NO DATE FOR ORAL ARGUMENT HAS BEEN SET

No. 12-1113
(Consolidated with 12-1092)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PUBLIC CITIZEN, ADVOCATES FOR HIGHWAY AND AUTO SAFETY, TRUCK SAFETY COALITION, MILDRED A. BALL, AND DANA E. LOGAN,
Petitioners,

v.

FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION AND THE UNITED STATES,
Respondents.

On Petition for Review of a Final Rule Issued by
the Federal Motor Carrier Safety Administration

INITIAL BRIEF FOR PETITIONERS

Henry M. Jasny
ADVOCATES FOR HIGHWAY AND AUTO SAFETY
750 First Street NE
Washington, DC 20002
(202) 408-1711

Gregory A. Beck
Scott L. Nelson
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

Counsel for Petitioners

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES AND CORPORATE DISCLOSURE STATEMENT

Pursuant to D.C. Circuit Rule 28(a)(1) and Federal Rule of Appellate Procedure 26.1, counsel for petitioners certify as follows:

A. Parties and Amici

Petitioners are Public Citizen, Advocates for Highway and Auto Safety, Truck Safety Coalition, Mildred A. Ball, and Dana E. Logan. Petitioner in consolidated case No. 12-1092 is American Trucking Associations, Inc.

Respondents are the Federal Motor Carrier Safety Administration (FMCSA) and the United States.

This Court granted motions to intervene by the American Trucking Associations, Inc.; the Owner-Operator Independent Drivers Association, Inc.; the Truckload Carriers Association; the National Industrial Transportation League; the National Shipper's Strategic Transportation Council, Inc.; and William B. Trescott.

A notice of intent to participate as amici curiae in support of respondent FMCSA and intervenor ATA was filed by American Bakers Association; Food Marketing Institute; Intermodal Association of North America; International Food Distributors Association; National Shipper's Strategic Transportation Council, Inc.; National Association of Manufacturers; National Chicken Council; National Grocers Association; National Private Truck Council, Inc.; National Retail Federation; National Turkey Federation; Retail Industry Leaders Association;

Snack Food Association; United States Chamber of Commerce; and United States Poultry and Egg Association.

B. Rulings Under Review

The ruling under review is a final rule titled "Hours of Service of Drivers" (Docket No. FMCSA-2004-19608), published in the Federal Register by Respondent FMCSA on December 27, 2011, at 76 Fed. Reg. 81,134.

C. Related Cases

American Trucking Associations, Inc. challenges the same hours-of-service rule in a separate petition, which has been consolidated with this case. *American Trucking Assocs. v. FMCSA*, No. 12-1092.

This case is closely related to three previous petitions filed by some of the same petitioners here challenging previous versions of FMCSA's hours-of-service rules. In the first two cases, this Court vacated the challenged rules and remanded to the agency for further rulemaking. *Pub. Citizen v. FMCSA*, 374 F.3d 1209 (D.C. Cir. 2004); *Owner-Operator Indep. Drivers Ass'n v. FMCSA*, 494 F.3d 188 (D.C. Cir. 2007). Following the second remand from this Court, several of the petitioners here filed a third petition challenging the results of the agency's rulemaking; petitioners dismissed that petition following the agency's publication of an amended rule. *Public Citizen v. FMCSA*, No. 09-1094 (voluntarily dismissed Feb.

8, 2012). This petition challenges that amended rule, which, as relevant to this petition, remains very similar to the previously challenged rules.

D. Corporate Disclosure Statement

Petitioners Public Citizen and Advocates for Highway and Auto Safety are national nonprofit organizations dedicated to improving truck safety. Petitioner Truck Safety Coalition is made up of two nonprofit organizations, Citizens for Reliable and Safe Highways and Parents Against Tired Truckers. None of these petitioners has a parent, subsidiary, or affiliate that has issued shares or debt securities to the public.

/s/ Gregory A. Beck

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulatory Materials

Other Authorities

GLOSSARY

APA	Administrative Procedure Act
DOT	Department of Transportation
FHWA	Federal Highway Administration
FMCSA	Federal Motor Carrier Safety Administration
ICC	Interstate Commerce Commission
NTSB	National Transportation Safety Board
OOIDA	Owner-Operator Independent Drivers Association, Inc.\
RIA	Regulatory Impact Analysis

INTRODUCTION

Congress created the Federal Motor Carrier Safety Administration (FMCSA) in 1999 to enhance highway safety and truck-driver health by limiting truck drivers' driving and working hours. In 2003, FMCSA responded to Congress's mandate by establishing rules that vastly *increase* the number of allowable daily and weekly hours, substantially worsening the problems that Congress ordered the agency to address. Twice before, this Court invalidated the rules because the agency failed to consider their impact on safety and driver health. *See Owner-Operator Indep. Drivers Assoc. v. FMCSA*, 494 F.3d 188 (D.C. Cir. 2007) (*OOIDA*); *Pub. Citizen v. FMCSA,* 374 F.3d 1209 (D.C. Cir. 2004) (*Public Citizen*). The agency now concedes that its decision to increase drivers' hours adversely affected safety and health. But, having already increased driving and working hours without considering those effects, the agency insists that the longer hours cannot be reduced even to their pre-2003 levels without evidence "definitively demonstrat[ing]" that the lower limits "would have higher net benefits" than the rules this Court invalidated. *Hours of Service of Drivers*, 76 Fed. Reg. 81,134, 81,134 (2011). The agency's decision is arbitrary and violates Congress's express command to improve highway safety and driver health. Once again, the rule should be set aside.

JURISDICTION

FMCSA published the challenged rule on December 27, 2011, under the Motor Carrier Act, 49 U.S.C. § 31502(b), and the Motor Carrier Safety Act, *id.* § 31136(a). *See* 76 Fed. Reg. at 81,140-41. Petitioners filed a timely petition for review on Feb. 24, 2012. This Court has jurisdiction under 28 U.S.C. § 2342(3)(A).

STATUTES AND REGULATIONS

The relevant statutes and regulations are included in Addendum A.

STATEMENT OF ISSUES

1) Did FMCSA abuse its discretion when it failed to consider revoking a provision in its hours-of-service rule that dramatically increased permissible weekly driving and working hours by allowing truck drivers to "restart" their weekly hours after only 34 hours off duty?

2) Did FMCSA abuse its discretion in adopting an 11-hour daily driving limit based on its assertion that it lacked "compelling scientific evidence" that 10 hours of driving is safer and more cost-effective?

3) Is FMCSA's hours-of-service rule arbitrary and capricious or contrary to law because it increases maximum daily and weekly driving and working hours without establishing that the longer hours increase safety and ensure driver health?

STATEMENT OF THE CASE

I. The High Costs of Long Driving Hours

In 2010, 3,675 people were killed and 80,000 people injured in crashes involving large trucks. National Highway Traffic Safety Administration, *Traffic Safety Facts 2010 Data* 1 (2012), *available at* http://www-nrd.nhtsa.dot.gov/Pubs/811628.pdf. Although large trucks make up only 4% of vehicles on the roads, they were involved in about one out of every nine fatal crashes in 2010. *Id.* at 2. More than three-quarters of people killed in those crashes were occupants of other vehicles, and another 10% were pedestrians or bicyclists. *Id.* at 1. As FMCSA acknowledges, the number of fatal crashes is "unacceptably high." 76 Fed. Reg. at 81,180.

The Department of Transportation (DOT) has long recognized the major role that fatigue plays in truck crashes. *See Hours of Service of Drivers; Driver Rest and Sleep for Safe Operations*, 65 Fed. Reg. 25,540, 25,545-46 (2000). In a 2006 FMCSA survey, about 48% of drivers said they had fallen asleep while driving in the previous year, 45% said they sometimes or often had trouble staying awake, and 65% reported that they often or sometimes felt drowsy while driving. *Hours of Service of Drivers*, 75 Fed. Reg. 82,170, 82,177 (2010). And fatigue increases the risk of a crash long before a driver feels tired. "As a person becomes fatigued, reaction times slow, concentration becomes more erratic, and decision-making is

slowed; all of which affect the ability of a driver to respond quickly to a hazardous driving situation." *Id.* at 82,175. "When driving an 80,000-pound [truck] at highway speeds, any delay in reacting to a potentially dangerous situation can be deadly." 76 Fed. Reg. at 81,134.

For more than two decades, FMCSA and its predecessor agency have acknowledged data showing that the "risk of accidents appears to increase with the number of hours driven." Federal Highway Administration (FHWA), *HOS Study: Report to Congress* 5-6 (1990). The agency has "freely concede[d] that studies show that performance begins to degrade after the 8th hour on duty and increases geometrically during the 10th and 11th hours." *Public Citizen*, 374 F.3d at 1218 (internal quotation marks and alteration omitted). The National Transportation Safety Board (NTSB) has estimated that 30-40% of truck crashes are fatigue-related. NTSB, *Factors that Affect Fatigue in Heavy Truck Accidents, Vol. 1* at v (1995) (NTSB 1995 Report). Moreover, long hours of work and chronic lack of sleep take a heavy toll on drivers' health. Truck drivers experience substantially more occupational injuries than other workers. 76 Fed. Reg. at 81,160. They also suffer from increased risk of high blood pressure, cardiovascular disease, obesity, diabetes, and other health problems. *Id.* at 81,177.

II. The Pre-Amendment Hours-of-Service Rules

Before the series of rulemakings that gave rise to this case, rules governing hours-of-service for truck drivers had been in effect since 1939 and had last been substantially updated in 1962. Rules adopted by the Interstate Commerce Commission (ICC) in 1939 imposed a maximum driving time of 10 hours and a minimum off-duty period of 8 consecutive hours in a 24-hour period. *See* 65 Fed. Reg. at 25,547-48. The rules also imposed weekly limits. If a carrier did not operate every day of the week, the rules limited its drivers to 60 on-duty hours in 7 consecutive days; if the carrier operated every day, the rules limited its drivers to 70 on-duty hours in 8 consecutive days. *Id*.

The ICC made two significant changes to the rules in 1962. First, "[f]or reasons it never explained clearly," the ICC untethered the 10-hour driving limit and 8-hour off-duty period from a 24-hour cycle. *Id.* at 25,548. Rather than requiring a 10-hour driving limit and 8-hour off-duty period every 24 hours, the amendments allowed a driver to drive a maximum of 10 hours following any consecutive 8-hour off-duty period. *Id.* As FMCSA later explained, this change had the seemingly unintended consequence of allowing drivers to significantly increase their daily driving time:

> For example, a driver who came on duty and started driving at 12:01 a.m. Monday would have to stop driving at 10:00 a.m. If the driver then took 8 hours off duty, he or she could drive again from 6:00 p.m. to midnight, for a total of 16 hours on Monday. The previous rule

would have limited the driver to a total of 10 hours driving time in any 24-hour period.

Id. Second, the amendments required that after spending 15 hours on duty (engaged either in driving or non-driving work), no more driving would be allowed until the driver took 8 consecutive hours off duty. *Hours of Service of Drivers*, 61 Fed. Reg. 57,252, 57,254 (1996).

In 1966, Congress created DOT and transferred to it the ICC's responsibility for motor carrier safety issues. *Id*. DOT assigned those responsibilities to FHWA. *Id.* Until 2003, the key provisions of the rules remained substantially unchanged:

Daily driving limit. A 10-hour driving limit following any 8 consecutive hours off duty. *Hours of Service of Drivers; Driver Rest and Sleep for Safe Operations*, 68 Fed. Reg. 22,456, 22,491 (2003).

