[NOT YET SCHEDULED FOR ORAL ARGUMENT]

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

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

AMERICAN TRUCKING ASSOCIATIONS, INC.,

Petitioner,

OWNER-OPERATOR INDEPENDENT DRIVERS ASS'N, INC., NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE, WILLIAM B. TRESCOTT, HEALTH & PERSONAL CARE LOGISTICS CONFERENCE, INC., NATIONAL SHIPPER'S STRATEGIC TRANSPORTATION COUNCIL, INC., and TRUCKLOAD CARRIERS ASSOCIATION,

Intervenors,

v.

FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION and UNITED STATES OF AMERICA,

Respondents.

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

INITIAL BRIEF FOR PETITIONER AND
INTERVENORS IN SUPPORT OF PETITIONER

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

Petitioner in No. 12-1092 is American Trucking Associations, Inc. (“ATA”), a District of Columbia non-profit corporation, is the national trade association of the trucking industry. ATA is a united federation of motor carriers, state trucking associations, and national trucking conferences created to promote and protect the interests of the trucking industry. Its membership includes approximately 2,000 direct dues-paying member trucking companies and industry suppliers of equipment and services. Directly and through its affiliated organizations, ATA represents over 34,000 companies and every size, type and class of motor carrier operation. ATA has no corporate parent and no publicly-held corporation has an ownership interest in ATA.

Intervenors in support of ATA are Owner-Operator Independent Drivers Association, Inc. (“OOIDA”); National Industrial Transportation League; NASSTRAC, Inc.; The Health & Personal Care Logistics Conference, Inc.; Truckload Carriers Association. William B. Trescott has also intervened.

Intervenor OOIDA is the largest association of independent truck owners and operators and small business motor carriers in the United States. It is a corporation organized under the laws of the State of Missouri with its place of business located in Grain Valley, Missouri. The purpose of OOIDA is to represent the in-

terests of professional truck drivers and small business trucking companies before federal and state agencies, courts and legislative bodies. OOIDA has over 150,000 members residing in each of the fifty states. OOIDA has no parent companies, and no publicly-held company owns a 10% or greater interest in OOIDA.

Intervenor The National Industrial Transportation League (the "League") is a national organization comprised primarily of shippers and receivers of goods throughout the United States and around the globe, created to promote and protect the interests of the nation's industrial shippers. The League has no parent companies, and no publicly-held company owns a 10% or greater interest in the League.

Intervenor NASSTRAC, Inc., also known as National Shipper's Strategic Transportation Council, Inc. and formerly as National Small Shipments Traffic Conference, is a trade association whose regular members are customers of trucking companies and other carriers of goods, and whose associate members include motor carriers. NASSTRAC, Inc. has no parent companies, and no publicly-owned company owns a 10% or greater ownership interest in NASSTRAC, Inc.

Intervenor The Health & Personal Care Logistics Conference, Inc. is a trade association of manufacturers of health care and personal care products in their capacity as customers of motor carriers and other transportation service providers. The Health and Personal Care Logistics Conference, Inc. has no parent companies,

and no publicly-held company owns a 10% or greater ownership interest in The Health and Personal Care Logistics Conference, Inc.

Intervenor Truckload Carriers Association (the "Association") is a trade association of motor carriers and industry suppliers created to promote and protect the interests of the truckload segment of the motor carrier industry. The Association has no parent companies, and no publicly-held company owns a 10% or greater ownership interest in the Association.

Amici curiae in support of petitioners are 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.

Respondents are the Federal Motor Carrier Safety Administration ("FMCSA"), an agency of the United States Department of Transportation, and the United States of America.

B. Ruling Under Review

The ruling under review is a final rule entitled "Hours of Service of Drivers" (Docket No. FMCSA-2004-19608), issued by Respondent Federal Motor Carrier Safety Administration on December 16, 2011, and published on December 27, 2011, at 76 Fed. Reg. 81134 ("the 2011 final rule").

