

ORAL ARGUMENT NOT YET SCHEDULED

No. 14-1183

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

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In re Advocates for Highway and Auto Safety; the International Brotherhood  
of Teamsters; and Citizens for Reliable and Safe Highways,

Petitioners.

Anthony Foxx, Secretary of the United States Department of Transportation;  
the United States Department of Transportation; and the Federal Motor Carrier  
Safety Administration,

Respondents.

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On Petition for a Writ of Mandamus

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**REPLY IN SUPPORT OF  
PETITION FOR MANDAMUS**

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January 20, 2015

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## **GLOSSARY**

DOT	Department of Transportation
FMCSA	Federal Motor Carrier Safety Administration
MAP-21	Moving Ahead for Progress in the 21st Century Act
NPRM	Notice of Proposed Rulemaking

## INTRODUCTION

Despite decades of inaction and delay, and despite having violated multiple statutory deadlines, Respondents ask this Court to trust them to issue entry-level driver-training regulations within a reasonable time from now. According to Respondents, mandamus relief is unwarranted because the Federal Motor Carrier Safety Administration (FMCSA) has decided to establish a negotiated rulemaking committee to develop proposed entry-level driver-training rules and “offers its commitment to proceed expeditiously” with that process. Resp. at 2. But FMCSA’s recent decision to proceed with negotiated rulemaking does not justify its failure to have promulgated entry-level driver-training regulations and should give the Court no confidence that the agency will do so any time soon. Particularly given Congress’s express direction over *two* years ago that the Department of Transportation (DOT) should establish regulations within *one* year, *see* Moving Ahead for Progress in the 21st Century Act (MAP-21), Pub. L. No. 112-141, § 32304, 126 Stat. 405, 791 (July 6, 2012), the agency should not be granted unlimited time to publish a final rule. The Court should grant the petition for a writ of mandamus and order DOT to promulgate entry-level driver-training regulations by a date certain.

## ARGUMENT

### I. Mandamus Relief is Available.

Respondents emphasize that mandamus is an extraordinary remedy that is available only “to correct transparent violations of a clear duty to act.” Resp. at 12 (quoting *In re Am. Rivers and Idaho Rivers United*, 372 F.3d 413, 418 (D.C. Cir. 2004)). Such a violation unquestionably exists here. MAP-21 required DOT to establish entry-level driver-training regulations by October 1, 2013. Respondents “do not dispute that FMCSA has not met that deadline.” Resp. at 14. Respondents have transparently violated a clear duty to promulgate regulations by October 2013, and mandamus relief is available to address this violation.

### II. The *TRAC* Factors Support Mandamus.

As explained in the petition, the factors set forth by this Court in *Telecommunications Research & Action Center v. FCC*, 750 F.2d 70, 80 (D.C. Cir. 1984) (*TRAC*), strongly support granting the petition and requiring FMCSA to promulgate entry-level driver-training regulations by a date certain.

A. The first two *TRAC* factors, which look at the reasonableness of the delay, weigh heavily in favor of relief. Those factors provide that “the time agencies take to make decisions must be governed by a ‘rule of reason’” and that “where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory

scheme may supply content for this rule of reason.” *Id.* (citation omitted). Here, MAP-21 provided the content for the rule of reason, specifying that DOT must promulgate driver-training regulations by October 1, 2013. DOT failed to meet that deadline.

Respondents emphasize that they have now decided to proceed with a negotiated rulemaking process. They provide no justification, however, for waiting over two years after MAP-21 was enacted even to announce they were considering such a process. Even under FMCSA’s current extended negotiated rulemaking schedule—under which FMCSA gives itself an additional 21 months from now to promulgate rules that Congress required it, in 2012, to promulgate within one year—had the agency begun negotiated rulemaking expeditiously after MAP-21 was enacted, its final rule would have already been published.

Unable to justify missing MAP-21’s deadline, Respondents note that “an agency’s failure to meet a statutory deadline ‘does not end the analysis.’” Resp. at 15 (quoting *In re United Mine Workers of Am. Int’l Union*, 190 F.3d 545, 551 (D.C. Cir. 1999)). That statement means, however, that courts “continue [their] analysis of the remaining *TRAC* factors” after finding that the first two weigh in favor of mandamus. *In re United Mine Workers*, 190 F.3d at 551. It does not change the fact that the first two factors weigh against Respondents.