Daily on-duty limit. A prohibition on driving after 15 hours on duty until the driver took 8 consecutive hours off duty. *Id.*

Weekly on-duty limit. A limit of 60 or 70 hours of driving over a 7- or 8-day period. *Id.*

III. Congress's Mandate for Safer Rules

When the rules were originally formulated in 1939, trucks could average only 25 miles per hour, and could hope to cover at most 250 miles in a single day. 68 Fed. Reg. at 22,472. Since then, trucks have replaced railroads as the dominant means of shipping, leading to many more trucks on the highways. *Id.* Trucks travel

much longer distances and face "significantly higher traffic speeds and volumes." *Id.* And the larger size of trucks means that crashes, when they occur, are more likely to be deadly. *Id.* These new realities require a "higher level of driver alertness." *Id.* Yet "truckers engaged in interstate commerce work some of the longest hours known in this country." 65 Fed. Reg. at 25,548.

Concerned about FHWA's failure to address the problem of rising fatalities from truck crashes, Congress passed a series of laws beginning in 1984 that in increasingly forceful language required safer hours-of-service rules. These enactments culminated in the creation of FMCSA as a new agency within DOT, in part for the purpose of revising the antiquated hours-of-service rules to reduce crashes and protect driver health.

A. Motor Carrier Safety Act

In 1984, Congress noted that 31,759 truck crashes, resulting in nearly 2,500 fatalities and 26,000 injuries, had occurred over a recent one-year period. S. Rep. No. 98-424, at 1 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4785, 4785. Frustrated that DOT had not "focused its attention … upon the hazards that commercial motor vehicle drivers face in the course of their work," *id.* at 9, 1984 U.S.C.C.A.N. at 4793, Congress passed the Motor Carrier Safety Act, Pub. L. 98-554, 98 Stat. 2829 (1984). The Act required DOT to "prescribe regulations on commercial motor vehicle safety" that, "[a]t a minimum, … ensure that … the responsibilities

imposed on operators of commercial motor vehicles do not impair their ability to operate the vehicles safely" and that "the operation of commercial motor vehicles does not have a deleterious effect on the physical condition of the operators." 49 U.S.C. § 31136(a).

FHWA initiated some rulemaking under the Act, but made no safety improvements to the hours-of-service rules. *See Federal Motor Carrier Safety Regulations*, 54 Fed. Reg. 7191, 7193 (1989). In a report to Congress, the agency acknowledged evidence that "driving in excess of 8 hours may be associated with a significantly increased risk of crash involvement." *HOS Study: Report to Congress*, at 6. The agency also noted research demonstrating "a cumulative fatigue effect after several successive days of driving operations." *Id.* But the agency proposed to do further studies before reevaluating the hours-of-service regulations. *Id.* at 10.

B. ICC Termination Act

Meanwhile, evidence mounted that the existing hours-of-service rules were unsafe. NTSB found that 31% of crashes it investigated were attributable to driver fatigue, making fatigue the most common cause of large-truck crashes. NTSB, *Fatigue, Alcohol, Other Drugs, and Medical Factors in Fatal-to-the-Driver Heavy Truck Crashes*, *Vol. 1* at vi (1990) (NTSB 1990 Report). NTSB cited evidence that "accident rates for trucks tend to increase dramatically the longer the driver

continues beyond 8 hours of continuous driving." *Id.* at 78. A later NTSB study found that lack of sufficient nightly sleep, length of driving and on-duty time, and cumulative fatigue, among other factors, contributed to fatigue-related crashes. NTSB 1995 Report at 4-5, 10, 26, 60. The study recommended that FHWA revise its hours-of-service rules within two years. *Id.* at 53.

On the heels of NTSB's report, Congress ordered FHWA to revise the rules. ICC Termination Act § 408, Pub. L. 104-88, 109 Stat 803 (1995). Congress required FHWA to initiate rulemaking

> dealing with a variety of fatigue-related issues pertaining to commercial motor vehicle safety (including 8 hours of continuous sleep after 10 hours of driving, loading and unloading operations, automated and tamper-proof recording devices, rest and recovery cycles, fatigue and stress in longer combination vehicles, fitness for duty, and other appropriate regulatory and enforcement countermeasures for reducing fatigue-related incidents and increasing driver alertness).

49 U.S.C. § 31136 note. Congress required the agency to issue an advance notice of proposed rulemaking by March 1, 1996, and a final rule by March 1, 1999. *Id.*

FHWA issued an advance notice of proposed rulemaking more than 8 months after the statutory deadline, which called for further research but did "not propose regulatory changes." 61 Fed. Reg. at 57,253. The agency never issued a notice of proposed rulemaking or final rule.

C. Motor Carrier Safety Improvement Act

In 1999, shortly after the deadline for a final rule, DOT's Office of Inspector General issued a report, requested by the Senate Commerce, Science, and Transportation Committee, on the effectiveness of FHWA's safety program. DOT, Office of Inspector General, *Motor Carrier Safety Program: Federal Highway Administration* at i (1999), *available at* http://www.oig.dot.gov/sites/dot/files/pdfdocs/tr1999091.pdf. The report concluded that FHWA had not effectively enforced the law and that the number of fatalities from large truck crashes was "unacceptable." *Id.* at ii-iii. The Inspector General also concluded that the "long-overdue revision of hours of service regulations [was] necessary to ensure they reflect the latest research on fatigue" and "would have a significant bearing on motor carrier safety." *Id.* at vii, 53.

The following month, NTSB issued a new report on DOT's efforts to address fatigue. NTSB, *Safety Report—Evaluation of U.S. Department of Transportation Efforts in the 1990s to Address Operator Fatigue* (1999). NTSB found that "[d]espite the acknowledgement by [DOT] that fatigue is a significant factor in transportation accidents, little progress has been made to revise the hours-of-service regulations to incorporate the results of the latest research on fatigue and sleep issues." *Id.* at 25. NTSB criticized FHWA's "lack of progress" and failure to "act[] decisively to revise the antiquated hours-of-service regulations." *Id.* at 19,

23. It recommended that FHWA "[e]stablish, within 2 years, scientifically based hours-of-service regulations." *Id.* at 25.

Alarmed by these reports and frustrated by FHWA's continued inaction, Congress passed the Motor Carrier Safety Improvement Act. Pub. L. 106-159, 113 Stat. 1748 (1999). Congress found that "[t]he current rate, number and severity of crashes involving motor carriers … are unacceptable," and that "[m]eaningful measures to improve safety must be implemented expeditiously to prevent increases in motor carrier crashes, injuries, and fatalities." 49 U.S.C. § 113 note. Congress focused specifically on FHWA's "fail[ure] to meet statutorily mandated deadlines for completing rulemaking proceedings on motor carrier safety," including "driver hours-of-service regulations." *Id.*

To remedy these problems, Congress took the dramatic step of creating FMCSA as a new agency within DOT, assigned to take over FHWA's safety responsibilities and charged with "reduc[ing] the number and severity of large-truck involved crashes through … more expedited completion of rulemaking proceedings" and "scientifically sound research." *Id.* § 113(a), (f), note. Congress provided in the clearest possible terms that FMCSA's preeminent mission was safety:

> Safety as Highest Priority.—In carrying out its duties, [FMCSA] shall consider the assignment and maintenance of safety as the highest priority, recognizing the clear intent, encouragement, and dedication of Congress to the furtherance of the highest degree of safety in motor carrier transportation.

Id. § 113(b).

IV. FMCSA Rulemaking

FMCSA promptly published a proposed rule to "reduce the number of [truck] drivers and others killed and injured in crashes." 65 Fed. Reg. at 25,552. In its final rule, however, the agency instead vastly *increased* the number of daily and weekly hours that truck drivers can drive, thus substantially worsening the problem that Congress ordered the agency to address. This Court twice vacated the agency's rules. Each time, the agency reenacted the rules in substantially the same form.

A. FMCSA's First Round of Rulemaking

1. FMCSA's 2000 Notice of Proposed Rulemaking

In 2000, FMCSA published a notice of proposed rulemaking. 65 Fed. Reg. 25,540. The agency acknowledged the "general consensus that modifications to current [hours-of-service] regulations would substantially improve [truck] safety by reducing the fatigue factor in [truck]-involved crashes." *Id.* at 25,540. It proposed to limit driving and working time to a 14-hour work period, made up of 12 on-duty and 2 off-duty hours, followed by 10 consecutive hours off duty. *Id.* at 25,581. The proposed rule contained several key features designed to "reduce the

risk of drivers operating [trucks] while drowsy, tired, or fatigued to reduce crashes involving these drivers." *Id.* at 25,540.

24-Hour Cycle. By combing a 14-hour work period with a mandatory 10-hour off-duty period, the proposed rule would have increased "the 18-hour on-duty/off-duty cycle to a normal 24-hour work cycle." *Id. at* 25,558.

Limited Working Hours. Acknowledging that "all work can either induce fatigue or deprive the driver of sleep," the rule would have limited working as well as driving time to a total of 12 on-duty hours within a 14-hour window. *Id.*

8 Hours of Sleep. To ensure that drivers would have enough off-duty time to obtain 8 hours of sleep, the proposal required not only 10 consecutive off-duty hours but also two off-duty hours within the 14-hour work period "to allow a driver to tend to personal necessities and rest at the driver's discretion." *Id.* at 25,541.

Mandatory "Weekend." FMCSA determined that drivers need a weekly off-duty period to recover from cumulative fatigue resulting from long driving days and to compensate for accrued "sleep debts." *Id.* at 25,555-58. The agency proposed a mandatory "weekend" of 32 to 56 hours. *Id.*

2. FMCSA's 2003 Final Rule

In 2003, FMCSA published a final rule that abandoned virtually every premise of the 2000 proposal. 68 Fed. Reg. 22,456. Although the rule adopted the

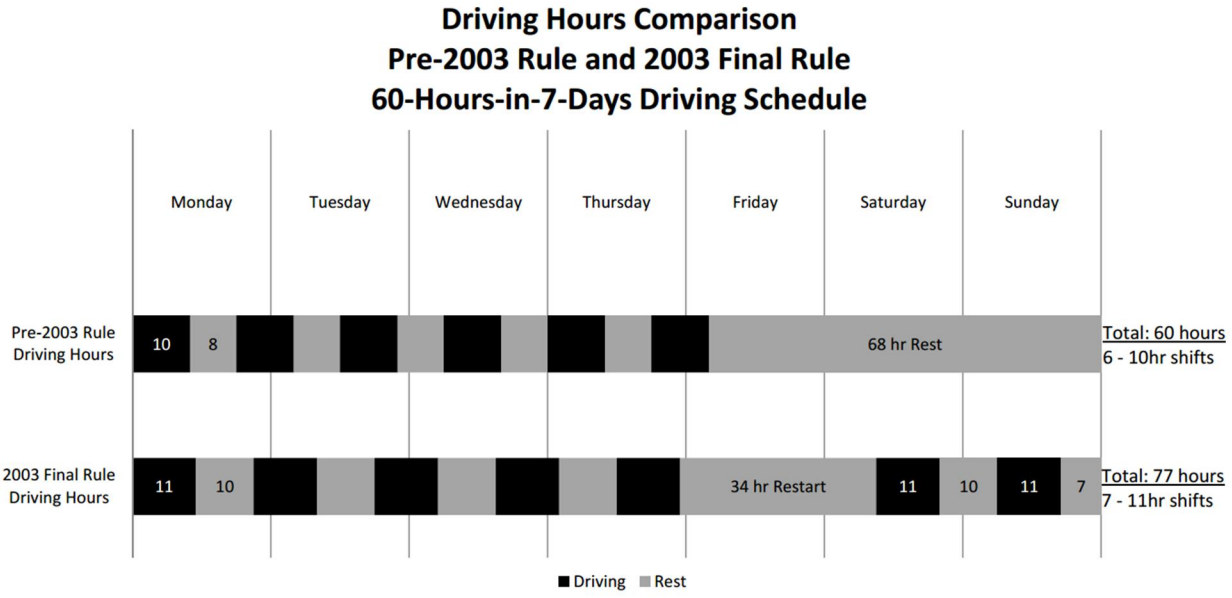
proposed 14-hour driving window and 10-hour off-duty period, it did not provide a 24-hour schedule, a limit on non-driving hours, an off-duty period during the 14-hour driving window, or a mandatory weekly recovery period. *Id.* at 22,547, 22,468-71, 22,479, 22,501-02. Worst of all, the rule drastically increased permissible driving and working hours.