C. Related Cases

This case has been consolidated with No. 12-1113. ATA is aware of no additional pending cases that have been consolidated. This court reviewed earlier iterations of FMCSA's Hours of Service ("HOS") rules in *Public Citizen v. FMCSA*, No. 03-1165, and in the consolidated cases of *OOIDA v. FMCSA*, No. 06-1035, and *Public Citizen v. FMCSA*, No. 06-1078. The petitioners in a third case concerning HOS rules, *Public Citizen v. FMCSA*, No. 09-1094, voluntarily dismissed the case on February 8, 2012, after FMCSA published the final rule at issue here.

TABLE OF CONTENTS

Page

CERTIFICATE OF PARTIES, RULINGS, AND RELATED CASES i

TABLE OF AUTHORITIES vii

GLOSSARY viii

JURISDICTIONAL STATEMENT 1

STATEMENT OF ISSUES 1

STATUTES AND REGULATIONS 2

INTRODUCTION 2

STATEMENT OF FACTS 3

SUMMARY OF ARGUMENT 11

STANDING 15

ARGUMENT 15

I. THE RESTART RESTRICTIONS AND OFF-DUTY BREAK REQUIREMENT WILL NOT YIELD ANY BENEFITS 16

A. FMCSA Concluded That the 2011 Rule Has Net Benefits By Significantly Exaggerating the Percentage of Large-Truck Crashes Caused by Truck Driver Fatigue 17

1. FMCSA Egregiously Misrepresented LTCCS Data Concerning Fatigue 18

2. The Restart Restrictions and Break Requirement Have No Net Benefits 20

3. FMCSA Provided No Rational Explanation for Its Claim That Fatigue Causes 13% of Crashes 21

B. The Purported Health Benefits of the 2011 Rule Are Illusory 25

TABLE OF CONTENTS
(continued)

Page

1. FMCSA Has No Factual Basis for Believing the Final Rule Will Cause Drivers to Sleep More 26

2. FMCSA Has No Factual Basis for Believing the Final Rule Will Measurably Decrease Drivers' Mortality Risk......28

C. FMCSA's Entire Cost-Benefit Analysis Is Predicated on a Fundamental Error....31

II. THE ONCE-PER-WEEK RESTRICTION ON USE OF THE RESTART PROVISION IS ARBITRARY AND CAPRICIOUS................36

A. The Once-Per-Week Restriction Must Be Vacated Because It Is Wholly Dependent on FMCSA's Unjustifiable Cost-Benefit Analysis 36

B. FMCSA's Purported Explanations for the Once-Per-Week Restriction Are Indefensible....37

III. THE TWO-NIGHT REQUIREMENT IS ARBITRARY AND IRRECONCILABLE WITH FMCSA'S PRIOR VIEWS ON DRIVER SAFETY AND HEALTH 41

IV. THE REQUIREMENT THAT DRIVING BREAKS BE TAKEN OFF-DUTY IS ARBITRARY AND CAPRICIOUS. 46

V. FMCSA'S MODIFICATION OF THE SHORT-HAUL EXEMPTION IN 49 C.F.R. § 395.1(E)(2) IS PROCEDURALLY DEFECTIVE AND ARBITRARY AND CAPRICIOUS 50

CONCLUSION 53

TABLE OF AUTHORITIES

Page(s)

CASES

**Dillmon v. NTSB*,
588 F.3d 1085 (D.C. Cir. 2009)....................16, 40, 42, 44

FCC v. Fox Television Stations, Inc.,
556 U.S. 502 (2009)....................16

**Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*,
463 U.S. 29 (1983)....................16, 36, 40, 50, 52

**OOIDA v. FMCSA*,
494 F.3d 188 (D.C. Cir. 2007)....................6, 16, 22, 51

Public Citizen v. FMCSA,
374 F.3d 1209 (D.C. Cir. 2004)....................4, 5

Rainbow/PUSH Coal. v. FCC,
330 F.3d 539 (D.C. Cir. 2003)....................15

Sierra Club v. EPA,
292 F.3d 895 (D.C. Cir. 2002)....................15

Thompson v. Clark,
741 F.2d 401 (D.C. Cir. 1984)....................36

STATUTES, RULES AND REGULATIONS

*5 U.S.C. § 706(2)(A) & (D)....................16

28 U.S.C. § 2342(3)(A)....................1

49 U.S.C. § 31136....................1, 3

49 U.S.C. § 31502....................1, 3, 4

49 C.F.R. § 395.1(e)(2)....................1, 6, 8, 14, 50, 53

49 C.F.R. § 395.3 (2004)....................4, 5

49 C.F.R. § 395.3 (2002)....................4

49 C.F.R. § 395.8(f)(8)(i)....................45

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[*] Asterisks indicate authorities upon which we chiefly rely.

