UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

William B. Trescott,	§
Plaintiff	§
	§
vs.	§
	§
The United States et al.,	§
Defendants	§

PLAINTIFF'S COMPLAINT

QUESTION PRESENTED

Does the U.S. Supreme Court's recent ruling in *Caperton v. Massey* lead to the conclusion that the United States can be held liable for judicial misconduct under the Civil Rights Act?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides:

> 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.

The Civil Rights Act, 42 U.S.C. § 1985(3), 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.

JURISDICTION

This court has federal question jurisdiction under 28 U.S.C. § 1331.

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PARTIES

Plaintiff is William B. Trescott, a trucker by trade and an inventor who has not issued debt securities to the public. If class action certification is granted pursuant to Rule 23 of the Federal Rules of Civil Procedure, additional plaintiffs may include a large number of crash victims and other persons who paid excessive amounts for transportation services.

Defendants are The United States of America and a large number of government employees. If class action certification is granted pursuant to Rule 23 of the Federal Rules of Civil Procedure, additional defendants may include a large number of other persons who unduly influenced the decisions of government employees.

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STATEMENT OF THE CASE

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. 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 student who survived the crash was nursed by the dead girl's parents. In response to the media circus resulting from this outrage, three weeks later on May 16th, 2006, President Bush appointed an alumnus of Taylor University, former Indiana State Trooper John H. Hill, to become the Federal Motor Carrier Safety Administrator in violation of the *Motor Carrier Safety Improvement Act of 1999* (Pub. L. 106-159, 113 Stat. 1748) which requires that "The head of the Administration… shall be an individual with professional experience in motor carrier safety." 49 U.S.C. § 113(c). Though Hill's performance as a law enforcement officer was impeccable prior to his joining the Federal Motor Carrier Safety Administration (FMCSA), he had never driven a truck for a living, much less met the minimum standard for employment in the motor carrier safety profession—an above average safety record driving 18 wheelers. Nor did he publish any articles, safety films, or patent applications demonstrating expertise designing trucks or testing safety devices as any reasonable person would expect of someone who had professional experience in motor carrier safety. His degree from Taylor University was in political science, not engineering.

Officer Hill's get tough policy cost the lives of 300 truckers. On July 11th, 2007, Hill claimed in sworn testimony before the House Subcommittee on Surface Transportation, A-2, 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.[1] Despite record high 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.[2] While changes to truckers' hours of service rules imposed in 2003 can explain 13% of this 36% difference, any 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. In a June 6th letter to David Strickland, head of the National Highway Traffic Safety Administration, the American Trucking Associations and Owner Operator Independent Driver Association confirmed that fatal injuries to truckers could be reduced 23 percent if cab structural integrity was improved sufficiently to prevent crushing in rollovers.[3]

On April 19th, 2011, at the annual National Private Truck Council convention in Cincinnati, Hill explained his refusal to obey three court orders[4] requiring him to protect the occupational health of truckers 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."[5] Though I filed related cases described below to decriminalize modern safety features on trucks, after President Bush fired a dozen US Attorneys for no apparent reason in December 2006, the US

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

[2] Large Truck Fact Sheet, Traffic Safety Overview (p.2), http://www-nrd.nhtsa.dot.gov/Pubs/810993.pdf; http://www-nrd.nhtsa.dot.gov/Pubs/810989.pdf

[3] Trucking Groups Call on NHTSA to Examine Truck Crashworthiness Standards http://www.truckinginfo.com/news/news-detail.asp?news_id=73939

[4] *Public Citizen v. FMCSA*, 374 F.3d 1209 (D.C. Cir. 2004); *Advocates for Highway and Auto Safety v. FMCSA*, 429 F.3d 1136 (D.C. Cir. 2005); *Owner-Operator Indep. Drivers' Ass'n v. FMCSA*, 494 F.3d 188 (D.C. Cir. 2007)

[5] *John Hill Talks About Life at the FMCSA*, Deborah Lockridge, 4/25/2011 http://www.truckinginfo.com/news/news-detail.asp?news_id=73580

Attorneys handling my case provided the D.C. Circuit with false information. There is a 95% probability that President Bush's Staff Secretary[6] at the time he appointed Hill was especially selected to become the judge deciding my case in a non random manner.