Increased Daily Limits. The 2003 rule increased permissible consecutive driving hours from 10 to 11, within an on-duty window of up to 14 hours. *Id.* at 22,471-73. FMCSA conceded that crash risk increases "geometrically" during the 10th and 11th hours of driving and that increasing consecutive driving hours reversed longstanding agency policy, but contended the increase was justified because the rule decreased the driving window from 15 to 14 hours and increased mandatory off-duty time from 8 to 10 hours. *Id.*

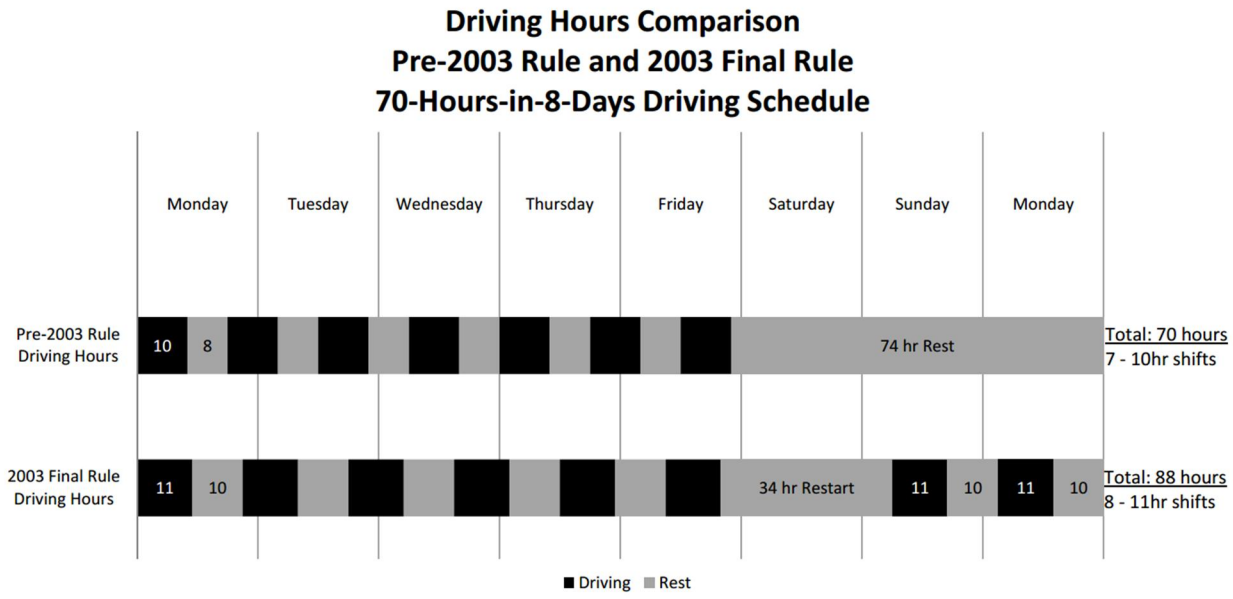
Increased Weekly Limits. Rather than a mandatory "weekend," FMCSA adopted a 34-hour "restart," under which 34 off-duty hours (the mandatory 10 daily off-duty hours plus an additional 24 hours) would reset accumulated weekly driving and working hours. *Id.* at 22,478-79. The agency justified the restart as a means to address cumulative fatigue, *id.* at 22,478, even though the restart did not require drivers to take any additional off-duty time—under the rule, drivers could continue driving 60- or 70-hour weeks without ever taking an extended off-duty period for rest and recovery. Indeed, as FMCSA only later acknowledged, the rule

increased overall driving and working time at the expense of off-duty time by allowing truckers to resume driving much sooner—after only 34 hours off duty—than under the prior rule. *See Hours of Service of Drivers*, 70 Fed. Reg. 49,978, 50,021 (2005).

The new 11-hour driving limit and restart provision, in combination, dramatically increased the number of permissible driving hours. A driver on a 60-hours-in-7-days schedule who drove 21-hour rotations and took 34 off-duty hours could drive 77 hours in 7 days—28% more than under the pre-2003 rule. *See id*.



A driver on a 70-hours-in-8-days schedule could drive 88 hours in 8 days—a 26% increase over the pre-2003 rule. *See id.*



For drivers maximizing on-duty time, weekly workload increases were even greater. A driver working 14-hour shifts could accumulate 84 hours in 7 days or 98 hours in 8 days—a 40% increase. *See id.*

Although the agency did not expressly acknowledge this massive increase in allowable time, its computer modeling did so implicitly by predicting that the industry could hire 58,500 fewer long-haul drivers than under the pre-2003 rule, saving nearly $1.1 billion annually. 68 Fed. Reg. at 22,495 (Tables 5 & 6).

3. ***Public Citizen v. FMCSA***

This Court vacated FMCSA's 2003 rule as arbitrary and capricious because the agency failed to consider the rule's impact on driver health, as required by the Motor Carrier Safety Act. *Public Citizen*, 374 F.3d at 1216.

The Court also emphasized "the troubling nature of … other facets of the rulemaking." *Id.* at 1217. Noting that FMCSA "freely concede[d] that studies show that performance begins to degrade after the 8th hour on duty and increases geometrically during the 10th and 11th hours," the Court wrote that the increase in driving time from 10 to 11 hours "raise[d] very real concerns." *Id.* at 1217-18 (internal quotation marks and alteration omitted). The Court expressed "doubts" about whether FMCSA's two justifications for the increase in driving time—the decrease in the driving window and increase in off-duty time—were sufficient. *Id.* at 1218. The court noted that "the agency cited absolutely no studies in support of its notion that the decrease in [the] daily driving-eligible tour of duty from fifteen to fourteen hours will compensate for [the] conceded and documented ill effects from the increase" in driving time. *Id.* And the Court observed that the benefits attributed to the off-duty hours "assume[d], dubiously, that time spent driving is equally fatiguing as time spent resting—that is, that a driver who drives for ten hours has the same risk of crashing as a driver who has been resting for ten hours, then begins to drive." *Id.* Because the agency's analysis considered only drivers' sleep, not "time on task," the Court considered it of "questionable value in justifying the increase in daily driving time." *Id.* at 1218-19.

Finally, the Court found it "problematic" that FMCSA did "not even acknowledge, much less justify, that the [34-hour restart] … dramatically increases the maximum permissible hours drivers may work each week." *Id.* at 1222.

B. FMCSA's Second Round of Rulemaking

1. FMCSA's 2005 Notice of Proposed Rulemaking and Final Rule

Following this Court's decision, FMCSA adopted an almost identical rule. 70 Fed. Reg. 49,978. The agency again adopted the maximum daily 11-hour driving limit, contending that it is economically beneficial to carriers and that available data "do not clearly indicate whether the 11th hour of driving, combined with 10 hours of off-duty time, poses a significant risk." *Id.* at 50,012. FMCSA also maintained the 34-hour restart, labeling it a "safety net" affording drivers two nights' sleep to alleviate cumulative fatigue. *Id.* at 50,038-39.

FMCSA acknowledged for the first time the massive increase in driving hours authorized by the new rule. *Id.* at 50,021. The agency minimized the health and safety effects of these extra hours by suggesting that "the average driver … cannot realistically, drive and work the longer weekly hours, on a regular basis." *Id.* at 50,022.

In response to this Court's holding that it acted arbitrarily in failing to consider the health effects of its rule, FMCSA acknowledged that studies "generally concluded that long work hours appear to be associated with poorer

health, increased injury rates, more illnesses, or increased mortality." *Id.* at 49,989. But the agency dismissed those findings, claiming "a lack of knowledge on, and great deal of uncertainty about, whether the potential long hours alone adversely affect driver health," and an absence of "evidence that drivers [had] drastically increased their hours of driving or work" under the 2003 rule. *Id* at 50,038.

2. ***OOIDA v. FMCSA***

In *OOIDA*, this Court again vacated the hours-of-service rule. 494 F.3d 188. The Court held that FMCSA had failed to provide a reasoned explanation for its methodology in determining crash risk during the 11th hour of driving, *id.* at 204-05, and that the agency had failed to account for "cumulative fatigue due to the increased weekly driving and working hours permitted by the 34-hour restart provision." *Id.* at 206. The Court rejected the agency's rationalization that the average driver could not "realistically drive and work the longer weekly hours on a regular basis" because "whatever the 'average driver' will do on a 'regular basis,' it is clear that FMCSA contemplates that many drivers will work those longer hours—as those hours were the basis for the agency's conclusion that the 34-hour restart provision will have economic benefits." *Id.*

C. FMCSA's Third Round of Rulemaking

After this Court vacated the rule for the second time, FMCSA again adopted the same hours-of-service limits. *Hours of Service of Drivers*, 73 Fed. Reg. 69,567

(2008). To determine risks in the 11th hour of driving, the agency relied on the results of a new study it had commissioned that it claimed showed *no* increase in crash risk for the 11th hour of driving, *id.* at 69,576—a conclusion this Court in *Public Citizen* had deemed "implausible." 374 F.3d at 1219. In response to this Court's holding that it had failed to consider the effects of cumulative fatigue from long weekly driving hours, FMCSA asserted that the 34-hour restart would "zero out" any accumulated fatigue. 73 Fed. Reg. at 69,569. The agency also pointed to a general decline in traffic fatalities as evidence that its longer daily and weekly hours were safe. *Id.* at 69,572.

Some of the petitioners here petitioned for judicial review of the 2008 rule. 75 Fed. Reg. at 82,173. In a settlement agreement, FMCSA agreed to publish a new rule, and the parties jointly requested that this Court hold the petition in abeyance during the agency's rulemaking proceedings. *Id.*

D. FMCSA's Fourth Round of Rulemaking

In its next notice of proposed rulemaking, FMCSA proposed to limit drivers to either 10 or 11 hours of consecutive driving, but said that it "favor[ed] a 10-hour limit." *Id.* at 82,170. The agency wrote that it considered a 10-hour driving limit to be a "reasonable choice," given its "goal of improving highway safety and protecting driver health," the "potentially significant but unquantifiable health benefits of reductions in maximum working and driving hours," and the "imprecise

but demonstrated relationship between fatigue, time-on-task, hours awake, and hours worked." *Id.* at 82,180, 82,190. The agency did not consider eliminating the 34-hour restart, but instead proposed limits on its use. *Id.* at 82,170.

In its final rule, the agency retained both the 11-hour driving limit and the 34-hour restart, subject to two limitations on the restart's use. 76 Fed. Reg. at 81,134. First, any restart would have to include two periods between midnight and 5 a.m. *Id.* Second, a driver would be allowed to begin another 34-hour off-duty period no sooner than 7 days after the beginning of the previous restart. *Id.* The agency also imposed a mandatory 30-minute break during driving shifts longer than 8 hours. *Id.*

The agency for the first time acknowledged that "[l]ong daily and weekly hours are associated with an increased risk of crashes and with the chronic health conditions associated with lack of sleep." *Id*. Moreover, the agency's cost-benefit analysis showed significant adverse safety and health impacts from the 11th hour of driving, which it valued as high as $9 billion over 10 years. *See* FMCSA, *Regulatory Impact Analysis*, Exh. C-5 (2011) (RIA). Nevertheless, the agency decided to retain the 11-hour limit because it was "unable to definitively demonstrate that a 10-hour limit … would have higher net benefits than an 11-hour limit." 76 Fed. Reg. at 81,134. Claiming an "absence of *compelling* scientific evidence demonstrating the safety benefits of a 10-hour driving limit, as opposed

to an 11-hour limit," and "strong evidence that an 11-hour limit could well provide higher net benefits," the agency concluded that it lacked "reasonable grounds under the Administrative Procedure Act for adopting a new regulation on this issue." *Id.* at 81,135 (emphasis added).