GLOSSARY

APA	Administrative Procedure Act, 5 U.S.C. §§ 500 *et seq.*
ATA	American Trucking Associations
FMCSA	Federal Motor Carrier Safety Administration
HOS	Hours of Service
LTCCS	Large Truck Crash Causation Study
NHTSA	National Highway Traffic Safety Administration
NPRM	Notice of Proposed Rulemaking
OOIDA	Owner-Operator Independent Drivers Association
RIA	Regulatory Impact Analysis

JURISDICTIONAL STATEMENT

This is a petition for review from a final regulation promulgated by the Federal Motor Carrier Safety Administration ("FMCSA"). FMCSA was authorized to conduct the rulemaking under 49 U.S.C. §§ 31502(b) and 31136. This Court has jurisdiction under 28 U.S.C. § 2342(3)(A).

STATEMENT OF ISSUES

1. Whether the final rule's limitation on the use of the restart provision to once every 168 hours should be set aside as arbitrary and capricious.

2. Whether the final rule's provision requiring that every restart include two periods between 1 a.m. to 5 a.m. should be set aside as arbitrary and capricious.

3. Whether the final rule's off-duty break requirement should be set aside as arbitrary and capricious because it requires breaks from driving that exclude all on-duty non-driving activity.

4. Whether the final rule's amendment and narrowing of the exemption set forth in 49 C.F.R. § 395.1(e)(2) should be held unlawful because FMCSA failed to provide notice of the amendment or, alternatively, be set aside as arbitrary and capricious.

STATUTES AND REGULATIONS

All applicable statutes and regulations are included in Addendum A to this brief.

INTRODUCTION

When Congress created FMCSA, the agency inherited responsibility for regulations governing the maximum hours commercial motor vehicle drivers may work. FMCSA completely overhauled those regulations in 2003 in ways that significantly reduced driver fatigue by increasing the opportunities drivers have to obtain rest and restorative sleep. Among other changes, FMCSA both extended the rest period drivers must take between daily tours of duty and provided drivers with a minimum 34-hour recovery period (the "restart provision") that allows for two lengthy and uninterrupted periods of sleep. To prevent drivers from being stranded far from home for long periods, the agency allowed drivers who use the 34-hour recovery period to restart their weekly hours clock.

The 2003 HOS regulations were followed by dramatic improvements in highway safety. Nevertheless, in 2010, FMCSA prepared to foist four unwanted and unnecessary changes to those regulations on drivers: FMCSA restricted the minimum 34-hour restart to one use per week; mandated that every restart include two consecutive periods from 1 a.m. to 5 a.m.; required drivers to take a daily 30-minute off-duty break under certain circumstances; and narrowed the regulatory

exemption granted to short-haul drivers by subjecting those drivers to the off-duty break requirement.

These changes are arbitrary and capricious as well as unwarranted. The agency claims that restart restrictions and the off-duty break requirement are justified by the cost-benefit analysis in FMCSA's Regulatory Impact Analysis ("RIA"). That "analysis," however, is a sham; FMCSA stacked the deck in favor of its preferred outcome by basing its cost-benefit calculations on a host of transparently unjustifiable assumptions. FMCSA therefore cannot justify the 2011 final rule on the ground that it has net benefits.

FMCSA's collateral justifications for the proposed rule changes fare no better. Those purported justifications contradict the evidence in the administrative record and require the agency to ignore, without any supporting basis, numerous positions it previously adopted. Accordingly, each of these changes must be vacated as arbitrary and capricious.

STATEMENT OF FACTS

FMCSA and HOS Regulations. FMCSA has the duty to promulgate regulations that "deal[] with a variety of fatigue-related issues pertaining to commercial [motor vehicle] safety." 49 U.S.C. § 31136 note. To do so, FMCSA may prescribe requirements for drivers' "qualifications and maximum hours of service." *Id.* § 31502(b)(1). Before it promulgates or amends hours-of-service ("HOS")

rules, FMCSA must "consider the costs and benefits of" those rules or amendments. *Id.* § 31502(d).

