S. 837, 843-44 & n.ll (1984). This Court ruled in *Peter Pan v. FMCSA* (D.C. Cir. December 2006, No. 05-1436), quoting *Northpoint Tech., Ltd. v. FCC*, 412 F.3d 145, 151 (D.C. Cir. 2005) (quoting *Chevron*, 467 U.S. at 842-43):

> "[U]nder the *Chevron* two-step, we stop the music at step one if the Congress 'has directly spoken to the precise question at issue' because we—and the agency—'must give effect to [its] unambiguously expressed intent.' "

B. Congressional Inaction is not Acquiescence

Respondents claim at 11 that Congress recognized FHWA's authority over commercial vehicle size and weight enforcement by requesting and receiving information on FHWA's implementation of the size and weight program, A-1 & A-5, and that the decision to maintain commercial vehicle size and weight enforcement in FHWA rather than FMSCA, taken **without public comment,** 64 FR 56270, is consistent with Congress's intent because "(Congressional acquiescence to longstanding executive interpretation indicates that the interpretation is valid)."

The agency received direction from Congress in the form of post enactment statements from Congressmen with financial leverage over it—rendering the agency action invalid. A-1 & A-5. *Texas Medial Assoc. v. Mathews* (1976, WD Tex) 408 F Supp 303. When the Chairman of the House

Subcommittee on Surface Transportation ordered his Counsel to represent me before the Agency in 2001, the Secretary hired her away from him two weeks later, presumably to obtain trade secrets I shared with the Chairman that had not yet been patented [3]—eventually making her Chief Counsel of FMCSA after I filed suit in District Court. The Secretary resigned when I accused him of corruption in my comments to the notice of proposed rulemaking. Docket Number FHWA–2006–24134-4, at 5.

The Court should not consider lightly the effect on a Congressman of losing his Counsel. People tell their lawyers a lot of personal things. It is well known that the Committee Chairman in A-1 is being criminally investigated concerning a bridge to nowhere in Alaska and that the home of a Senator from the same state was searched.[4] Because no motor carrier safety hearings were held for five years until I filed my petition with the Secretary, the Court should not give the same deference to the argument that Congressional inaction is evidence of Congressional intent as it would if normal oversight hearings had taken place and ordinary parliamentary procedures were followed to consider legislation[5] before the Committee.

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[3] U.S. Patents 6,494,313; 6,776,299; 6,840,724; 6,910,844; & 7,070,062

[4] as televised on the ABC Evening News

[5] Presidential Candidate Ron Paul's *'The Safer Truck Act'* (HR 2083, HR 1248)

C. States have the Right to Protect their Citizens

Texas grants annual permits for equipment up to 12 feet wide and 120,000 pounds on its state highways,[6] yet even though almost one in ten truck fatalities nationwide occurs in my state,[7] Texas is compelled to ban intermodal vehicles from its federal highways or face the loss of a federal subsidy of almost one billion dollars every six years.[8] 23 U.S.C. § 141(b)(2). The loss of this much money would be so economically devastating to Texas that our Legislature feels compelled to prohibit such vehicles from operating over (on a bridge) as well as on a public highway.[9] The only way for an intermodal vehicle to legally drive from one side of town to the other if a federal highway bisects a municipality, is to tunnel under it! Congress did not intend for the Federal Highway Administration to have the power to ban intermodal vehicles. 49 U.S.C. §§ 13503(b)(1) & 13506(a)(11). B-6.

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[6] TRC § 623.071(c) The department may issue an annual permit to allow the operation on a state highway of equipment that exceeds weight and size limits provided by law for the movement of: …(3) superheavy or oversize equipment that: (A) cannot reasonably be dismantled; and (B) does not exceed: (i) 12 feet in width; (ii) 14 feet in height; (iii) 110 feet in length; or (iv) 120,000 pounds gross weight.

[7] Traffic Safety Facts 2005—Large Trucks, NCSA, www-nrd.nhtsa.dot.gov

[8] *The Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users* (SAFETEA–LU) (Pub. L. 109–59, 119 Stat. 1144)

[9] TRC § 621.101(a) A vehicle or combination of vehicles may not be operated over or on a public highway … if the vehicle or combination [is] heavier than 80,000 pounds, including all enforcement tolerances, regardless of tire ratings, axle spacing (bridge), and number of axles. (c) This section does not: (1) authorize size or weight limits on the national system of interstate and defense highways in this state greater than those permitted under 23 U.S.C. Section 127...