Moreover, DOT's failure to meet MAP-21's deadline is only the most recent failure in a long history of agency inaction and delay on entry-level driver training. Congress first set a date of December 1993 for the agency to complete a rulemaking. DOT missed that deadline, and did not promulgate regulations on the topic until 2004, after organizations concerned with vehicle safety sought a writ of mandamus compelling it to act. When the agency finally promulgated regulations, instead of engaging in reasoned rulemaking, "FMCSA simply disregarded the volumes of evidence that extensive, on-street training enhances [commercial motor vehicle] safety." *Advocates for Highway & Auto Safety v. FMCSA*, 429 F.3d 1136, 1147 (D.C. Cir. 2005). The Court declared FMCSA's action arbitrary and capricious and remanded to the agency for further rulemaking. *Id.* at 1139-40. The agency began a rulemaking, publishing a notice of proposed rulemaking (NPRM) in December 2007, *see* 72 Fed. Reg. 73226 (Dec. 26, 2007), but it never completed the rulemaking; it neither published a final rule on entry-level driver training nor concluded that such a rule was unnecessary (a conclusion that, in any event, would have contradicted evidence in the record). By the time Congress passed MAP-21, six-and-a-half years had passed since this Court's decision in *Advocates for Highway & Auto Safety*, and the NPRM had been pending for over four-and-a-half years. By failing to complete its rulemaking, FMCSA "effectively nullified [the Court's] determination that [the 2004 rulemaking was] invalid," *In re*

*Core Commc'ns, Inc.*, 531 F.3d 849, 856 (D.C. Cir. 2008), leaving its regulations exactly as they would have been if the Court had not declared FMCSA's 2004 rulemaking arbitrary and capricious.

Respondents contend that anything that happened before MAP-21 is not “pertinent to the timing question presented here.” Resp. at 14 n.5. But the fact that, after decades had passed without DOT establishing valid entry-level driver-training regulations, Congress had to again mandate that the agency complete a rulemaking on entry-level driver training, and that it do so expeditiously, does not erase the agency's history of delay. After decades went by without the agency publishing regulations requiring training in how to drive a commercial motor vehicle, Congress set a specific deadline by which the agency was required to act. The agency's failure to meet that deadline was unreasonable, and the first two factors weigh heavily in Petitioners' favor.

**B.** The third and fifth *TRAC* factors likewise weigh in favor of relief. Those factors, which are often considered together, recognize that “delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake,” and instruct courts to “take into account the nature and extent of the interests prejudiced by delay.” *TRAC*, 750 F.2d at 80. Here, as Respondents concede, “[t]here is no doubt that entry-level driver training for commercial motor vehicles affects human health and welfare.” Resp. at 16.

Respondents do not address the fifth factor, but argue that the third factor does not weigh in favor of mandamus because there is insufficient evidence in the record that delay would put human health at risk. Resp. at 17. It is beyond dispute, however, that entry-level driver training “is primarily about ‘human health and welfare’” not “‘economic regulation.’” *In re Barr Labs., Inc.*, 930 F.2d 72, 75 (D.C. Cir. 1991) (quoting *TRAC*, 750 F.2d at 80). Moreover, the record shows that thousands of people die and many more are injured in commercial motor vehicle crashes every year, *see, e.g.*, 72 Fed. Reg. at 73236 (citing analysis estimating that entry-level interstate drivers who would not be trained without a rule are responsible for 97 fatal crashes and 2,574 non-fatal crashes annually), and FMCSA agrees that entry-level driver-training requirements would “help entry-level CDL drivers learn to operate more safely.” *Id.* at 73230. The longer the rule is delayed, the longer entry-level drivers without adequate training will be allowed to operate commercial motor vehicles on our nation’s highways, placing both their own lives and the lives of other people at risk. The third and fifth factors plainly favor relief.

C. Finally, the fourth *TRAC* factor considers the “effect of expediting delayed action on agency activities of a higher or competing priority.” *TRAC*, 750 F.2d at 80. Respondents do not argue that promulgating the entry-level driver-training rule in a timely manner would harm competing priorities. And by requiring the agency to promulgate driver-training regulations within one year,

Congress demonstrated that it intended the agency to make such regulations a priority. The fourth factor thus also favors relief.

In sum, the first, second, third, fourth, and fifth factors all weigh in favor of relief, and no factor weighs against it.<sup>1</sup> Applying the *TRAC* test, the Court should grant the petition and require DOT to establish entry-level driver-training regulations by a date certain.