The 2003, 2005, and 2008 Final Rules. When Congress created FMCSA in 1999, "the existing HOS [rules] had been in place (with some revisions) since 1962" (*Public Citizen v. FMCSA*, 374 F.3d 1209, 1212 (D.C. Cir. 2004))—"well before there had been a clear scientific understanding of fatigue causal factors" (68FR22,456, 22,458 (Apr. 28, 2003)). Those rules allowed driving for no more than 10 hours in a 15-hour on-duty period. *See Public Citizen*, 374 F.3d at 1212. Drivers could extend that period by "tak[ing] periodic 'off-duty' breaks during the day." *Id.* Once drivers reached the daily limits, they could restart their daily hours clock by spending at least eight hours off duty. 49 C.F.R. § 395.3(a) (2002).

FMCSA "significant[ly] revis[ed]" these HOS regulations in 2003 (*Public Citizen*, 374 F.3d at 1214) after a lengthy process aimed at developing "rules that [are] science-based" (68FR22,460). In the 2003 rules, FMCSA retained preexisting limits preventing drivers from driving after they had worked either 60 hours in the prior seven days or 70 hours in the prior eight days, depending on how many days per week the driver's employer operates. 49 C.F.R. § 395.3(b) (2004). The agency, however, required drivers to take 10 hours instead of eight hours off between tours of duty. *Id.* § 395.3(a). FMCSA also shortened and capped the daily driving period. It banned all driving later than 14 hours after a driver began work

and prohibited drivers from using breaks to extend that period. *Id.* Because "allowing one additional hour of driving activity can be safely accommodated within [this] context of a somewhat reduced overall tour of duty," (68FR22,473), FMCSA permitted driving for up to 11 of the 14 daily on-duty hours (*see* 49 C.F.R. § 395.3(a) (2004)).

The 2003 rule also added a provision that permits drivers to restart the weekly hours clock after taking "any off duty period of 34 or more consecutive hours." *Id.* § 395.3(c). This restart period allows drivers to recover "after a sustained period of daily work" and "to avoid the build-up of cumulative fatigue and/or sleep deprivation." 68FR22,478.

After this Court vacated the 2003 rule because the agency did not consider "the impact of the rule on the health of drivers" (*Public Citizen*, 374 F.3d at 1216), FMCSA issued a revised final rule. *See* 70FR49,978 (Aug. 25, 2005). That revised rule maintained the major features FMCSA implemented in 2003, because FMCSA recognized that the 2003 regulations "afford[ed] ample time for drivers to" sleep on a daily and weekly basis and therefore prevented driver fatigue. 70FR50,023.

In particular, the agency acknowledged that the restart provision gives drivers the chance to "minimize" both "acute and cumulative fatigue" (*id.*), while also providing "far more flexibility" in scheduling. 70FR49,980. Although commen-

ters claimed "that a driver using the 34-hour recovery period could work" very long hours every week (70FR50,022), FMCSA rejected this criticism as unfounded. "[I]n practice," the agency said, drivers cannot "continually maximize their driving and on-duty time and minimize their off-duty time." *Id.* "[I]ndependent survey data" confirmed that drivers are neither "maximizing their driving hours or total on-duty time" nor "routinely tak[ing] the minimum number of off-duty hours." *Id.*

The 2005 regulations did make one relevant change to the 2003 rules. FMCSA added a partial exemption to the HOS rules for short-haul drivers. The exemption covers drivers who (1) operate commercial motor vehicles that do not require a commercial driver's license; (2) "operate[] within a 150 air-mile radius of the location where the driver reports to and is released from work"; and (3) "return[] to [that] location at the end of each [daily] duty tour." 49 C.F.R. § 395.1(e)(2) (2006). Qualifying drivers are excepted from FMCSA's logbook requirements and may extend the daily duty period from 14 to 16 hours twice per week. *Id*. FMCSA created this exemption because fatigue is not a problem for short-haul drivers; instead of driving long hours, short-haulers perform a "variety of work" tasks, and that variety prevents fatigue. 70FR49,980.