IV. Judicial Review is Justified

A. The Secretary is Prohibited from Regulating Intermodalism

> Article I, section 8, clause 3 of the Constitution gives Congress the authority to regulate interstate commerce. The Supreme Court has held that Congress may also legislate on matters "affecting interstate commerce," a phrase generally treated as equivalent to intrastate commerce. Federal legislation is presumed, therefore, to apply only to interstate commerce unless it reveals some indication of a Congressional intent to reach intrastate commerce. 72 FR 73227.

The question this Court is being asked to answer is whether the agency's interpretation of the word "using" as when a vehicle is "using The Dwight D. Eisenhower System of Interstate and Defense Highways" in 23 U.S.C. § 127(a)(2), is a permissible construction of the statute. Every dictionary has many definitions of the word "use" such as "employ, expend, consume, make familiar by habit or practice," and "the permanent equitable right that a beneficiary has to the enjoyment…" [10] Is an intermodal vehicle or snow plow crossing a road "using" the national highway system or is the highway merely an obstacle in its way that must be crossed? If a vehicle crosses a state line while driving on a federal highway it is undoubtedly using it, but what if it is merely driving a short distance on a highway that has been declared by a local government to be within a terminal area? The lack of any

[10] Funk & Wagnall's Standard Desk Dictionary

discussion in the rule after the statute was amended by *The Energy Policy Act* makes clear that the Agency construed Section 127(a)(2) as an unambiguous expression of the Congress's intent, thereby triggering review under *Chevron* step 1 (467 U.S. at 842 *et seq*.). The agency's construction fails scrutiny under *Chevron* part one because there is more than one definition for "using." Congress may have meant "using" to more narrowly mean "expend" or "consume" rather than more broadly "employ" or "make familiar." As I explained in my Initial Brief at 31 & 60, an intermodal vehicle prevents highway damage that would otherwise be caused by long haul trucks. The agency's construction fails *Chevron* part two because Congress prohibited the Secretary from regulating intermodal vehicles unless traveling outside a terminal area with a loaded container in the same manner that a long haul truck might cause wear and tear. 49 U.S.C. §§ 13503(b)(1) & 13506(a)(11). B-6. The complete absence of any discussion of a statutorily mandated factor makes the agency's reasoning arbitrary and capricious. *United Mine Workers v. Dole*, 870 F.2d 662, 673 (D.C. Cir. 1989).

B. FHWA Has No Authority to Regulate Safety Devices

Respondents have argued that FHWA's commercial motor vehicle size and weight program only serves "to establish limitations which the States are

required to implement and enforce in order to protect and preserve the infrastructure and overall highway safety." 72 FR 7746. *Res*. Br. at 10. The question this Court is being asked to answer is which addendum is correct in its listing of Section 127(a)(2)—A.3 or B-3? If B-3 is correct, then § 127(a) only regulates axle weight—which is not safety related. No one disputes FHWA's authority to enforce limits on axle weight or require trucks to be equipped with additional axles to protect roads and bridges because, except for long combination vehicles, additional axles usually improve safety. If the Secretary feels an 80,000 pound gross weight limit is desirable for more than just those vehicles described in § 127(a)(2)(2), she can advise Congress and State transportation departments as authorized in 23 U.S.C. § 315. A.5.

The lack of discussion after the statute was amended, however, makes it clear that the Agency construed its version of Section 127(a)(2) in A.3 as an unambiguous expression of Congressional intent, thereby triggering review under *Chevron* part one. The agency's construction fails scrutiny because the statutory language of § 127(a)(2)(2), "…overall gross weight may not exceed eighty thousand pounds" contradicts the language of § 127(a)(1), "…a gross weight of at least eighty thousand pounds…" Anyone with common sense will recognize that a truck cannot weigh at least eighty thousand pounds and

not exceed eighty thousand pounds. They failed to consider the amendment's effect of converting what had been subordinate sentences of a paragraph into separate subsections of law. A statute ought to be construed so that no clause, sentence, or word shall be superfluous, void, or insignificant. *Duncan v. Walker*, 533 U.S. 167, 174 (2001). If Congress intended § 127(a)(2)(2) to apply to all vehicles, then the use of the words "at least" in § 127(a)(1) would have been superfluous. Agencies must explain rejection of reasonable alternatives. *Public Citizen v. Steed,* 733 F.2d 93, 99 (D.C. Cir. 1984).

If the Court rules that Section 127 is ambiguous despite efforts to clarify it in *The Energy Policy Act*, then the agency's construction fails *Chevron* part two on 14th Amendment grounds: By mathematical analysis, Section 127(a)(2)(2) is a grandfather clause[11] while 23 C.F.R. § 658.17(b) regulates the weight of safety devices on modern vehicles. Why should trucks traveling between Sioux City, Iowa and South Dakota or Nebraska be allowed to have modern safety devices and not those traveling in Texas? A.3. Texas has seven times as many fatal truck crashes as Iowa.[12] Why should Texas be compelled to deny its residents the equal protection under the law that residents of Sioux City, Iowa enjoy?