SUMMARY OF ARGUMENT

A. FMCSA's failure to consider revoking the 34-hour restart was an abuse of discretion. This Court has already twice vacated the restart, first for FMCSA's failure to consider its effect on the health of drivers, and then for the agency's failure to consider the effect of cumulative fatigue from long hours of driving. The agency now admits that the restart negatively impacts both driver health and cumulative fatigue, but has made no effort to quantify those effects or to consider whether they render the 34-hour restart unsafe. Moreover, the agency has now disavowed each of the reasons that it originally relied on to support the restart. In light of its failure to remedy the defects identified by this Court, and its lack of any justification for the provision, FMCSA abused its discretion by failing to consider the option of revoking the restart.

FMCSA's adoption of limits to the use of the restart does not render the rule safe. Even with the limits, the 34-hour restart allows extremely long driving and work hours over the course of a single week and average weekly hours that far exceed the pre-2003 limits. Even during weeks when drivers are prohibited from

using a restart, they can drive just as many hours as they could under the pre-2003 rules—an amount of driving that Congress deemed unsafe. And the restart limits would not effectively restrict use of the restart by drivers on 8-day schedules who maximize their driving hours, although those drivers are at the highest risk of fatigue.

B. FMCSA considered the possibility of eliminating the 11-hour driving limit but decided not to based on the mistaken belief that the Administrative Procedure Act (APA) requires "compelling scientific evidence" of cost-effectiveness to justify a 10-hour driving limit. 76 Fed. Reg. at 81,135. The agency's decision misconstrued the scope of its authority to change the rule and disregarded its statutory mandate to improve highway safety. Because the agency's rejection of a 10-hour limit was based on an erroneous view of the law, its decision was an abuse of discretion.

In addition, FMCSA's uncertainty about the cost-effectiveness of a 10-hour limit was a product of the agency's failure to exercise its discretion to resolve questions of fact. The agency's cost-benefit analysis was unable to determine the relative cost-effectiveness of a 10-hour limit because it left unresolved three critical questions—average driver sleep, base fatigue level, and discount rate—that the agency had the expertise and authority to resolve. If it had supplied reasonable

answers to those questions, the agency would have concluded that the 10-hour limit is cost-effective.

C. Congress has repeatedly and clearly required FMCSA and its predecessor agency to adopt rules that *reduce* driver fatigue, *increase* highway safety, and *protect* driver health. Instead, FMCSA adopted rules that allow more daily and weekly driving hours than ever before. Although FMCSA is not prohibited from considering the cost of new rules, its heavy reliance on cost to adopt rules that *increase* driver fatigue, *reduce* highway safety, and *damage* drivers' health violates Congress's express command.

Although FMCSA originally touted the 34-hour restart as a safety provision, it now admits that the restart's only function is to *minimize* off-duty hours and to allow substantially more weekly driving than before. Similarly, the agency now acknowledges that the 11th hour of driving causes more crashes and harms driver health. In light of these admissions, FMCSA's adoption of these provisions was an abuse of discretion and contrary to its statutory mandate to consider "safety as the highest priority." 49 U.S.C. § 113(b).

STANDING

Petitioners Mildred A. Ball and Dana E. Logan are truck drivers who are directly regulated by the challenged rule. *See Sierra Club v. EPA*, 292 F.3d 895,

900 (D.C. Cir. 2002). A declaration in support of standing is attached as Addendum B.

ARGUMENT

I. FMCSA's Failure to Consider Revoking the 34-Hour Restart Was an Abuse of Discretion.

This Court has twice held that FMCSA's adoption of the 34-hour restart was arbitrary and capricious, first for the agency's failure to consider the restart's effect on driver health, and then for its failure to take account of the effect of cumulative fatigue. Each time, the agency readopted the restart in identical form. In response to a third challenge, the agency agreed to reconsider the rule. However, the agency did not consider the possibility of revoking it. Instead, FMCSA proposed to keep the rule, subject to limitations on its use. The final rule follows that proposal.

An agency decision is arbitrary and capricious when the agency fails to "consider reasonably obvious alternatives and explain its reasons for rejecting alternatives in sufficient detail to permit judicial review." *Pub. Citizen v. Steed*, 733 F.2d 93, 99 (D.C. Cir. 1984) (internal quotation marks and alterations omitted). If this Court's two decisions vacating the rule did not make the alternative of revoking the restart sufficiently obvious, the agency should have been alerted to the possibility by the comments of petitioners Advocates for Highway and Auto Safety, Public Citizen, and Truck Safety Coalition, which pointed out that the restart has never been supported by evidence and could not

stand unless the agency demonstrated that the rule would not adversely affect public safety and driver health. 76 Fed. Reg. at 81,164; *see Int'l Ladies' Garment Workers' Union v. Donovan*, 722 F.2d 795, 817-18 (D.C. Cir. 1983) (vacating rule where agency failed to adequately consider alternatives proposed in comments). "At the very least," the possibility of eliminating the 34-hour restart "should have been addressed and adequate reasons given for its abandonment." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 48 (1983).

A. The Agency Failed to Remedy the Rulemaking Errors Previously Identified by This Court.

Because FMCSA has not remedied the problems this Court identified in concluding that the 34-hour restart was arbitrary and capricious, the agency acted arbitrarily in failing to consider eliminating the restart.

In *Public Citizen*, this Court held that the agency acted arbitrarily by failing to consider the effect of the 34-hour restart on driver health, as required by statute. 374 F.3d at 1216. In reviewing the available studies in response to this Court's ruling, FMCSA "did not dispute that there are some links between driving and various health conditions." 73 Fed. Reg. at 69,573. Nevertheless, in readopting the rule in 2005 and 2008, the agency concluded that the longer driving and working hours the restart allowed "neither cause[] nor exacerbate[] the risks associated with driving a [truck]." *Id.* Those conclusions were contrary to a massive body of scientific and medical research and were "so implausible" that they could not have

been "ascribed to a difference in view or the product of agency expertise." *State Farm*, 463 U.S. at 43. The agency now admits that it was mistaken, conceding for the first time that "[l]ong daily and weekly hours are associated with … chronic health conditions associated with lack of sleep." 76 Fed. Reg. at 81,134.

On review of FMCSA's second round of rulemaking, this Court in *OOIDA* held that FMCSA acted arbitrarily in giving "no explanation for the failure of its operator-fatigue model to account for cumulative fatigue due to the increased weekly driving and working hours permitted by the 34-hour restart provision." 494 F.3d at 206. In response, the agency readopted the rule in 2008, asserting that long weekly driving and working hours have *no* effect on a driver's fatigue. 73 Fed. Reg. at 69,569. The agency's conclusion contradicted its own former position and numerous studies showing a "cumulative fatigue effect after several successive days of driving operations." *HOS Study: Report to Congress*, at 6; *see also* 68 Fed. Reg. at 22,478; 65 Fed. Reg. at 25,555-56. Again, FMCSA's conclusion was so implausible that it could not reasonably have been credited. And again, the agency now concedes that its conclusion was wrong, finding that the "restart provision may be exacerbating problems with long hours and resulting fatigue," and that the resulting long hours "are associated with an increased risk of crashes." 76 Fed. Reg. at 81,134; 75 Fed. Reg. at 82,182.

The agency's cost-benefit analysis now concludes that limiting use of the restart will have safety and health benefits of up to $9.7 billion over ten years. *See* RIA Exh. C-5. If *limiting* the restart can have such significant benefits, then the benefits from *eliminating* the restart would surely be much more significant. But the agency never considered or attempted to quantify those benefits (or associated costs), because it still denied that the longer hours the rule permitted had any adverse effects on health or fatigue when it last affirmatively adopted the restart in 2008. It thus remains true, as it was when this Court vacated the rule in 2004 and 2007, that the agency has not adequately considered driver health or cumulative fatigue resulting from the increased hours that the restart allows. In light of this Court's holdings, the agency's failure to reconsider the 34-hour restart to take account of those factors was an abuse of discretion.

B. The Agency Has Disavowed Each of Its Reasons for Adopting the Restart.

In past rulemakings, FMCSA advanced several justifications for the 34-hour restart. Those justifications were arbitrary when made, and the agency has since backed away from each of them. Because the agency no longer agrees with the reasons that led it to adopt the 34-hour restart, and because it has not advanced any new reasons for the restart, its failure to consider revoking the restart provision was arbitrary and capricious.

1. In its initial rulemaking in 2003, the agency failed to acknowledge that the restart allowed more driving and working hours than the previous rules, and claimed that the rule fulfilled the goal of a mandatory "weekend" to help drivers recover from accumulated fatigue. 68 Fed. Reg. at 22,478-79. That justification made no sense because the restart is not mandatory. *See id.* at 22,516 (§ 395.3(c)) ("Any period of [7 or 8] consecutive days *may* end with the beginning of any off duty period of 34 or more consecutive hours" (emphasis added)). Drivers who choose not to use the restart can continue driving 60 hours in 7 days or 70 hours in 8 days, week after week, just as they could under the pre-2003 rules. The *only* function of the restart is to *increase* driving and working time at the expense of off-duty hours. Under the pre-2003 rule, a driver maximizing working time could have exhausted the 70-hour weekly limit in 5 days, and would thus have had to take the remaining 3 days as off-duty time. Using the restart, the same driver could resume driving after only 34 hours, when the old rules would have required rest.

In *Public Citizen*, this Court noted that FMCSA had not acknowledged the increase in weekly working hours allowed by the rule. 374 F.3d at 1222. In response, the agency belatedly conceded that the restart made increased hours possible, but still defended the rule as a "safety net" to allow recovery from cumulative fatigue. 70 Fed. Reg. 50,038-39; *see also* 73 Fed. Reg. at 69,569. FMCSA now admits what the rule's plain language has said all along—drivers

"are not required to have 2 consecutive nights off" under the rule, and "the restart is *only useful for drivers who are trying to minimize their off-duty time*." 76 Fed. Reg. at 81,140, 81,145 (emphasis added).

2. In its second round of rulemaking, FMCSA defended the 34-hour restart on the ground that drivers "cannot realistically drive and work the longer weekly hours" allowed by the rule. 70 Fed. Reg. at 50,022. That is, FMCSA contended that the maximum driving and working hours under the restart are so high that nobody could "realistically" use them all.

This Court recognized in *OOIDA* that "it is clear that FMCSA contemplates that many drivers will work those longer hours—as those hours are the basis for the agency's conclusion that the 34-hour restart provision will have economic benefits." 494 F.3d at 206. Even then, FMCSA continued to argue that it was "not required to demonstrate that constant, maximum utilization of the [hours-of-service] rules is as safe as the pre-2003 rules." *Hours of Service of Drivers*, 72 Fed. Reg. 71,247, 71,249 (2007); *see also* 73 Fed. Reg. at 69,570. Now, the agency concedes that the restart gets significant use. *See* 75 Fed. Reg. at 82,182. Indeed, the agency recognizes that the trucking industry's objections to limiting the restart are premised on assertions that companies have already maximized time under the restart in precisely the way the agency previously denied was possible. *See id.*

3. In its third round of rulemaking, the agency asserted that national crash statistics show that the restart has had no "adverse impact on safety." 73 Fed. Reg. at 69,572. The agency argued that, since the 2003 rule went into effect, the number of fatigue-related crashes "remained relatively stable from year to year, without any clear trend since the 2003 rule was adopted." *Id.* That claim lacked scientific foundation because national crash statistics are not limited to fatigue-related crashes and cannot isolate the effects of the hours-of-service rules. FMCSA had itself previously rejected use of national crash data for precisely those reasons. 70 Fed. Reg. at 50,012.