This Court invalidated portions of the 2005 final rule on procedural grounds. *See OOIDA v. FMCSA*, 494 F.3d 188, 206 (D.C. Cir. 2007). FMCSA issued an in-

terim final rule that repromulgated the 2005 regulations pending the agency's publication of a revised final rule. *See* 72FR71,247 (Dec. 17, 2007). In November 2008, FMCSA issued a new final rule that adopted the provisions of the interim rule as final—and thus reaffirmed FMCSA's commitment to the 2003 and 2005 regulations. *See* 73FR69,567 (Nov. 19, 2008).

In the 2008 rule, FMCSA concluded that "overall safety of the motor carrier industry has been maintained since the 2003 and 2005 HOS rules became effective." 73FR69,577. Furthermore, after "consider[ing] driver health at length," FMCSA determined "there is not enough sufficient, credible evidence that the number of work hours allowed by the HOS regulation will have a negative impact on driver health." 73FR69,573. The agency found that drivers working under the rule "should not develop cumulative fatigue at all" and that those who do "will be able to 'zero out' their fatigue by taking" a 34-hour restart. 73FR69,569. And FMCSA again rejected the argument that the restart provision should be curtailed out of concern that drivers will regularly use that restart to work "to the theoretical maximum" permissible under the rules. 73FR69,570.

The 2011 Final Rule. Carriers and drivers thus operated under the same basic HOS regulations from 2003 to 2010. Driver safety significantly improved under those regulations, and driver health was maintained. Nevertheless, in response to a lawsuit challenging the 2008 HOS rules, FMCSA published a new Notice of

Proposed Rulemaking ("NPRM") in December 2010. *See* 75FR82,170 (Dec. 29, 2010). This time, the agency proposed a radical overhaul of the 2003 regulations.

Among other things, FMCSA suggested (1) restricting use of the restart provision to one time per week; (2) requiring the restart to include two consecutive overnight periods; (3) preventing driving whenever drivers have worked for seven consecutive hours without a 30-minute off-duty break; (4) reducing the daily driving limit to 10 hours; and (5) shortening the 14-hour daily duty period to 13 hours but allowing an extension of that period to 16 hours twice per week. 75FR82,179–83. Because the last of these changes would make the general HOS rules "in some respects similar" to the short-haul exemption in 49 C.F.R. § 395.1(e)(2), the agency also solicited comments on whether it should eliminate that exemption. 75FR82,184.

FMCSA's 2011 final rule recognized that the proposals to reduce the daily driving and duty limits were unnecessary and unworkable. *See, e.g.*, 76FR81,153, 81,158–59. Because it did "not extend[] the driving window from 14 to 16 hours twice a week," FMCSA found "no need to remove" the short-haul exemption in § 395.1(e)(2). 76FR81,160. FMCSA did, however, adopt slightly amended versions of the proposed restrictions on the restart provision and of the mandatory off-

duty break requirement.[1] FMCSA also narrowed the short-haul exemption by subjecting drivers who qualify for the exemption to the new break requirement. 76FR81,187.

The RIA. FMCSA decided to impose the restart restrictions and the off-duty requirement principally on the basis of the "estimated net benefits" of those provisions. 76FR81,179. The cost-benefit analysis in the RIA was therefore central to the agency's decisions. That analysis purported to compare the productivity costs and the safety and health benefits of three packages of rule changes—each of which included the restart restrictions and the off-duty break requirement—against the status quo.

To estimate costs and benefits, the agency created four so-called "intensity groups" of drivers "based on their average weekly hours of work." 76FR81,175. FMCSA then imposed a number of assumptions to determine how many hours the workweeks of drivers in each "intensity group" would be reduced by each of the proposed rule changes. RIA 3-5–3-10.

The agency theorized that these reductions in hours would improve safety both by constricting drivers' ability to drive while fatigued and by shifting hours

[1] While the NPRM mandated that restarts include two periods from midnight to 6 a.m., the final rule narrowed that period to the hours between 1 a.m. and 5 a.m. 76FR81,136. Similarly, although the NPRM prohibited driving if more than seven hours had passed since the driver had been off duty for at least 30 minutes, the final rule extended the seven-hour limit to eight hours. *Id.*

from drivers who work long weeks to drivers who work shorter weeks. 76FR81,176. To measure these purported benefits, FMCSA created two models: One estimates changes in the risk of fatigue-caused crashes as a function of hours driven in a given day, while the second estimates changes in that risk as a function of hours worked in the previous week. *See* RIA 4-11–4-16. The agency scaled both functions around the percentage of all large-truck crashes it claims are caused by truck driver fatigue. FMCSA used the scaled functions to estimate the decreases in crash risk it contends follow from hours reductions caused by the 2011 rule. Finally, FMCSA monetized those decreases in crash risk by applying a "measure of the average damages from large truck crashes." 76FR81,176.