### **III. FMCSA’s Decision to Use a Negotiated Rulemaking Process Does Not Excuse It From a Deadline.**

Respondents’ main argument against granting the petition is not that their delay in promulgating entry-level driver-training regulations is justified, but that the delay should be ignored and the agency trusted to move forward because FMCSA recently decided to undertake a negotiated rulemaking process and is now “commit[ted] to proceed expeditiously” with that process. Resp. at 4. According to Respondents, although their long delay and violation of MAP-21 may be a cause for “regrets,” *id.*, it is not a reason to impose a deadline. However, neither FMCSA’s decision to establish a negotiated rulemaking advisory committee nor the agency’s professed commitment to expedition justify providing it with unlimited time to publish a final rule.

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<sup>1</sup> The sixth *TRAC* factor states that “the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed.” 750 F.2d at 80 (internal quotation marks and citation omitted). That factor does not affect the balance of factors.

To begin with, the establishment of a negotiated rulemaking advisory committee is unnecessary. In December 2012, FMCSA tasked its Motor Carrier Safety Advisory Committee with identifying concepts to consider in moving forward with entry-level driver-training regulations. The committee met on December 3-4, 2012, and April 8-9, 2013, to discuss the issue, and submitted a report with recommendations to FMCSA in June, 2013. *See* Letter from Stephen C. Owings, Chairman, Motor Carrier Safety Advisory Committee, to Anne C. Ferro, Administrator, FMCSA (June 17, 2013), *available at* <http://mcsac.fmcsa.dot.gov/Reports.htm>. The committee's recommendations addressed whether driver-training regulations should cover both interstate and intrastate drivers; the use of accrediting organizations to approve driver-training programs; the need for a different training program for bus drivers; the use of simulators; instructor training; hours requirements vs. performance-based requirements; length and detail of the curriculum; and continued training requirements. *See* Motor Carrier Safety Advisory Committee, Final Report: Recommendations on Minimum Training Requirements for Entry-Level Commercial Motor Vehicle (CMV) Operators (Task 13-01) (June 2013), *available at* <http://mcsac.fmcsa.dot.gov/Reports.htm>; *compare* Resp. at 13 (listing areas of disagreement among stakeholders). Given that a FMCSA advisory committee containing representatives of the safety advocacy, safety enforcement, industry,

and labor communities has already discussed entry-level driver training and crafted recommendations, the creation of another advisory committee to consider the issue is an unnecessary delay.<sup>2</sup>

Moreover, although Respondents rely on their recent decision to conduct a negotiated rulemaking as a reason not to hold them to a deadline, that process does not account for the extended schedule discussed in their brief. FMCSA's notice that it intends to engage in negotiated rulemaking stated that FMCSA intended "to complete the Reg Neg for the proposed rule within the first half of 2015." 79 Fed. Reg. 73273-02, 73274 (Dec. 10, 2014); *see also* Resp. at 16 (stating that rulemaking committee will meet between February and June 2015). And the convener's report states that although "negotiated rulemaking typically takes a bit longer than normal rule drafting," it "makes up that time by producing a better proposal which shortens and streamlines the comment process." DOT, *Recommendations for a Collaborative Approach to Developing Entry-Level Driver*

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<sup>2</sup> Respondents assert that interested parties are "in agreement" about proceeding with a negotiated rulemaking, Resp. at 13—an odd assertion considering that Petitioner Advocates for Highway and Auto Safety (Advocates) filed comments in response to the notice that FMCSA was considering a negotiated rulemaking explaining that Advocates opposed such a process because it would be "an unnecessary and redundant exercise" that would "only further impede the implementation of this long overdue rule." *See* Advocates for Highway and Auto Safety, Comments, Docket No. FMCSA-2007-27748-0838 (Sept. 18, 2014). Respondents note that Advocates and the International Brotherhood of Teamsters have agreed to participate on the negotiated rulemaking committee, but Petitioners' decision to participate in a negotiated rulemaking process in which FMCSA has decided to engage does not mean that Petitioners support such an approach.

Training Regulations (Nov. 26, 2014) (Convener’s Report), Resp. Add. at 13. Yet FMCSA’s schedule gives the agency 15 months *after the conclusion of the negotiated rulemaking*, until September 2016, to publish the final rule. In other words, even after the negotiated rulemaking process is completed, FMCSA intends to take more time to finish its rulemaking than Congress gave it to engage in the entire process. FMCSA’s suggestion that it will take so much extra time, after decades of delay, only further demonstrates the need to impose a court-ordered deadline on the agency.