On May 30th, 2006, one month after he appointed Hill, President Bush appointed his Secretary, Brett M. Kavanaugh, a member of the White House Staff presumably responsible for checking the backgrounds of appointees, to become a judge on the Washington D.C. Circuit Court of Appeals—despite a lack of any previous experience as a judge. Because there were fourteen judges on the D.C. Circuit and the chances of any particular judge sitting on a particular three judge panel was one in five, there is only a one in twenty chance that the President's secretary could have been randomly assigned to both panels hearing my case. The probability is 95% that Judge Kavanaugh was especially selected by someone in the government to decide my case. None of the other four judges assigned to hear my case sat on both panels, nor had any of the other four served as White House counsel when unqualified administrators were appointed. Because the D.C. Circuit Rules allow a single judge to rule on a motion and the judges merely initialed the order dismissing my case rather than signing it, there is no way of knowing if the other four judges appearing on court documents ever read the pleadings. In 2009, the Supreme Court ruled that a judge was required to recuse himself when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case. See *Caperton v. Massey* 556 U. S. ____ (2009). Nevertheless, when I appealed to the Supreme Court, Chief Justice Roberts, another of President Bush's "appointed people" having jurisdiction over the Washington D.C. and Federal Circuits, denied my Petition for Certiorari.

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

STATEMENT OF THE CLAIM

The Petition for Certiorari was denied on October 4th, 2010. This timely complaint is being commenced within one year after the cause of action accrued as required under 42 U.S.C. 1986. Because declaratory decrees were violated and declaratory relief was unavailable, I claim the right to recovery of damages under 42 U.S.C. 1983-1986 for the loss of value of my patents, prototype expense, and lost income I suffered when the United States government prevented me from developing my technology.

I further claim *parens patriae* standing to bring a claim for two classes of additional plaintiffs: injured truckers and the estates of truckers who died needless preventable deaths due to the deliberate indifference of the United States government; and persons and businesses that paid excessive amounts for transportation services.

RELATED CASES

District Court ruled in *Trescott v. Peters*, 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 of Transportation's decision not to legalize modern safety features on trucks was being challenged, not any statutory mandates, I filed suit for promulgation of performance based safety standards under 49 U.S.C. 30162 in the D.C. Circuit Court of Appeals as required under the Motor Carrier Safety Act, 49 U.S.C. § 31136(a), and the Hobbs Act. 28 U.S.C. § 2342(3)(A).

On April 22nd, 2008, despite repeated motions to expedite claiming imminent harm, A-8, the D.C. 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. The Circuit's dubious justification for denying subject matter jurisdiction, which was not argued by any party in the case, that the defunct Interstate Commerce Commission lacked the power to legalize modern safety devices, was not only false, it ignored the plain language of the *Motor Carrier Safety Act of 1984* extending its jurisdiction to every obsolete commercial vehicle safety regulation promulgated before October 30th, 1984—including the challenged regulations. 49 U.S.C. § 31136(d). Under the protection of the Interstate Commerce Commission, truckers could easily negotiate the size and weight of their cargo to accommodate safety features without violating size and weight limits.

On June 8th, 2009, after 115 additional deaths had occurred, the District Court dismissed my case for failure to state a claim, ruling my 14th Amendment claims that I was "a trucker by trade endangered by the following rules" (*see* Certificate of Counsel, A-3) and 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 that "Americans may not be deprived of life, liberty, or property without due process of law" (*see* Statement of the Case, A-28), were not claims upon which relief can be granted under Fed. Rule Civ. Proc. 12(b)(6). A-109. This, of course, is nonsense. See *Erickson v. Pardus,* 551 U.S. 89 at 94 (2007) ("officials were in the meantime refusing to provide treatment…This alone was enough to satisfy Rule 8(a)(2)…Cf. Fed. Rule Civ. Proc. 8(f) ("All pleadings shall be so construed as to do substantial justice")"). The District Court's many factual errors such as, "He holds five patents for certain safety devices and heavy duty suspension components," A-106, suggest that

the district court judge did not even bother to read the briefs. My patents are for an intermodal vehicle and related cargo attachment mechanisms,[7] not safety devices or suspension components.