The agency has now ruled out reliance on national truck-crash statistics as a reliable indicator of the rule's safety: "Crashes have multiple causes and the consequences of a crash are affected by many factors—including speed, size of vehicles involved, roadway conditions, and improved safety features in vehicles," and crash rates "cannot be attributed to any single factor affecting crashes, including implementation of the 2003 rule." 75 Fed. Reg. at 82,176. The agency has also conceded that the general long-term decline in truck crashes, which also occurred with other vehicle types, did not coincide with implementation of the rules, and that "[i]n general, crashes decline in recessions, as they did in 1982-83, 1991-92, and 2001-02." *Id.* Moreover, the agency noted that recent data shows an increase in fatal truck crashes of about 9% in 2010. 76 Fed. Reg. at 81,139.

4. When it first adopted the 34-hour restart, FMCSA praised similar industry proposals as "provid[ing] opportunities for considerable gains in productivity." 68 Fed. Reg. at 22,479. The agency's cost-benefit analysis for the 2008 rule predicted benefits to the industry of more than $1 billion annually, resulting primarily from the need for fewer truck drivers. *Id.* at 22,495. As already explained, however, the agency has never considered or attempted to quantify the corresponding costs to safety and health. Accordingly, it has never conducted a complete cost-benefit analysis.

* * *

In short, no reasons remain for FMCSA's adoption of the 34-hour restart. The agency's failure even to *consider* eliminating the restart was thus an abuse of discretion. *See State Farm*, 463 U.S. at 48.

C. The Agency's Amendments to the Restart Do Not Render It Safe.

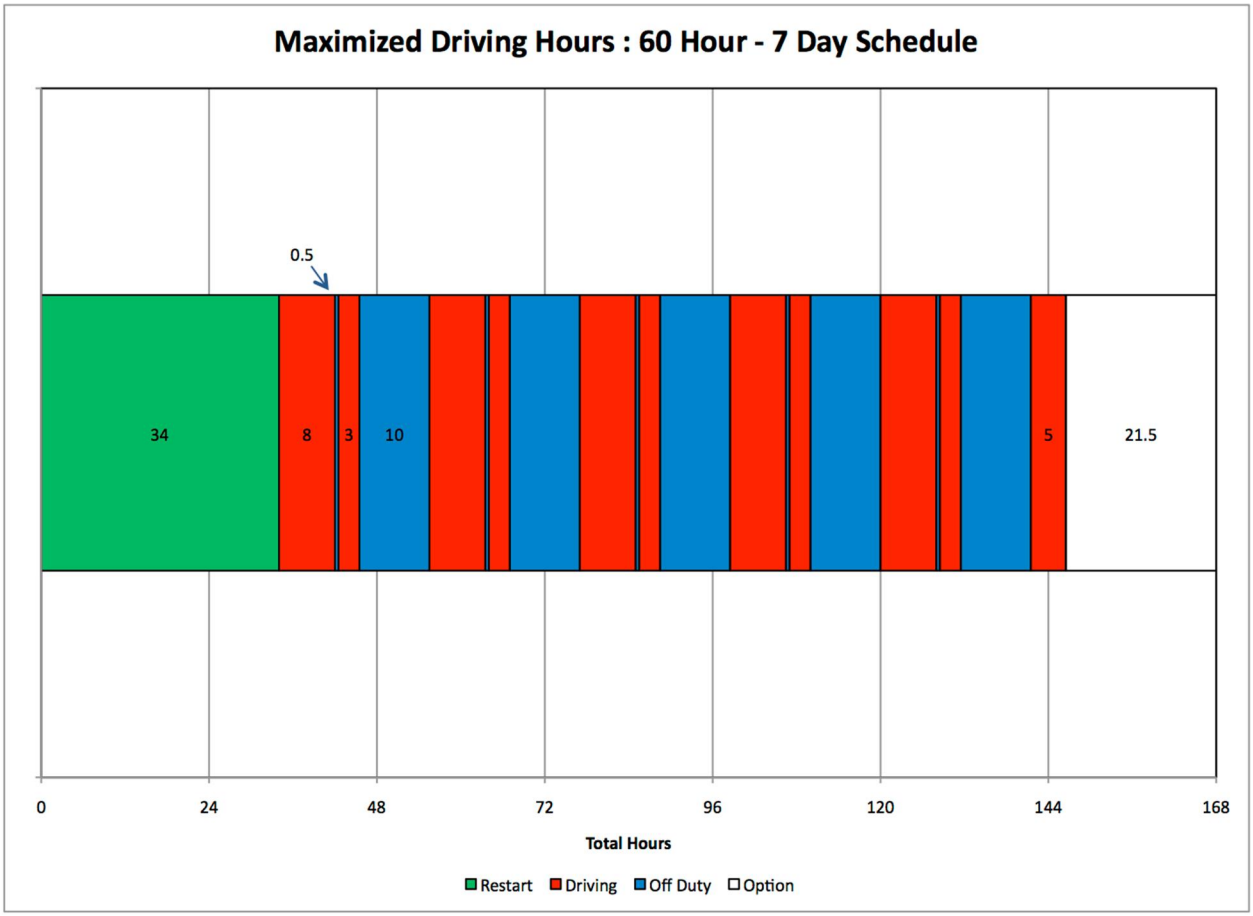
FMCSA's decision to limit use of the restart to once every 7 days and to require a 30-minute break during driving shifts of 8 or more hours does not resolve the restart's risks to health and safety because the restart still allows a massive increase in driving and working hours over pre-2003 limits.

First, drivers who have not used a restart within the past 7 days can drive nearly as many hours over the course of a single week as they could before the new limits on the restart's use. *See* 76 Fed. Reg. at 81,140 ("[D]rivers will not have

their work seriously curtailed in a single week."). The required 30-minute break only slightly decreases the maximum weekly working hours by up to 3 or 3.5 hours (half an hour per 8-to-11-hour driving shift). But even assuming the maximum number of driving shifts, the driver "will still be able to work up to 81 hours in a single [7-day] week," or 94.5 hours in an 8-day week. *Id.*

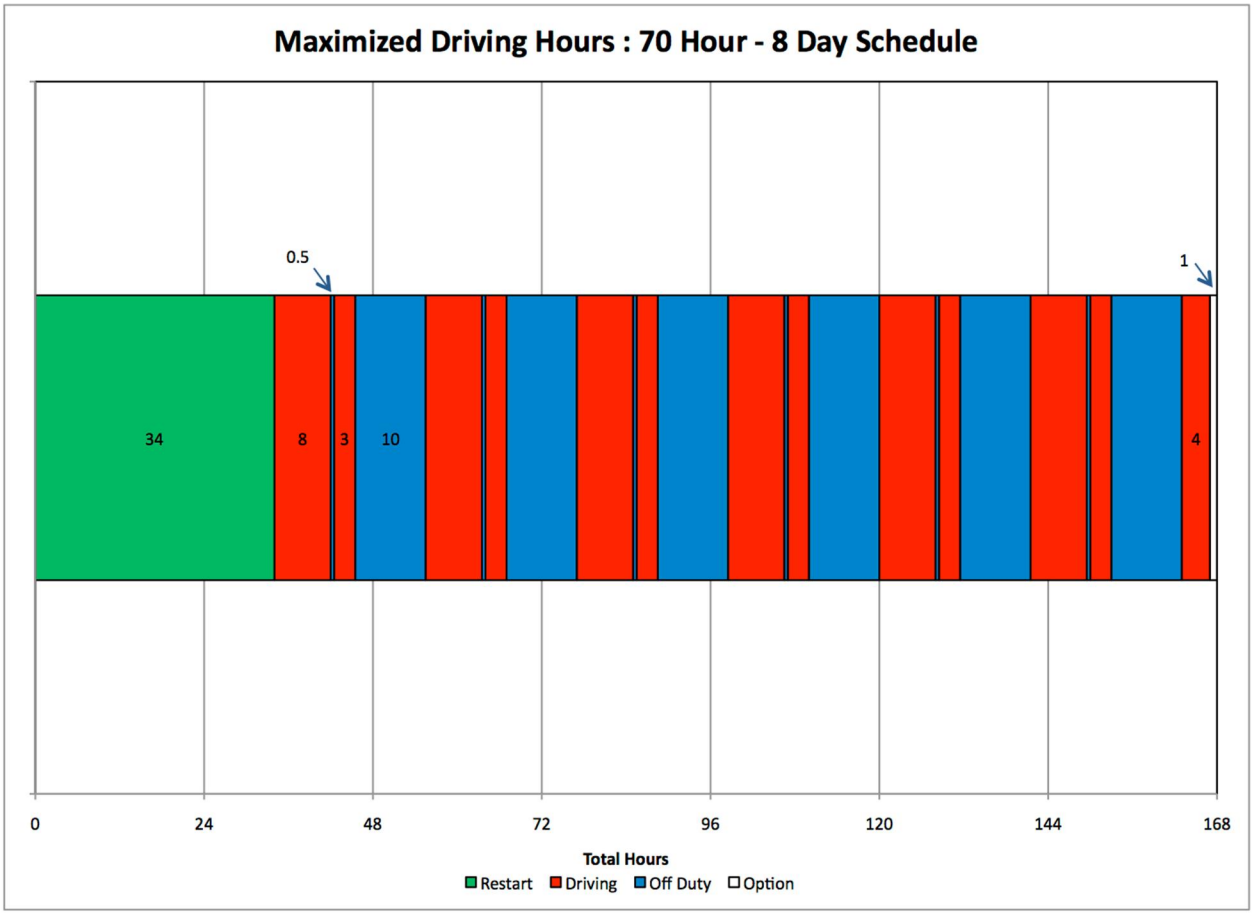
Second, immediately following a restart, drivers can still drive and work the same 60- or 70-hour week that was permitted under the pre-2003 rules. While that is fewer hours than would have been possible with the use of a second restart, the schedule still allows a level of driving and working that Congress deemed unsafe and that gives drivers no chance to recover from the previous week's "intense[]" hours. *Id.* at 81,134-35.

Third, drivers on a 7-day schedule who maximize their use of driving hours (by alternating between 11 hours of driving and 10 hours off duty) will have nearly 24 hours after their last driving shift before they can invoke another 34-hour restart. Therefore, they will have no reason to use a restart that week and will instead likely revert to the pre-2003 requirements by remaining off duty until the end of the 7th day of their driving schedule.



By taking a restart only on alternate weeks, drivers can continue working highly intense, fatigue-inducing schedules every other week, while still averaging many more hours than under the pre-2003 rules. *See id.* at 81,134 (noting that the amendments, "*on average*, will cut the maximum work week from 82 to 70 hours" (emphasis added)).

Finally, the 7-day restart provides essentially *no* limit for drivers on an 8-day schedule who maximize their driving hours. Those drivers will reach their 70-hour on-duty limit in 133 hours, or 167 hours after the previous restart began:



Because the 7-day restart limit is measured from the *beginning* of the previous restart, drivers on this schedule would need to wait just one additional hour to run out the 7-day (168-hour) clock and become eligible to use another restart. Many if not most long-haul drivers—those most at risk of fatigue from long, irregular work schedules—operate on 70-hours-in-8-day schedules.

Thus, the 34-hour restart, even with limits on its use, allows drivers to work many more hours than they could under the pre-2003 rules that Congress deemed unsafe. FMCSA has never considered the effects of all these additional hours on public safety and driver health.

II. FMCSA's Adoption of the 11-Hour Driving Limit Was an Abuse of Discretion.

Unlike the 34-hour restart, FMCSA chose to reconsider whether to adopt an 11-hour driving limit or return to the pre-2003 10-hour limit. Although the agency initially expressed a preference for a 10-hour limit, it decided to retain the 11th hour of driving because it was "unable to definitively demonstrate that a 10-hour limit … would have higher net benefits." 76 Fed. Reg. at 81,134. Claiming an "absence of compelling scientific evidence demonstrating the safety benefits of a 10-hour driving limit, as opposed to an 11-hour limit," and "strong evidence that an 11-hour limit could well provide higher net benefits," the agency "concluded that adequate and reasonable grounds under the [APA] for adopting a new regulation on this issue do not yet exist and that the current driving limit should therefore be allowed to stand for now." *Id.* at 81,135. The agency's decision was based on a misunderstanding of its authority and a failure to exercise its discretion to determine the safety and health impacts of the 11-hour rule.