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[11] axle spacings longer than § 127(a)(2)(1) need no special exception to the bridge law
[12] Traffic Safety Facts 2005—Large Trucks, NCSA, p.5, www-nrd.nhtsa.dot.gov

Congress in its wisdom anticipated this problem and provided FMCSA with authority over all "regulations **on** commercial motor vehicle safety" in § 31136(d) (emphasis added) as a stop gap measure until new rules limiting cargo weight were promulgated under § 31136(a)(1)—but the President appointed unqualified people to occupy the office of FMCSA Administrator and cargo weight limits were never promulgated. *Respondents* do not dispute this. No one in Congress favors unsafe trucks. If Congress intended that the weight of all vehicles should be limited to 80,000 pounds with only a few exceptions, it would not have said "at least 80,000 pounds" in § 127(a)(1).

C. Immediate Vacatur is Needed

A legal definition of the word "use" that Congress might have intended for trucks "using" the national highway system is:

> the permanent equitable right that a beneficiary has to the enjoyment of the rents and profits of lands and tenements of which the legal title and possession is vested in another in trust for the beneficiary [13]

The Secretary breached this trust in allowing FHWA to promulgate rules related to motor carrier safety which should have come from a "person with professional experience in motor carrier safety." 49 U.S.C. § 113(c). Just as a "confession" is an admission if guilt, a "profession" is a vow to establish

[13] Funk & Wagnall's Standard Desk Dictionary

trust. There are no academic degrees in motor carrier safety. In trucking, the only relevant credential is the number of miles driven without a preventable crash. I have 400,000. Trucking may not be rocket science, but motor carrier safety is an applied science utilizing precise mathematical formulae to determine what is safe that cannot be solved at the point of a gun. If *Respondents* claim a motor carrier enforcement officer who had never driven a truck for a living has "professional experience in motor carrier safety," not just public safety, the Court should inquire into what motivated the motor carrier to hire an obviously unqualified person[14] and what special consideration the carrier received from the police department in return for paying professional services fees to an individual police officer.

Under such circumstances, remand to either agency would be inappropriate and vacatur is needed to protect truckers from the dangers of the workplace. Texas has already enacted a statute to automatically adopt increases in Section 127 size and weight limits,[15] so vacatur of § 658.17(b) will bring immediate relief to the people of Texas. Because almost one

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[14] Even if one would admit that public safety professionals understand traffic safety as well as truckers do, motor carrier safety involves additional disciplines such as dunnage, cargo handling, and vehicle design beyond the abilities of motor carrier enforcement officers.

[15] TRC § 621.005 If the United States prescribes or adopts vehicle size or weight limits greater than those prescribed by 23 U.S.C. Section 127 on March 18, 1975, for the national system of interstate and defense highways, the increased limits apply to the national system of interstate and defense highways in this state.

hundred Americans are killed by heavy trucks every week and one in every seven Americans killed on the job is a heavy truck driver, A-6, this Court must act speedily to protect public safety.

CONCLUSION

The Court should permanently vacate those parts of the Code of Federal Regulations promulgated under Title 23 that lack statutory authority under Title 23 of the United States Code, including Sections 658.5, 658.15, & 658.17(b), with remand to the Federal Motor Carrier Safety Administration for promulgation of performance based safety standards as required in Chapter 311, Subchapter III of Title 49 for cargo weight, lateral stability, intermodalism, hybrid power trains, axles with increased track width, and modern safety devices.

Respectfully Submitted

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William B. Trescott
www.truckingvideo.com
8028 Farm to Market Road 457
Bay City, Texas 77414
(979) 244-3134

RULE 32(a)(7)(C) CERTIFICATE

I hereby certify that the attached Initial Brief for Petitioner complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B). The brief is composed in a 14-point proportional typeface, Times New Roman. As calculated by my word processing software, the Brief (exclusive of those parts permitted to be excluded under the Federal Rules of Appellate Procedure) contains 3,900 words.

CERTIFICATE OF SERVICE

I, William B. Trescott, hereby certify that I served a copy of the foregoing by certified mail on the following:

James Ray
Chief Counsel
Federal Highway Administration
1200 New Jersey Ave. SE
Washington, D.C. 20590-9898

D.J. Gribbin
General Counsel
U.S. Department of Transportation
1200 New Jersey Ave. SE
Washington, D.C. 20590-9898

Kelsi Brown Corkran,
Mark B. Stern
Civil Division Appellate Staff
U.S. Department of Justice, Room 7216
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530

_____
William B. Trescott