While it is conceivable that an overworked judge might mistakenly assume that decade old safety features proven to decrease fatalities by twenty percent were recently invented by a plaintiff and therefore failed to raise a right to relief above a speculative level, the opinion of the Circuit that "[t]he merits of the parties' positions are so clear as to warrant summary action," A-111, suggests something more than just simple error. District Court ruled, "Trescott's complaint, however, contains essentially no factual allegations." A-109. The Supreme Court held, "When ruling on a . . . motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint" and "[a] document filed *pro se* is to be liberally construed…a *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers," *Erickson* at 94 quoting *Estelle v. Gamble*, 429 U. S., at 106 (internal quotes omitted). See *Neitzke* v. *Williams*, 490 U.S. 319, 329 (1989) ("[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. The D.C. Circuit did not rule that my lawsuit to prevent the deaths of the 115 truckers was frivolous, therefore it should not have been dismissed. Hiring a lawyer would have made no difference. In three other related cases to protect the health of truckers,[8] petitioners hired excellent lawyers to represent them only to see their winning arguments mooted when the D.C Circuit refused to enforce its mandates.

As will be described more fully below, the likely reason for dismissing my case and failing

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[7] *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).

[8] *Public Citizen v. FMCSA*, 374 F.3d 1209 (D.C. Cir. 2004); *Advocates for Highway and Auto Safety v. FMCSA*, 429 F.3d 1136 (D.C. Cir. 2005); *Owner-Operator Indep. Drivers' Ass'n v. FMCSA*, 494 F.3d 188 (D.C. Cir. 2007)

to enforce the court orders violated in three related cases was that one of the Senate Commerce Committee chairmen who confirmed Hill without a proper hearing was running for President and because the other Co-chairman of the Commerce Committee sharing responsibility for confirming appointees was convicted of receiving gifts.[9]

ARGUMENT

I. There are some cases wherein the United States is a party that the Supreme Court cannot refuse to hear without violating the Civil Rights Act

The United States sold me a bill of goods. I paid thousands of dollars in patent application fees, patent issue fees, and patent maintenance fees to the United States Department of Commerce expecting to get something in return for my money. I was cheated. When I tried to assert my Article I right to profit from my inventions in a Federal Court, the United States denied my 14th Amendment rights to due process and equal protection under the law by misrepresenting the facts and failing to provide an impartial panel of judges to decide my case. Not only did the United States rob me of the money I paid for my patents, but hundreds of thousands of dollars of lost income and material expense incurred during the time I spent developing prototypes. My customers suffered even greater harm. Several hundred potential customers were needlessly killed and injured on the job due to the government's deliberate indifference and most of my former customers were charged too much for transportation services.

No one disputes that the United States has the right to regulate commerce under Article I,

[9] Former Co-chairman of the Senate Committee on Commerce, Science and Transportation (109th Congress) Senator Ted Stevens of Alaska was convicted in United States District Court for the District of Columbia of seven felony counts of failing to report gifts from an oil company on 10/27/08 (No. 08-0231: *USA v. STEVENS*)

Section 8, but the United States did that when the Department of Commerce issued my patents and when Congress created exceptions for them. Any instrumentality of a state infringing upon a patent can be sued in federal court, including a federal agency. 35 U.S.C. § 296(a). A patent is not just a procedural right. It is an Article I exclusive right granting a quasi-sovereign[10] interest —the ability to control the behavior of licensees. 35 U.S.C. § 271(d)(2). See *Massachusetts v. EPA*, 549 U. S. ____ (2007, slip op., at 14) quoting *Lujan v. Defenders of Wildlife*, 504 U.S. at 572 ("…a litigant to whom Congress has 'accorded a procedural right to protect his concrete interests'…the right to challenge agency action unlawfully withheld…can assert that right without meeting all the usual standards for redressability and immediacy."). As the Chief Justice stated, "The Court, in effect, takes what has always been regarded as a *necessary* condition for *parens patriae* standing—a quasi-sovereign interest—and converts it into a *sufficient* showing for purposes of Article III." *id* (Roberts slip op., at 5). I therefore have the right to bring a claim on behalf of my potential and former customers.

A. Judges who are potentially liable for a civil rights violation or have a personal interest in a case must recuse themselves

The Supreme Court held in *Caperton v. Massey* 556 U. S. ____ (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," (per curiam, slip op. at 2) quoting *In re Murchison*, 349 U. S. 133, 136 (1955). "It is axiomatic that a fair trial in a fair tribunal is a basic requirement of due process." *id.* at 6 (internal quotes omitted). The Civil Rights Act provides:

[10] sovereign: *adj*.—"possessing supreme excellence or efficacy," *Funk & Wagnall's Standard Desk Dictionary*

> 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... 42 U.S.C. 1986.