FMCSA sought to measure health benefits in a single way: by linking decreases in work allegedly caused by the final rule to increases in sleep and then linking increases in sleep to decreases in mortality risk. 76FR81,176. For the first task, FMCSA appropriated a preexisting "work/sleep function" showing an observed correlation between work and sleep. RIA 5-4. For the second, FMCSA assumed both that (1) seven hours of sleep is optimal, and that (2) there is a measurable increase in mortality risk for even microscopic deviations from that ideal point. *Id.* 5-5–5-7.

On the basis of these calculations, FMCSA concluded that a rule adopting the restart restrictions and off-duty break requirement without changing the daily

driving limit is likely to have benefits that exceed its costs. *See* 76FR81,179 Table 13. The agency adopted that package of provisions as the final rule on the basis of those "estimated net benefits." 76FR81,179 & Table 13.

SUMMARY OF ARGUMENT

Three of the four regulatory provisions at issue—the once-per-week restriction on use of the restart provision, the requirement that restarts include two overnight periods, and the off-duty break requirement—rest almost entirely on FMCSA's conclusion that the safety and health benefits of those changes outweigh their costs. That conclusion, however, reflects nothing more than the agency's pre-existing preference for regulatory change: The agency's cost-benefit analysis is driven by irrational assumptions and unjustifiable decisions made to inflate the total benefits produced by the rule. FMCSA improperly treats numerous associational relationships as causal to tilt the scales in favor of its preferred outcome—even while disavowing the clear and considerable safety improvements achieved under the 2003 and 2005 rules.

Three of those irrational choices are outcome-determinative; absent any one of those choices, the cost-benefit analysis would disclose that the final rule has net costs instead of net benefits. FMCSA's calculation of safety benefits, for example, critically depends on the agency's unjustifiable claim that 13% of crashes are caused by fatigue. FMCSA reached its 13% estimate by assuming that, whenever

truck driver fatigue is *present* at the time of a crash, fatigue *caused* the crash. This assumption contradicts both the agency's own prior reading of the same data and studies showing that, under the 2003 and 2005 HOS rules, only about 2% of large-truck crashes are caused by truck driver fatigue. When a fatigue-caused crash rate consistent with those studies is substituted for FMCSA's inflated estimate, the final rule has net costs instead of net benefits.

FMCSA's assertion that the final rule has net benefits also depends on the agency's claim that the rule yields substantial health benefits. The health benefits on which FMCSA relies, however, are wholly fictitious. On the basis of weak observed correlations, FMCSA assumes the existence of strong, continuous causal relationships between hours worked and hours slept and between sleep and mortality risk. The agency thus concludes that working minutes less per day will cause drivers to sleep more and that increasing drivers' sleep by seconds per day will result in measurable health benefits, no matter how long those drivers currently sleep. These assumptions are both absurd and inconsistent with the administrative record.

FMCSA's entire cost-benefit analysis is infected by an equally preposterous assumption: the agency claims that a small group of drivers accounts for all of the longest driver workweeks. There is not an iota of evidence in the record that such consistently "extreme" drivers exist. Undeterred by this lack of evidence, FMCSA

invented such drivers by (1) taking data points that show the length of numerous driver workweeks, (2) treating that data as depicting the work habits of individual *drivers* instead of the length of particular *workweeks*, and (3) assuming that each invented "driver" in the data works the same number of hours every week. Information about the work habits of individual drivers, however, cannot be drawn from the aggregate data on which FMCSA relies. The agency thus invalidly concluded that there are a few drivers who *always* work "extreme" hours because the aggregate data included a few very long workweeks. Without those invented "extreme" drivers, the alleged net benefits of the final rule disappear.