A. The Agency's Decision Was Based on an Error of Law.

FMCSA is wrong that, to adopt a 10-hour driving limit, it must have "compelling scientific evidence demonstrating safety benefits" and that it must "definitively demonstrate … higher net benefits" to constitute "adequate and reasonable grounds under the [APA] for adopting a new regulation." *Id.* at 81,134, 81,135. On the contrary, "just as an agency reasonably may decline to issue a

safety standard if it is uncertain about its efficacy, an agency may also revoke a standard on the basis of serious uncertainties if supported by the record and reasonably explained." *State Farm*, 463 U.S. at 51-52. As the Supreme Court wrote in *State Farm*, "[i]t is not infrequent that the available data does not settle a regulatory issue and the agency must then exercise its judgment in moving from the facts and probabilities on the record to a policy conclusion." *Id.* at 52; *see also Ctr. for Auto Safety v. Peck*, 751 F.2d 1336, 1349 (D.C. Cir. 1985) (holding that an agency's burden to justify a rule is satisfied by "demonstrat[ing], on the basis of careful study, that there is no cause to believe that the status quo is right, so that the existing rule has no rational basis to support it").

That FMCSA applied the wrong standard is especially clear given its statutory charge to "reduc[e] fatigue-related incidents and increas[e] driver alertness," 49 U.S.C. § 31136 note; to ensure that truckers' responsibilities "do not impair their ability to operate the vehicles safely," *id.* § 31136(a)(2); and to "consider the assignment and maintenance of safety as the highest priority," *id.* § 113(b). FMCSA's position that it may only choose a 10-hour limit if it "definitively demonstrate[s]" that the limit would have "higher net benefits," 76 Fed. Reg. at 81,134, is inconsistent with Congress's demand that the agency improve safety and driver health. Although the Motor Carrier Safety Act requires the agency to *consider* "costs and benefits," 49 U.S.C. § 31136(c)(2), it does not

require adoption of the most cost-effective rule. On the contrary, the statute permits consideration of costs only to the extent that it is "practicable and consistent with the purposes of this chapter," *id.*—to promote safety, protect driver health, and ensure increased compliance with laws and regulations. 49 U.S.C. § 31131(a). As the Senate Report on the Act explains:

> In requiring [FMCSA] to consider the costs and benefits, where practicable, in the course of regulatory activities, the Committee realizes that many aspects of safety and health regulations do not lend themselves to detailed cost-benefit analysis. However, the Committee intends that [FMCSA], in issuing a regulation, will perform some type of cost-benefit analysis, recognizing that while the benefits of a particular rule or regulation may be substantial, they may not be quantifiable. Additionally, *the Committee does not intend such requirement to have the effect of precluding, preventing, or suspending the promulgation or revision of rules, regulations, standards, or orders due to difficulty in establishing specific, quantified cost or benefit data*.

S. Rep. No. 98-424, at 8, 1984 U.S.C.C.A.N. at 4792 (emphasis added). By demanding proof of cost effectiveness before adopting a rule that would improve safety, FMCSA did the opposite of what Congress intended.

Ironically, FMCSA recognized its authority to choose safety over cost in 2003, when it first adopted the 11-hour rule. The agency wrote: "Because the agency's statutory priority is safety, we have adopted a rule that is marginally more expensive than the [industry] option but which will reduce fatigue-related accidents and fatalities more substantially." 68 Fed. Reg. at 22,457. FMCSA's decision to ratify its earlier increase in driving time from 10 to 11 hours based on

its belief that the APA requires "compelling scientific evidence" to retain the pre-2003 limit was "based not on the agency's own judgment, but on an erroneous view of the law." *City of Los Angeles Dept. of Airports v. U.S. Dept. of Transp.*, 103 F.3d 1027, 1031 (D.C. Cir. 1997). FMCSA's decision was thus an abuse of discretion.

B. The Agency Failed to Exercise Its Discretion to Determine the Net Benefits of the 10-Hour Driving Limit.

FMCSA claims that its regulatory impact analysis provides "strong evidence that an 11-hour limit *could well* provide higher net benefits" than a 10-hour limit. 76 Fed. Reg. at 81,135 (emphasis added). All that the agency's "compelling evidence" shows is that the agency does not know which rule has higher net benefits. The agency provides wide ranges for the possible net benefits of each of its proposed options, depending on the assumptions used. It estimates net benefits of between $920 and -$750 million annually for Option 2, which includes the 10-hour driving limit; compared to net benefits of between $770 million and -$250 million annually for Option 3, which includes the 11-hour limit. *See* RIA at ES-4. The most that the agency can say is that Option 3 has "calculated net benefits [that] *appear likely* to be *somewhat higher* than the net benefits of Option 2 *under some assumptions* about baseline conditions." 76 Fed. Reg. at 81,179 (emphasis added). But Option 3's net benefits are also "*lower* under *other assumptions*," which, as explained below, are more reasonable. RIA at 6-2 (emphasis added).

FMCSA's refusal to use its expert judgment to settle on a set of reasonable assumptions about the impact of 11 hours of driving was an abuse of discretion. It is not "sufficient for an agency to merely recite the terms 'substantial uncertainty' as a justification for its actions." *State Farm*, 463 U.S. at 52. When the facts are uncertain, the agency "must explain the evidence which is available, and must offer a rational connection between the facts found and the choice made." *Id.* (internal quotation marks omitted). The agency's explanation generally must include a justification for not "engaging in a search for further evidence." *Id.* If resolution of uncertainty requires further investigation, an agency has the authority to "resolve even substantial factual uncertainties in the exercise of its informed expert judgment." *Natural Res. Def. Council v. Herrington*, 768 F.2d 1355, 1391 (D.C. Cir. 1985). What the agency may *not* do is "tolerate needless uncertainties in its central assumptions when the evidence fairly allows investigation and solution of those uncertainties." *Id.* Otherwise, the court "might as well be deferring to a coin flip." *Greater Yellowstone Coal v. Servheen*, 665 F.3d 1015, 1028 (9th Cir. 2011).

Here, FMCSA's uncertainty about the cost-effectiveness of the 10-hour driving limit results from its injection of three uncertain values into its cost-benefit analysis: the assumed amount of drivers' nightly sleep (low, medium, or high), the baseline fatigue risk (7%, 13%, or 18%), and the discount rate (3% or 7%). *See*

RIA Exh. ES-6. In combination, those variables produce a set of 18 possible net benefits for the 10-hour driving limit and make it impossible to determine whether a 10-hour rule is cost effective. *See id.* If FMCSA had attempted to make reasonable assumptions rather than relying on uncertainty, it would have concluded that the 10-hour driving limit is more cost-effective than the 11-hour limit.

1. Amount of Sleep. Whether a 10-hour driving limit is cost-effective under FMCSA's regulatory impact analysis depends on whether truck drivers receive high, medium, or low levels of sleep. The 10-hour limit has *dramatically* different net benefits depending on which level of sleep is chosen. Under one set of assumptions, Option 2 has a net benefit of $690 million annually if driver sleep is "low." *See id.* But if driver sleep is "high," Option 2 has a net *cost* of $470 million annually—a difference of more than $1 billion. *See id.*

Rather than leaving the amount of sleep drivers receive undetermined, the agency should have resolved the question of whether drivers get a high, medium, or low level of sleep. As the agency charged with overseeing truck driver hours of service, that is "precisely the type of issue which rests within [its] expertise." *State Farm*, 463 U.S. at 53. Moreover, the "high" sleep scenario, which assumes that "drivers are getting close to the optimal amount" of sleep, is implausible. 76 Fed. Reg. at 81,177. FMCSA's cost-benefit analysis states that "it is unlikely that drivers … who are principally affected by the rule changes, would be able to obtain

the amount of sleep in the high sleep category." RIA at 6-7 to 6-8. On the other hand, the "low" level of sleep was based on an average of 6.28 hours of "measured sleep for drivers in a naturalistic driving study," *id.* at 5-4, which FMCSA has described as "the most reliable data on sleep under the current rule." 75 Fed. Reg. at 82,177; *see also* RIA at 6-11 (describing the "low" sleep category is "probably the most realistic for the drivers affected by the 2-night restart provision").

If anything, the "low" level of sleep *overestimates* the level of sleep that drivers are getting. Less than half of the drivers in the study drove beyond 9 hours, and a third did not drive beyond 8 hours—far less than the 11 hours allowed by the rules. *See* 75 Fed. Reg. at 82,176; *see also* RIA at 5-4 n.23 (noting that 6.28 hours "may be a conservative assumption as the drivers in the … study do not appear to have been working" at a high intensity level). Moreover, the measured sleep in the study was below the 6.28 cited by the regulatory impact analysis—averaging as low as 6.15 hours including days off, and *only 5.6 hours on work days*. 75 Fed. Reg. at 82,176. These numbers are well below the 7 or 8 hours that the agency found drivers need each night to obtain adequate rest. 76 Fed. Reg. at 81,177. And other "studies of verifiable sleep of truck drivers" have found that drivers are averaging as little as 3.8 to 5.2 hours of daily sleep. *Id.* at 81,174.

If the agency had eliminated the unrealistic assumption that drivers are getting high levels of sleep and instead relied on what it considers the best data on

the sleep that drivers are actually getting, the range of net benefits for Option 2 (with the 10-hour driving limit) would have been narrowed from between $920 million and -$750 million to between $920 million and $130 million annually, thus rendering the 10-hour limit cost-effective. *See* RIA, Exh. ES-6. By doing so, the agency would also have eliminated most of the "assumptions about baseline conditions" under which the 11-hour rule appears to be more cost-effective. *See id.* Exhs. ES-6, ES-7.

2. Baseline Fatigue. FMCSA chose 13% as the percentage of truck crashes for which fatigue is a cause (the "baseline fatigue"). *Id.* at 4-21. But the agency's "sensitivity analysis" used values of 7% and 18% to test its conclusions. *Id.* Several of the assumptions that the agency says support the cost-effectiveness of the 11-hour rule depend on these alternative baseline fatigue values. *See id.* Exhs. ES-6, ES-7.

Again, FMCSA's regulatory impact analysis provides enough information to at least limit the range of uncertainty. There, the agency notes that the crash data on which the agency relied to reach 13% as a baseline fatigue level underestimated actual fatigue levels because crash investigators took a "very conservative approach" to determining crash causes. *Id.* at 4-21. As a result, no cause was assigned to more than 13% of crashes, and the agency concludes that some of those crashes were probably caused by fatigue. *Id.* That conclusion is backed up by other

studies, which have found a much higher baseline fatigue level than the 13% rate on which the agency relies. *See, e.g.*, NTSB 1995 Report at v (citing evidence that 30-40% of truck crashes are fatigue-related); NTSB 1990 Report at vi (finding that 31% of investigated crashes were attributable to driver fatigue).

Because the regulatory impact analysis presumes the fatigue-related crash rate was *at least* 13%, the agency could have eliminated 7% as a possible real-world rate. Doing so would have further adjusted Option 2's net benefits to between $920 million and $400 million annually, compared to $770 million to $440 million annually for Option 3, making Option 2 more cost-effective than Option 3 under most remaining scenarios. *See* RIA, Exhs. ES-6, ES-7.