It is obvious that the President, the President's Counsel, and his Staff Secretary could with reasonable diligence have prevented the 300 deaths that resulted from denying truckers modern safety devices in 2007 and 2008 merely by checking the background of the President's appointee to head the FMCSA to determine whether he had the statutorily required experience under 49 U.S.C. § 113(c). The fact that an appointee with no apparent qualifications had attended the same college as several students killed in an infamous crash garnering nationwide publicity just a few weeks prior to his appointment should have alerted any reasonable person to the danger of a civil rights violation before any court orders were ignored. Though lack of electronic case filing privileges prevented me from filing a timely motion to recuse, immediately upon learning of his presence in the White House when the unqualified administrator was appointed, I sent the Clerk of the Court an email, A-100, and later a letter, A-102, suggesting that Judge Kavanaugh should recuse himself to ensure the integrity of the court. Predictably, my complaints were ignored.

B. No judge may decide an appeal of his own decision

The Supreme Court's June 8th, 2009 decision in *Caperton* created additional grounds for recusal. It is obvious that the D.C. Circuit could with reasonable diligence have prevented the hundred or more deaths that resulted from denying truckers modern safety devices in 2009 and 2010 by granting my motion to expedite, A-8, docketed September 4th, 2007. Even if one reasonably argues that manufacturing delays would have prevented stronger cabs from being installed on trucks prior to 2010, all three judges who sat on the April 22nd, 2008 panel should have recused themselves from the December 9th, 2009 panel because they had prior knowledge of

the "wrongs conspired to be done" the following year and undeniably had the "power to prevent or aid in preventing the commission of the same" described under 42 U.S.C. 1986.

The only judge on the 2008 panel who failed to recuse himself from the 2009 panel was Judge Kavanaugh—the staff secretary lacking any previous experience as a judge President Bush appointed to the court one month after he appointed the unqualified administrator. In *Caperton*, the Supreme Court held that "the information acquired from the prior proceeding, was critical" and "the objective inquiry is not whether the judge is actually biased, but whether the average judge in his position is likely to be neutral" (per curiam, slip opinion at 2 & 3) quoting *Mayberry v. Pennsylvania*, 400 U. S. at 466. "Just as no man is allowed to be a judge in his own cause, similar fears of bias can arise when—without the other parties' consent—a man chooses the judge in his own cause" *id.* at 3. **"[T]he probability of actual bias on the part of the judge or decision maker is too high to be constitutionally tolerable,"** *id*. at 2 citing Withrow v. Larkin, 421 U. S. 35, 47. Unlike the 2008 decision where I had a few days to check the backgrounds of judges and send the Clerk an email, I did not learn of Judge Kavanaugh's presence on the 2009 panel until after the D.C. Circuit published its decision. Therefore, despite having been granted electronic case filing privileges, I was never given an opportunity either to give my consent as required in *Caperton* or file a motion for him to recuse himself. The Supreme Court long held in *Conley v. Gibson*, 355 U. S. 41, 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. Notwithstanding, on March 9th, 2010, my petition for rehearing en banc (before the remaining nine judges) was denied, as was my petition for certiorari.

II. Courts may not disagree with correct arithmetic

A. Courts must show deference to the judgment exercised by a qualified professional

"[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). My Congressman recommended me to head the Federal Motor Carrier Safety Administration because of five patents on safer intermodal technology, a book and numerous articles and videos on the subject of commercial motor vehicle safety,[11] and several safety awards for driving 18 wheelers more than 400,000 miles without a preventable crash—having authored a Bill he introduced in the House Transportation Committee.[12] The Federal Highway Administration (FHWA) employee who promulgated the challenged rule had no apparent motor carrier safety qualifications. Because I provided the court with correct mathematical formulae indisputably proving that commercial motor vehicle safety regulations in Chapter 311 of Title 49 are related to motor carrier safety, A-45, 48, & 58, there could not legally be any doubt in the mind of any judge that 49 U.S.C. §§ 113(f)(1) & (g) prohibit the Federal Highway Administration from banning safety features under

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[11] *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*; '

[12] '*The Safer Truck Act,*' HR 2083, 107th Congress & HR 1248, 108th Congress

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). "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. "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).