Finally, FMCSA has not made any commitments to meeting even its prolonged schedule. FMCSA states that it “expect[s]” to issue a rule by September 2016, Resp. at 2, but it does not bind itself to that deadline and only even contemplates publishing a rule in 2016 if “there is a consensus” on the negotiated rulemaking committee, Resp. at 16, which, as the convener states, “is by no means assured.” Convener’s Report, Resp. Add. at 13.

Even if the negotiated rulemaking proceeds expeditiously, that process will only provide the framework for a proposed rule. As the never-finalized 2007 proposed rule vividly shows, FMCSA’s issuance of a proposed rule does not ensure that a final rule will follow in a timely manner. Likewise, FMCSA’s establishment of internal deadlines does not ensure that it will meet them. After issuing its NPRM in 2007, FMCSA set numerous dates for publication of a final

rule, none of which it met. DOT's report on significant rulemakings from December 2009 stated that FMCSA at one time scheduled the rule for February 26, 2010, but that its new projected publication date was June 28, 2010.<sup>3</sup> By May, it had pushed its projected date back to November 17, 2010,<sup>4</sup> and by November, it had pushed it back again to May 27, 2011.<sup>5</sup> By the time that date came around, it had pushed its projected date back further, to November 25, 2011,<sup>6</sup> and by that date, it had been pushed it back even further, to July 2, 2012.<sup>7</sup> Given this history, FMCSA's statement that it "expects" to publish a final rule by September 2016 is meaningless.

The record demonstrates that FMCSA does not feel bound to follow either the deadlines mandated by statute or its own internal schedules with respect to issuing driver-training regulations. The only way to ensure that FMCSA does not

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<sup>3</sup> See DOT, Report on DOT Significant Rulemakings at 26 (Dec. 2009), *available at* [http://www.dot.gov/sites/dot.gov/files/docs/Significant\\_Rulemaking\\_December\\_2009.pdf](http://www.dot.gov/sites/dot.gov/files/docs/Significant_Rulemaking_December_2009.pdf).

<sup>4</sup> See DOT, Report on DOT Significant Rulemakings at 30 (May 2010), *available at* [http://www.dot.gov/sites/dot.gov/files/docs/Significant\\_Rulemaking\\_May\\_2010.pdf](http://www.dot.gov/sites/dot.gov/files/docs/Significant_Rulemaking_May_2010.pdf).

<sup>5</sup> See DOT, Report on DOT Significant Rulemakings at 28 (Nov. 2010), *available at* [http://www.dot.gov/sites/dot.gov/files/docs/Significant\\_Rulemaking\\_November\\_2010.pdf](http://www.dot.gov/sites/dot.gov/files/docs/Significant_Rulemaking_November_2010.pdf).

<sup>6</sup> See DOT, Report on DOT Significant Rulemakings at 30 (May 2011), *available at* [http://www.dot.gov/sites/dot.gov/files/docs/Significant\\_Rulemaking\\_May\\_2011.pdf](http://www.dot.gov/sites/dot.gov/files/docs/Significant_Rulemaking_May_2011.pdf).

<sup>7</sup> See DOT, Report on DOT Significant Rulemakings at 27 (Oct. 2011), *available at* [http://www.dot.gov/sites/dot.gov/files/docs/Significant\\_Rulemaking\\_October\\_2011.pdf](http://www.dot.gov/sites/dot.gov/files/docs/Significant_Rulemaking_October_2011.pdf).

endlessly delay is for this Court to require it to publish entry-level driver-training regulations by a date certain.

#### **IV. The Court Should Set a Deadline for Issuance of a Final Rule.**

The petition asked this Court to order the agency to publish a proposed rule within 60 days of the Court's order and to issue a final rule within 120 days thereafter. Petitioners continue to believe that this date is feasible and that a quick deadline makes sense in light of the agency's decades of delay.

In the alternative, if the Court finds it reasonable for the agency to undertake the negotiated rulemaking, Petitioners ask that the Court order the agency to promulgate a final rule within one year of FMCSA's announcement of its decision to undertake such a rulemaking—that is, by December 2015—which will also be six months after the date FMCSA has represented it expects to conclude the negotiated rulemaking. *See* 79 Fed. Reg. at 73274.

#### **CONCLUSION**

The petition for a writ of mandamus should be granted.

Respectfully submitted,

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January 20, 2015

## **CERTIFICATE OF SERVICE**

I certify that on January 20, 2015, I caused the foregoing reply to be filed with the Clerk of the Court through the Court's ECF system, which will serve notice of the filing on counsel for all parties.

/s/ Adina H. Rosenbaum

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Counsel for Petitioners