3. Discount Rate. The final uncertainty in FMCSA's cost-benefit analysis is the discount rate applied to future health benefits. FMCSA "applies equal weight" to the discount rates of 3% and 7%, 76 Fed. Reg. at 81,180, both of which are recommended by OMB Circular A-4, *available at* http://www.whitehouse.gov/sites/default/files/omb/assets/omb/circulars/a004/a-4.pdf (OMB Circular); *see* RIA at C-1 (citing circular). Discount rates provide a method for discounting the value of benefits that will not accrue until the future, when economists consider them less valuable. OMB Circular at 32. OMB's suggested 3% rate is an estimate of the general rate at which people tend to discount future costs and benefits. *See id.* at 33-34. In contrast, the 7% rate is an "estimate of the average before-tax rate of

return to private capital in the U.S. economy." *Id.* at 33. The 7% rate is thus the "appropriate discount rate whenever the main effect of a regulation is to displace or alter the use of capital in the private sector." *Id.* Although the OMB circular recommends using a discount rate even for health-related benefits, it does not suggest what rate to use for that purpose. *Id.* at 34-35.

The decision of which discount rate to use is within the agency's discretion, but the potentially "major consequences of the discount rate" mean that the agency must "fix the rate carefully and explain its decision intelligibly." *Herrington*, 768 F.2d at 1414. FMCSA's failure to fix the discount rate here, and its reliance on the resulting uncertainty to justify its adoption of longer hours, was an abuse of discretion. Moreover, the agency did not "explain … intelligibly" the appropriateness of a 7% rate—a rate designed to approximate the return on private capital—to discount the value of future lives saved. The absurdity of using a 7% rate for that purpose is illustrated by the fact that, at that rate, "the present value of a life saved in ten years is worth about 51% of a present life." Ben Trachtenberg, *Health Inflation, Wealth Inflation, and the Discounting of Human Life*, 89 Or. L. Rev. 1313, 1328 (2011); *see* Cass R. Sunstein & Arden Rowell, *On Discounting Regulatory Benefits*, 74 U. Chi. L. Rev. 171, 172-73, 180, 184 (2007) (describing rates used by other agencies and noting research showing that people discount future health benefits at a 2% rate).

Eliminating the 7% rate would have removed another uncertainty from the agency's analysis and further narrowed the possible net benefits of Option 2 to between $920 million and $690 million annually, compared to between $770 million and $660 million for Option 3. Moreover, assuming a "low" level of driver sleep and a 3% discount rate, the 10-hour driving limit is *more* cost-effective than the 11-hour limit. *See* 76 Fed. Reg. at 81,180 (concluding that, given a 3% discount rate, "Option 2 (10 hours) would have higher net benefits at low sleep").

III. FMCSA's Decision to Increase Daily and Weekly Driving Hours Is Contrary to Law and an Abuse of Discretion.

A. Congress Expressly Required the Agency to Reduce Driver Fatigue, Increase Public Safety, and Protect Driver Health.

1. Congress has repeatedly and firmly required FMCSA and its predecessor agency to adopt rules that *reduce* driver fatigue, *increase* highway safety, and *protect* driver health. Instead, in the series of rulemakings beginning in 2000 and leading to the rule under review, FMCSA adopted rules that allow longer daily and weekly driving hours than ever before. The agency has no evidence that it is safe to allow truck drivers, already too often fatigued under the pre-2003 rules, to drive and work even longer hours. Much less does FMCSA have evidence that increasing driving and working hours makes the roads *safer*, as Congress demanded.

In the Motor Carrier Safety Act, Congress found that "it is in the public interest to *enhance* commercial motor vehicle safety and thereby *reduce* highway fatalities, injuries, and property damage." 49 U.S.C. § 31131(b) (emphasis added). Accordingly, Congress required FHWA to "prescribe regulations on commercial motor vehicle safety" for the purpose of "*promot[ing]* the safe operation of commercial motor vehicles." *Id.* §§ 31131(a)(1), 31136(a) (emphasis added). The regulations must "[a]t a minimum … *ensure* that … the responsibilities imposed upon operators of commercial motor vehicles do not impair their ability to operate such vehicles safely" and that they have no "deleterious effect" on driver health. *Id.* § 31136(a) (emphasis added). When FHWA had still not acted a decade later, Congress in § 408 of the ICC Termination Act directed the agency to develop, by no later than 1999, "appropriate regulatory and enforcement countermeasures for *reducing* fatigue-related incidents and *increasing* driver alertness." 49 U.S.C. § 31136 note (emphasis added).

Frustrated by FHWA's continued "fail[ure] to meet statutorily mandated deadlines for completing rulemaking proceedings on motor carrier safety," including "driver hours-of-service regulations," Congress in the Motor Vehicle Safety Improvement Act found that "[m]eaningful measures to *improve* safety must be implemented expeditiously to prevent increases in motor carrier crashes, injuries, and fatalities." 49 U.S.C. § 113 note (emphasis added). Congress thus

created FMCSA with the mandate to "*reduce* the number and severity of large-truck involved crashes." *Id.* (emphasis added). If there could be any question about Congress's intent that FMCSA adopt hours-of-service rules that *improve* safety, Congress stated its intent in language that is unusually clear:

> Safety as Highest Priority.—In carrying out its duties, the Administration shall consider the assignment and maintenance of *safety as the highest priority*, recognizing the *clear intent, encouragement, and dedication of Congress to the furtherance of the highest degree of safety* in motor carrier transportation.

Id. § 113(b) (emphasis added).

Given the strength and clarity of its statutory mandates, FMCSA has a heavy burden to show that its hours-of-service rules would reduce crashes, enhance public safety, and protect driver health. Indeed, in adopting its original hours-of-service rule in 2003, FMCSA agreed that its "statutory focus on safety and the specific mandate of Sec. 408 both demand that [its] rulemaking *improve* [truck] safety." 68 Fed. Reg. at 22,457 (emphasis added). The agency thus adopted its 2003 hours-of-service rules on the premise that they would be both cost-effective *and* save lives. *Id.* Now, however, FMCSA concedes that its premise was wrong. As the agency admits, "[w]orking long daily and weekly hours on a continuing basis is associated with chronic fatigue, a high risk of crashes, and a number of serious chronic health conditions." 76 Fed. Reg. at 81,136.

2. Petitioners do not contend that FMCSA is prohibited from considering costs in its hours-of-service regulations—the agency is not required to adopt the *safest* possible rule at any price. Congress in the Motor Carrier Safety Act required the Secretary of Transportation to consider "costs and benefits" in enacting regulations. 49 U.S.C. § 31136(c)(2). Congress, however, allowed consideration of costs only to the extent that doing so is "consistent with the purposes of this chapter," *id.*—which are to promote safety, driver health, and compliance with laws and regulations—*not* to allow the trucking industry to hire fewer drivers. *Id.* § 31131(a). Moreover, consideration of cost must be consistent with Congress's requirement that the agency consider "safety as the highest priority." *Id.* § 113(b).

Most importantly, because FMCSA's organic statutes require it to "reduc[e] fatigue-related incidents and increas[e] driver alertness," *id.* § 31136 note, and to "ensure" that truckers' responsibilities "do not impair their ability to operate the vehicles safely" or negatively impact their health, *id.* § 31136(a), the agency cannot act in a way that *increases* crashes, *decreases* driver alertness, or *harms* driver health as compared to the baseline of the pre-2003 rules. To invoke cost as the determining factor in support of rules that are less safe violates Congress's express commands. *See Natural Res. Def. Council v. EPA*, 966 F.2d 1292, 1305-06 (9th Cir. 1992) (where statute directed agency to require permits, agency acted

arbitrarily and capriciously in creating exemption from permit requirement to ease burden on regulated community).

B. The Agency Has Not Shown that the 34-Hour Restart Is Safe.

Before the rulemaking at issue here, FMCSA touted the 34-hour restart as a safety provision akin to a mandatory "weekend," and refused to acknowledge that the longer driving hours it allowed contribute to driver fatigue. As explained above, however, the agency now concedes the restart is useful only to drivers seeking to "*minimize* their off-duty time." 76 Fed. Reg. at 81,140 (emphasis added). It also concedes that the "restart provision may be exacerbating problems with long hours and resulting fatigue," and that "long weekly work hours are associated with a higher risk of crashes, sleep loss, and negative health effects." *Id.* at 81,134; 75 Fed. Reg. at 82,182.

Although the agency's cost-benefit analysis shows a net benefit over the previous version of the restart from adopting limits to the restart's use, the agency has never attempted to show that the restart *itself*, with or without limits, is *safer than the pre-2003 rules*—the dispositive issue under the governing statutes. Even with limits on the restart's use, the rule legalizes practices FMCSA previously found unsafe. The agency's 2000 notice of proposed rulemaking noted disapprovingly that 25% of drivers reported working at least 75 hours in the previous 7 days. 65 Fed. Reg. at 25,558. That schedule would have violated the

pre-2003 rules, but the restart readily permits it. Accordingly, the 34-hour restart should be vacated.

C. The Agency Has Not Shown That 11 Hours of Continuous Driving Is Safe.

The agency in prior rulemakings relied on the "implausible" conclusion that 11 hours of driving does not cause *any* increase in crash risk. *Public Citizen*, 374 F.3d at 1219. But the agency now "agrees that the studies show a general increase in crash risk with longer work hours," and that retaining the pre-2003 10-hour limit "might save more lives and prevent more crashes than an 11-hour limit," albeit "at a higher cost." 76 Fed. Reg. at 81,135, 81,151. The agency's regulatory impact analysis estimates safety and health benefits of between $1.3 billion and $9 billion over 10 years from switching to a 10-hour limit—the equivalent of as many as 9,000 lives saved under the agency's $6 million valuation of a human life. *See* RIA at ES-1, Exhs. C-2, C-11. Moreover, the agency concedes that its estimate of crash risk in the 11th hour of driving is "very moderate" compared to the risk found in other studies. *Id.* at 6-11. Indeed, the agency has previously concluded that drivers' performance degradation "increases geometrically during the 10th and 11th hours" of driving. 68 Fed. Reg. at 22,471. The 11th hour of driving is especially dangerous because it comes at the end of a driver's shift, between the 10th and 14th hours after reporting for duty, when driver performance is at its lowest and crash risk is greatest. *See* 76 Fed. Reg. at 81,149.

The agency's reliance on cost to avoid adopting a rule that it agrees "might save more lives and prevent more crashes" is incompatible with its statutory responsibility to reduce fatigue, increase highway safety, and ensure protection of driver health. Like the 34-hour restart, the 11-hour driving limit should be vacated.

CONCLUSION

As in *OOIDA*, the Court should "vacate those portions of the [hours-of-service rules] that increase the daily driving limit from 10 to 11 hours, and that permit an off-duty period of 34 hours to restart the weekly on-duty limits." 494 F.3d at 212.

Respectfully submitted,

/s/Gregory A. Beck
Gregory A. Beck
Scott L. Nelson
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

Henry M. Jasny
ADVOCATES FOR HIGHWAY AND AUTO SAFETY
750 First Street NE
Washington, DC 20002
(202) 408-1711

Counsel for Petitioners

CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32 (A)(7)(C) AND CIRCUIT RULE 32-1 FOR CASE NUMBER 12-1113

I hereby certify that the foregoing Initial Brief for Petitioners 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, Century Expanded. As calculated by my word processing software (Word 2010), the brief (excluding those parts permitted to be excluded under the Federal Rules of Appellate Procedure and the D.C. Circuit Rules) contains 11,636 words.

/s/Gregory A. Beck
Gregory A. Beck

CERTIFICATE OF SERVICE

I certify that on July 24, 2012, I caused the foregoing to be filed through the Court's ECF system, which will serve notice of the filing on counsel for all parties.