B. Courts must make certain that professional judgment in fact was exercised

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. Unlike the four students from Taylor University who were killed, many of the three hundred truckers who died because a Taylor University graduate failed to protect them had families to support. 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. When a claim is made that lives are in danger, A-3, 8-10, & 14, this obligation also falls upon the court which must "make certain that professional judgment in fact [is] exercised." *Youngberg* at 321. According to *Youngberg*, it is the court that has the burden of proof—not the plaintiff. That the Federal Highway Administration found it *needful* under 23 U.S.C. § 315 to promulgate the challenged regulations, A-33 & 36, because an unqualified Federal Motor Carrier Safety Administrator neglected to do so does not excuse the United States, or its courts, from obeying civil rights laws. 42 U.S.C. 1983-1986. Because lower courts failed to "make certain that professional judgment in fact was exercised" and the Supreme Court failed to grant Certiorari, the

United States must be found deliberately indifferent in violating the civil rights of the dead and injured truckers (and the families who depended upon them for support) because declaratory relief was unavailable. 42 U.S.C. 1983. See *County of Sacramento v. Lewis,* 523 U.S. 833 (1998) ("The Court has recognized that deliberate indifference is egregious enough to state a substantive due process claim").

1. Defendants' claims were false

Defendant's claims that "the FHWA has authority neither to deviate from the statutory standards nor to grant an exception for the inventions for which Trescott holds patents," A-108, are false. Congress created exceptions for safety features under 49 U.S.C. § 31113(b) as well as intermodal vehicles under 49 U.S.C. §§ 13503(b)(1) & 13506(a)(11). The Federal Highway Administration's authority applies only to regulations that are "needful." *See* 49 U.S.C. § 104(c) and 23 U.S.C. § 315 ("the Secretary is authorized to prescribe and promulgate all needful rules and regulations for the carrying out of the provisions of this title"). According to a recent study by the Federal Railroad Administration,[13] intermodalism is up to five times more fuel efficient than long haul trucking while virtually eliminating highway wear and tear. The shock of fuel prices exceeding four dollars per gallon triggered a recession in 2008—harming the nation.[14] The Government Accountability Office (GAO) reported that unrecovered pollution, accident, and congestion costs of long haul trucks exceeded 112.2 billion dollars in 2007 while those of trains were only one sixth as much (GAO-11-134, p.4, 23, & 27).[15] A regulation cannot be needful if it

[13] 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
[14] 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/
[15] *A Comparison of the Costs of Road, Rail, and Waterways Freight Shipments That Are Not Passed on to Consumers*, GAO, 2011, http://www.gao.gov/products/GAO-11-134

harms the nation or has the opposite effect Congress intended.

According to the GAO, trucks moved two trillion ton-miles of freight in 2007 (*id.* at 4). The Department of Transportation estimated that large trucks traveled 227 billion miles the same year.[16] This means the average truck carried less than nine tons of cargo in 2007—less than half of what a typical 18 wheeler is capable of carrying. Because truckers cannot predict how much their cargo will weigh, the government claimed that "statutory standards" require the FHWA to ban safety features on trucks weighing only 50,000 pounds even though it negligently allows unlimited amounts of cargo to be loaded on trucks weighing 80,000 pounds. The Supreme Court ruled, "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). Therefore, when Congress stipulates that a regulation must be *needful* as in Section 315, the burden of proof falls on the United States and its Courts, not the plaintiff, and a case to decriminalize safety features cannot be dismissed without such a showing. The Defendant failed to show that banning safety features on 50,000 pound trucks was needful just because they might exceed 80,000 pounds if they were overloaded.

2. The court did not consider all of the claims

Congress did not intend that federal highways should become barriers to the movements of intermodal vehicles. 49 U.S.C. § 302(e). The question before the court was whether the Federal Highway Administration has statutory authority to protect long haul trucking companies from competition by prohibiting intermodal vehicles such as I invented from crossing from one side of a town to the other if a federally funded highway bisects the town. I claimed that the

[16] NHTSA 2009 Large Trucks Fact Sheet, http://www-nrd.nhtsa.dot.gov/Pubs/811388.pdf

Federal Highway Administration's decision to include intermodal vehicles in its revised definition of *commercial motor vehicle*, 23 C.F.R § 658.5 ("a vehicle designed or regularly used to carry freight"), A-99, in contradiction of the statutory definition mandated by Congress in 49 U.S.C. § 31101(1) ("[a] vehicle used on the highways in commerce") violated the *Regulatory Flexibility Act*, 5 U.S.C. §§ 603(c)(3) & 604(a)(2). A-60. Intermodal vehicles are a type of cargo handling equipment used to load and unload trains and barges. They are not *used on the highways* in interstate or foreign commerce, therefore the 10th Amendment prohibits the commercial vehicle size and weight limitations cited in the D.C. Circuit's summary affirmance, 23 U.S.C. § 127(a)(2) & 49 U.S.C. § 31113(a)(1), A-111, from being applied to them. Congress expressly prohibited the Secretary of Transportation from regulating intermodal vehicles. 49 U.S.C. §§ 13503(b)(1) & 13506(a)(11). The Defendant failed to show that infringing on my patents by preventing the vehicles I designed from crossing roads or driving short distances in a terminal area was needful.

3. Defendants' claims were not material to the case

The statutory size and weight limits cited by the D.C. Circuit are irrelevant. Even if Congress doubled the truck size and weight limits, modern safety features would remain illegal so long as cargo size and weight remained unregulated. Employers would just increase the amount of freight truckers are required to haul. Congress commanded the Secretary of Transportation to "ensure that…commercial motor vehicles are maintained, equipped, loaded, and operated safely" regardless of size and weight limits. 49 U.S.C. § 31136(a)(1). The Hobbs Act clearly grants the courts of appeals exclusive jurisdiction over cases arising from this statute. *See* 28 U.S.C. § 2342(3)(A) ("all rules, regulations, or final orders of…the Secretary of Transportation issued pursuant to…Subchapter III of Chapter 311"). Therefore, the D.C. Circuit's decision, A-111, to allow the FHWA to require states to deprive truckers of safety features to comply with size and

weight limits in the absence of professional judgment required under 49 U.S.C. § 113(c) was deliberately indifferent to their lives and safety. See *County of Sacramento id.* 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…Historically, this guarantee of due process has been applied to deliberate decisions of government officials to deprive a person of life, liberty, or property").

4. The court failed to enforce its mandates

The D.C. Circuit could have satisfied its constitutional obligation to "make certain that professional judgment [is] exercised" merely by enforcing its mandate in *Advocates for Highway and Auto Safety v. FMCSA*, 429 F.3d 1136 (D.C. Cir. 2005) to ensure that all truckers possess professional qualifications.[17] Under the protection of the Interstate Commerce Commission, truckers earned high enough incomes to have trucks custom built to their specifications.[18] By refusing to enforce its mandates in *Public Citizen v. FMCSA*, 374 F.3d 1209 (D.C. Cir. 2004) and *Owner-Operator Indep. Drivers' Ass'n v. FMCSA*, 494 F.3d 188 (D.C. Cir. 2007), A-112, the D.C. Circuit allowed cut-throat competition from overworked trainees with a three times higher crash risk operating long haul trucks without supervision.[19] Without market power to negotiate

[17] See *Youngberg* note 30 at 323 ("[b]y 'professional' decision maker, we mean a person competent, whether by education, training or experience, to make the particular decision at issue.").

[18] *Sweatshops on Wheels*, Michael Belzer, Oxford University Press, 2000, p.122-3

[19] The hours of service rules vacated by the Circuit require instructors to rest for 10 hours in a sleeper berth after 14 hours on duty, allowing trainees to drive more than 80 hours per week unsupervised. 49 CFR § 395.3. This is so dangerous for the instructors that most trainees receive very little training. It has long been known that "drivers in their first year of driving are about 3 times more likely than a veteran driver to be involved in an accident." 72 FR 71268. When employment in the trucking industry declined 9-13% due to the recession, truck fatalities fell 30%. 75 FR 82180, NHTSA, http://www-fars.nhtsa.dot.gov/Trends/TrendsLargeTruckRel.aspx. The Supreme Court has long recognized that unskilled pickup and delivery drivers are different than skilled long haul truckers (See *Teamsters v. United States*, 431 U.S. 324, 370 (1977) "City drivers…have regular working hours…and do not face the hazards of long-distance driving at high speeds.") and that short haul driver qualifications are not the same as linehaul driver qualifications ("[S]eniority could not be awarded for periods prior to the date when … the

the size and weight of their cargo, vehicle size and weight limits restrain the freedom of truckers to install safety features. As Chief Justice Rehnquist wrote 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."

III. No single individual is responsible

This Court should hold no illusion that the present case has anything to do with the inadequacies of a particular judge or the pleadings of a pro se litigant. Litigants in the three related cases described above all hired top notch lawyers to represent them who won their cases only to see their winning arguments mooted when the D.C Circuit failed to enforce its mandates. A-112. Judge Kavanaugh did not take part in these other decisions. My case was just one of many before the D.C. Circuit showing a pattern of deliberate indifference toward the safety of truckers and an unconstitutional bias in favor of unqualified officials who defied court orders. The D.C. Circuit denied my motion to partially enforce its mandate in *Owner-Operator*, A-113, even though the Virginia Tech Transportation Institute[20] and Penn State University[21] verified my calculations using completely independent statistical methods. Motor carrier safety is an applied science that relies on precise mathematical formulae. Courts must make certain that political interference had no effect on an Agency's judgment i.e. "when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to

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class member met … the qualifications for employment as a line driver." *id* at 333).