/s/Gregory A. Beck
Gregory A. Beck

ADDENDUM A

STATUTORY AND REGULATORY ADDENDUM

STATUTORY AND REGULATORY ADDENDUM

TABLE OF CONTENTS

ICC Termination Act of 1995, Pub. L. 104-88, § 408, 109 Stat. 803, 958-59 (49 U.S.C. § 31136 note), provides:

> (a) ADVANCE NOTICE.—The Federal Highway Administration shall issue an advance notice of proposed rulemaking dealing with a variety of fatigue-related issues pertaining to commercial motor vehicle motor vehicle safety (including 8 hours of continuous sleep after 10 hours of driving, loading and unloading operations, automated and tamper-proof recording devices, rest and recovery cycles, fatigue and stress in longer combination vehicles, fitness for duty, and other Appropriate regulatory and enforcement countermeasures for reducing fatigue-related incidents and increasing driver alertness) not later than March 1, 1996.
>
> (b) RULEMAKING.—The Federal Highway Administration shall issue a notice of proposed rulemaking dealing with such issues within 1 year after issuance of the advance notice under subsection (a) is published and shall issue a final rule dealing with those issues within 2 years after the last day of such 1-year period.

Motor Carrier Safety Improvement Act of 1999, Pub. L. 106-159, § 3, 113 Stat. 1748 (1999) (42 U.S.C. § 113 note), provides:

> Congress makes the following findings:
>
> (1) The current rate, number, and severity of crashes involving motor carriers in the United States are unacceptable.
>
> (2) The number of Federal and State commercial motor vehicle and operator inspections is insufficient and civil penalties for violators must be utilized to deter future violations.
>
> (3) The Department of Transportation is failing to meet statutorily mandated deadlines for completing rulemaking proceedings on motor carrier safety and, in some significant safety rulemaking proceedings, including driver hours-of-service regulations, extensive periods have elapsed without progress toward resolution or implementation.
>
> (4) Too few motor carriers undergo compliance reviews and the Department's data bases and information systems require substantial improvement to enhance the Department's ability to target inspection and enforcement resources toward the most serious safety problems and to improve States' ability to keep dangerous drivers off the roads.
>
> (5) Additional safety inspectors and inspection facilities are needed in international border areas to ensure that commercial motor vehicles, drivers, and carriers comply with United States safety standards.
>
> (6) The Department should rigorously avoid conflicts of interest in federally funded research.
>
> (7) Meaningful measures to improve safety must be implemented expeditiously to prevent increases in motor carrier crashes, injuries, and fatalities.

(8) Proper use of Federal resources is essential to the Department's ability to improve its research, rulemaking, oversight, and enforcement activities related to commercial motor vehicles, operators, and carriers.

Motor Carrier Safety Improvement Act of 1999, Pub. L. 106-159, § 4, 113 Stat. 1748, (1999) (42 U.S.C. § 113 note), provides:

> The purposes of this Act are—
>
> (1) to improve the administration of the Federal motor carrier safety program and to establish a Federal Motor Carrier Safety Administration in the Department of Transportation; and
>
> (2) to reduce the number and severity of large-truck involved crashes through more commercial motor vehicle and operator inspections and motor carrier compliance reviews, stronger enforcement measures against violators, expedited completion of rulemaking proceedings, scientifically sound research, and effective commercial driver's license testing, recordkeeping and sanctions.

49 U.S.C. § 113 (Motor Carrier Safety Improvement Act of 1999, Pub. L. 106-159, § 101, 113 Stat. 1748 (1999)), provides in relevant part:

> (a) IN GENERAL.—The Federal Motor Carrier Safety Administration shall be an administration of the Department of Transportation.
>
> (b) SAFETY AS HIGHEST PRIORITY.—In carrying out its duties, the Administration shall consider the assignment and maintenance of safety as the highest priority, recognizing the clear intent, encouragement, and dedication of Congress to the furtherance of the highest degree of safety in motor carrier transportation.
>
> * * *
>
> (f) POWERS AND DUTIES.—The Administrator shall carry out—
>
> > (1) duties and powers related to motor carriers or motor carrier safety vested in the Secretary by chapters 5, 51, 55, 57, 59, 133 through 149, 311, 313, 315, and 317 and by section 18 of the Noise Control Act of 1972 (42 U.S.C. 4917; 86 Stat. 1249–1250); except as otherwise delegated by the Secretary to any agency of the Department of Transportation other than the Federal Highway Administration, as of October 8, 1999; and
> >
> > (2) additional duties and powers prescribed by the Secretary.
>
> (g) LIMITATION ON TRANSFER OF POWERS AND DUTIES.—A duty or power specified in subsection (f)(1) may only be transferred to another part of the Department when specifically provided by law.
>
> * * *

49 U.S.C. § 31131 (Motor Carrier Safety Act of 1984, Pub. L. 98-554, §§ 202-203, 98 Stat. 2832 (1984)), provides:

> (a) PURPOSES.—The purposes of this subchapter are—
>
> (1) to promote the safe operation of commercial motor vehicles;
>
> (2) to minimize dangers to the health of operators of commercial motor vehicles and other employees whose employment directly affects motor carrier safety; and
>
> (3) to ensure increased compliance with traffic laws and with the commercial motor vehicle safety and health regulations and standards prescribed and orders issued under this chapter.
>
> (b) FINDINGS.—Congress finds—
>
> (1) it is in the public interest to enhance commercial motor vehicle safety and thereby reduce highway fatalities, injuries, and property damage;
>
> (2) improved, more uniform commercial motor vehicle safety measures and strengthened enforcement would reduce the number of fatalities and injuries and the level of property damage related to commercial motor vehicle operations;
>
> (3) enhanced protection of the health of commercial motor vehicle operators is in the public interest; and
>
> (4) interested State governments can provide valuable assistance to the United States Government in ensuring that commercial motor vehicle operations are conducted safely and healthfully.

49 U.S.C. § 31136 (Motor Carrier Safety Act of 1984, Pub. L. 98-554, § 206, 98 Stat. 2832 (1984)), provides (in part):

> (a) MINIMUM SAFETY STANDARDS.—Subject to section 30103(a) of this title, the 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;
>
> (2) the responsibilities imposed on operators of commercial motor vehicles do not impair their ability to operate the vehicles safely;
>
> (3) the physical condition of operators of commercial motor vehicles is adequate to enable them to operate the vehicles safely; and
>
> (4) the operation of commercial motor vehicles does not have a deleterious effect on the physical condition of the operators.
>
> * * *
>
> (c) PROCEDURES AND CONSIDERATIONS.—(1) A regulation under this section shall be prescribed under section 553 of title 5 (without regard to sections 556 and 557 of title 5).
>
> (2) Before prescribing regulations under this section, the Secretary shall consider, to the extent practicable and consistent with the purposes of this chapter—
>
> (A) costs and benefits; and
>
> (B) State laws and regulations on commercial motor vehicle safety, to minimize their unnecessary preemption.
>
> * * *

49 U.S.C. § 31502 (Motor Carrier Act of 1935) provides:

(a) APPLICATION.—This section applies to transportation—

(1) described in sections 13501 and 13502 of this title; and

(2) to the extent the transportation is in the United States and is between places in a foreign country, or between a place in a foreign country and a place in another foreign country.

(b) MOTOR CARRIER AND PRIVATE MOTOR CARRIER REQUIREMENTS.—The Secretary of Transportation may prescribe requirements for—

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

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

(c) MIGRANT WORKER MOTOR CARRIER REQUIREMENTS.—The Secretary may prescribe requirements for the comfort of passengers, qualifications and maximum hours of service of operators, and safety of operation and equipment of a motor carrier of migrant workers. The requirements only apply to a carrier transporting a migrant worker—

(1) at least 75 miles; and

(2) across the boundary of a State, territory, or possession of the United States.

(d) CONSIDERATIONS.—Before prescribing or revising any requirement under this section, the Secretary shall consider the costs and benefits of the requirement.

49 C.F.R. § 395.3 (2012) provides:

> (a) Except as otherwise provided in § 395.1, no motor carrier shall permit or require any driver used by it to drive a property-carrying commercial motor vehicle, nor shall any such driver drive a property-carrying commercial motor vehicle, regardless of the number of motor carriers using the driver's services, unless the driver complies with the following requirements:
>
> (1) Start of work shift. A driver may not drive without first taking 10 consecutive hours off duty;
>
> (2) 14–hour period. A driver may drive only during a period of 14 consecutive hours after coming on duty following 10 consecutive hours off duty. The driver may not drive after the end of the 14–consecutive-hour period without first taking 10 consecutive hours off duty.
>
> (3) Driving time and rest breaks.
>
> (i) Driving time. A driver may drive a total of 11 hours during the 14–hour period specified in paragraph (a)(2) of this section.
>
> (ii) Rest breaks. After June 30, 2013, driving is not permitted if more than 8 hours have passed since the end of the driver's last off-duty or sleeper-berth period of at least 30 minutes.
>
> (b) No motor carrier shall permit or require a driver of a property-carrying commercial motor vehicle to drive, nor shall any driver drive a property-carrying commercial motor vehicle, regardless of the number of motor carriers using the driver's services, for any period after—
>
> (1) Having been on duty 60 hours in any period of 7 consecutive days if the employing motor carrier does not operate commercial motor vehicles every day of the week; or
>
> (2) Having been on duty 70 hours in any period of 8 consecutive days if the employing motor carrier operates commercial motor vehicles every day of the week.

(c)

(1) Through June 30, 2013, any period of 7 consecutive days may end with the beginning of an off-duty period of 34 or more consecutive hours. After June 30, 2013, any period of 7 consecutive days may end with the beginning of an off-duty period of 34 or more consecutive hours that includes two periods from 1 a.m. to 5 a.m.

(2) Through June 30, 2013, any period of 8 consecutive days may end with the beginning of an off-duty period of 34 or more consecutive hours. After June 30, 2013, any period of 8 consecutive days may end with the beginning of an off-duty period of 34 or more consecutive hours that includes two periods from 1 a.m. to 5 a.m.

(d) After June 30, 2013, a driver may not take an off-duty period allowed by paragraph (c) of this section to restart the calculation of 60 hours in 7 consecutive days or 70 hours in 8 consecutive days until 168 or more consecutive hours have passed since the beginning of the last such off-duty period. When a driver takes more than one off-duty period of 34 or more consecutive hours within a period of 168 consecutive hours, he or she must indicate in the Remarks section of the record of duty status which such off-duty period is being used to restart the calculation of 60 hours in 7 consecutive days or 70 hours in 8 consecutive days.

ADDENDUM B

DECLARATION IN SUPPORT OF STANDING

DECLARATION OF DANA E. LOGAN

1. My name is Dana E. Logan. I have been a commercial driver for 30 years.

2. I work as a cross-country commercial driver for Continental Carbonic. My work is covered by the Federal Motor Carrier Safety Administration's rules governing hours of service.

3. My job requires me to make deliveries between locations in the Midwest and the East Coast. Although I try to avoid using the 34-hour restart provision to drive more hours, my schedule requires me to use a restart on average about once every other week. After using a 34-hour restart, I feel fatigued the following week. Based on my personal experience, I believe that the 34-hour restart allows an amount of driving that is unsafe.

4. I try to avoid driving the full 11 hours allowable per shift whenever possible. Nevertheless, demands on my schedule sometimes require me to drive the full 11 hours. I believe 11 hours is too long to drive in a single shift.

5. On March 4, 2011, I submitted a comment on the FMCSA's proposed hours-of-service rules to request that the new rules limit driving to 10 hours per shift and to limit the restart to once per week, as the FMCSA proposed.

6. My comment stated:

> I would like to comment on the new proposed HOS rules. I am a cross-country commercial driver. I know from personal experience that 10 hours per day would be much safer than the current 11 hours per day. Fatigue is a major problem in my industry. I have been involved in a major fatality accident due to a fatigued driver. Five innocent people died that night in an accident that could have been easily prevented. Please opt for safety. I also like the one time a week re-start. In all of my years on the road I have never used it more than once a week. However I think it is a good idea so it will not be misused.

7. Several years ago, I was involved in an accident in which a fatigued commercial driver crashed into an SUV , exploded the gas tank and crushed it into the back of and completely under my trailer. Five people died, including the commercial driver. I believe that fatigue is a major problem in the trucking industry and that the current hours-of-service rules are unsafe.

Pursuant of 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Dana E. Logan

Dana E. Logan

Dated: 7-19-2012