[20] Blanco, Hanowski, Olson, Morgan, Soccolich, Wu, Guo, *The Impact of Driving, Non-Driving Work, and Rest Breaks on Driving Performance in Commercial Motor Vehicle Operations*, www.fmcsa.dot.gov/facts-research/research-technology/report/Work-Hours-HOS.pdf

[21] Jovanis, Wu, Chen, *Hours of Service and Driver Fatigue*, www.fmcsa.dot.gov/facts-research/research-technology/report/HOS-Driver-Fatigue.pdf

demonstrate that the person responsible actually did not base the decision on such a judgment." *Youngberg* at 323. Former FMCSA Administrator Hill's allegation that "political people tell the appointed people what they're going to do"[22] is not only plausible under such circumstances, he resurrects the famous Nuremberg defense. Therefore, neither he nor Judge Kavanaugh should be presumed solely responsible for their actions. As the Supreme Court said in *Caperton*, "the objective inquiry is not whether the judge is actually biased, but whether the average judge in his position is likely to be neutral" (per curiam, slip opinion at 2 & 3). Because recusal would have been tantamount to an admission of guilt, this Court's inquiry should focus on how that particular judge came to be assigned to a panel hearing an appeal of his own decision, not whether the judge is guilty of a civil rights violation.

A. Additional defendants should be allowed

The Due Process Clause requires the United States to provide equal protection from death and injury to <u>all</u> employees of a motor carrier. Therefore, carriers cannot have two classes of employees—one group sitting safely in offices receiving hundreds of thousands of dollars per year while unsupervised trainees earning only a tenth as much are exposed to three times the risk of death and injury as the average employee. The incomes of the former group are often so high that they can influence the behavior of government employees. The Secretary of Transportation hand delivered a letter to a presidential aide requesting clemency for a former Governor convicted of issuing commercial driver's licenses in exchange for campaign donations, for example.[23] Former FMCSA Administrator Hill said of the current FMCSA administrator, "I can assure you that Anne

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[22] *John Hill Talks About Life at the FMCSA*, Deborah Lockridge, 4/25/2011 http://www.truckinginfo.com/news/news-detail.asp?news_id=73580

[23] James Janega, Gary Marx, "Wife of Gov. George Ryan sent President George Bush a letter on her husband's behalf," Chicago Tribune, http://archives.chicagotribune.com/2008/dec/21/local/chi-ryan-clemency_bd21dec21

Ferro is getting marching orders."[24] It is difficult to imagine how, without ever driving a truck for a living, the head of Maryland's driver's license office could have become president of Maryland's trucking association and subsequently FMCSA Administrator without granting special favors as the convicted governor did while head of Illinois' driver's license office. The additional profit gained from lower wages for truckers by John McCain, the former Chairman of the Senate Commerce Committee that confirmed Hill without a hearing, who owns a trucking company that distributes beer, was likely greater than the hand-outs received by his co-Chairman, Senator Ted Stevens, who was convicted of failing to report gifts from an oil company.[25] The same month that the Senator was convicted, the $4 per gallon fuel prices that resulted from FHWA's ban on intermodal vehicles (and motorists who purchased gas guzzling pickups and SUV's to protect themselves from unqualified truck drivers) allowed the nation's largest oil company to announce record earnings of 14 billion.[26] The nation's largest truckload carrier also announced record profits.[27] Because the United States was severely harmed by a recession triggered by high fuel prices,[28] the government should be allowed to name additional defendants, A-145, who profited from undue influence they may have had over the decisions of government employees.

The United States should also be allowed to name as additional defendants employees with oversight responsibility who were aware of imminent deaths and injuries, but failed to take appropriate action. To facilitate this task, I have included a list of emails with suggestive titles,

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[24] *Former FMCSA Chief Speaks out on HOS, EOBRs,* Deborah Lockridge, 4/20/2011 http://www.truckinginfo.com/news/news-detail.asp?news_id=73560

[25] United States District Court for the District of Columbia (No. 08-0231: *USA v. STEVENS,* 10/27/08)

[26] http://www.businesswire.com/portal/site/exxonmobil/index.jsp?ndmViewId=news_view&ndmConfigId=1001106&newsId=20081030005627&newsLang=en

[27] http://www.truckinginfo.com/news/news-detail.asp?news_id=61646
http://www.truckinginfo.com/news/news-detail.asp?news_id=73526

[28] 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/

A-114-138, sent to legislative directors and transportation policy advisors on both the Commerce and Transportation Committees. Lower level employees are not named on the list because they were not free to take appropriate action. The likely reason that Bill Mahorney failed to respond to my Section 30162 petition (though he left a message on my answering machine stating that he was preparing a response) is that he was rewarded with a big promotion to head of FMCSA's enforcement division for promulgating the challenged rule. A-98. Because the Federal Highway Administrator resigned when I filed the petition as did the Chief of the FBI station that received my civil complaint, A-139, after charges against the convicted Senator were abruptly dropped, lower level employees should be considered witnesses, not defendants.

B. Class action certification should be granted

Pursuant to Rule 23(a) of the Federal Rules of Civil Procedure, the Court should certify as additional plaintiffs injured truckers and the estates of deceased truckers who died as a result of the Defendants' deliberate indifference toward their personal safety on grounds that (1) the class is so numerous that joinder of all members is impracticable, (2) the questions of law or fact are common to the class insofar as all members of the class whether living or dead suffered a loss of income as a result of Defendants' deliberate indifference, (3) my claims and defenses are typical of the claims or defenses of the class insofar as all income losses resulted from Defendants' refusal to decriminalize modern safety features, and (4) as the inventor of a technology that would have saved their lives and prevented their injuries and loss of income, I can most fairly and adequately protect the interests of the class.

The Court should also certify as plaintiffs an additional class of persons and firms that paid fuel surcharges when purchasing transportation services to claim the full amount they were billed for Diesel fuel on grounds that (1) the class is so numerous that joinder of all members is imprac-

ticable, (2) the questions of law or fact are common to the class insofar as all members of the class suffered additional costs of doing business as a result of Defendants' failure to perform a cost-benefit analysis, (3) my claims and defenses are typical of the claims or defenses of the class insofar as the costs resulted from Defendants' refusal to decriminalize fuel efficient intermodal vehicles, and (4) as the inventor of a technology that would have prevented these additional costs, I can most fairly and adequately protect the interests of the class. Executive Order No. 12,866 § 6(3)(C) requires federal agencies to perform a cost-benefit analysis for any "significant regulatory action likely to result in an annual effect on the economy of $100 million or more." 58 F.R. 51,741. See *Entergy Corp. v. Riverkeeper*, 129 S.Ct. 1498, 1516 (2009) ("Cost-benefit analysis requires the agency to first monetize the costs and benefits of a regulation, balance the results, and then choose the regulation with the greatest net benefits."). Diverting 50% of truck freight to rail would have saved $46.75 billion in 2007[29]—well beyond the 100 million dollar threshold requiring the FHWA to perform a cost benefit analysis.

The additional plaintiffs should be maintained under Rule 23(b)(3) on grounds that (A) dead and injured victims cannot easily control the prosecution of separate actions, (B) there is no known litigation concerning the controversy already commenced, (C) it is in the interest of judicial economy to concentrate all the claims in a single forum, and (D) the difficulties likely to be encountered in the management of a class action would be minimized if a single formula was used to determine compensation for each class. Because the Department of Transportation recently accepted that the value of a statistical life was $6 million, 75 F.R. 82187, and the probability that stronger cabs would have prevented their injuries is 23%, each crash victim should receive up to

[29] *A Comparison of the Costs of Road, Rail, and Waterways Freight Shipments That Are Not Passed on to Consumers*, GAO, 2011, http://www.gao.gov/products/GAO-11-134

$1.38 million (or $2.16 million if the Court finds it in the interest of judicial economy to include aggravating factors such as Defendants' failure to obey court orders). An abbreviated list of victims with greater than 50-50 probability of wrongful death appears in the appendix at A-139.

CONCLUSION

Pursuant to Rule 23(c)(1) of the Federal Rules of Civil Procedure, the Court should issue an order certifying this action as a class action and appoint class counsel under Rule 23(g) having no conflicts of interest in representing possible defendants in the oil and trucking industries that can fairly and adequately represent the interests of each class with experience in handling class actions, complex litigation, and claims of the type asserted in this action.

Respectfully submitted,

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