The agency's collateral justifications for the restart restrictions and off-duty break requirement fare no better than its reliance on the cost-benefit analysis. FMCSA does not attempt to validate the once-per-week restriction on the restart on any ground independent of the cost-benefit analysis. In any event, that restriction depends on drastic, and inadequately supported, changes in agency positions concerning both the restart's effects on safety and health and drivers' practical ability to work to the maximum hours permitted by the HOS rules.

FMCSA argues that the restriction requiring every restart to include two periods from 1 a.m. to 5 a.m. will yield one type of benefit so ephemeral it could not be captured in the RIA. Specifically, the agency claims that the two-overnight requirement encourages regular nighttime drivers to flip their schedules and obtain

nighttime sleep—which the agency asserts is more restful than daytime sleep—when the drivers are not working. FMCSA's claim, however, departs without sufficient explanation from the agency's prior views concerning (1) whether drivers receive sufficient rest under the 2003 rules; (2) the effects of the two-overnight requirement on daytime traffic; (3) the increased fatigue caused by shifting daily schedules, and (4) the health effects of drivers' existing sleep patterns. The final rule also undercuts the agency's asserted rationale by requiring drivers to base restarts on their home time zone even if they are on the other side of the country. Both of the restrictions on the restart provision are therefore arbitrary and capricious.

So is the off-duty break requirement. FMCSA attempts to justify that requirement by arguing that off-duty breaks from driving are more effective at maintaining safety than working breaks. Nothing in the administrative record supports FMCSA's position. To the contrary, the record demonstrates that *all* types of breaks from driving are equally effective at preventing crashes.

Finally, FMCSA's decision to narrow the short-haul exemption in § 395.1(e)(2) must be vacated. That decision is not a logical outgrowth of the NPRM, which raised the possibility of eliminating—but not altering—the exemption, and therefore was issued without adequate notice. FMCSA's decision to subject short-haul drivers to the off-duty break requirement is also arbitrary,

both because the agency never explains its decision in the final rule and because FMCSA's general rationale for off-duty breaks does not even arguably apply to short-haul drivers.

STANDING

ATA has standing to challenge the final rule. ATA is a membership organization. FMCSA-2004-19608-20873. Its motor carrier members are the objects of the regulation at issue (*e.g.*, FMCSA-2004-19608-6491, -20865) and would therefore be able to challenge the final rule in their own right (*Sierra Club v. EPA*, 292 F.3d 895, 900 (D.C. Cir. 2002)). Moreover, "the interest [ATA] seeks to protect is germane to its purpose" of promoting the interests of the trucking industry, and "neither the claim asserted nor the relief requested requires [ATA's] member[s] to participate in the lawsuit." *Rainbow/PUSH Coal. v. FCC*, 330 F.3d 539, 542 (D.C. Cir. 2003). Each of the intervenors also has standing to challenge the rule, because the intervenors' individual members are either (1) drivers or motor carriers regulated by the rule, or (2) businesses directly affected by changes in truck drivers' hours.

ARGUMENT

Under the Administrative Procedure Act ("APA"), the changes included in FMCSA's 2011 final rule must be set aside if those changes are "'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,'" or if the

2011 rule was "promulgated 'without observance of procedure required by law.'" *OOIDA*, 494 F.3d at 198 (quoting 5 U.S.C. § 706(2)(A) & (D)). To satisfy the APA, "an agency must 'articulate a satisfactory explanation for its action[,] including a rational connection between the facts found and the choice made.'" *Id.* at 203 (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

An agency action is arbitrary and capricious if the agency has "offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *State Farm*, 463 U.S. at 43. Moreover, when the agency alters its prior positions, it must both "display awareness that it is" doing so and provide an "adequate explanation for its departure." *Dillmon v. NTSB*, 588 F.3d 1085, 1089-90 (D.C. Cir. 2009) (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)).

I. THE RESTART RESTRICTIONS AND OFF-DUTY BREAK REQUIREMENT WILL NOT YIELD ANY BENEFITS.

FMCSA chose to impose the new restart restrictions and off-duty break requirement because the agency believes those changes generate safety and health benefits that significantly outweigh their costs. *See* 76FR81,178–79. The agency's calculations of safety and health benefits, however, depend on irrational and unjustifiable assumptions that cause FMCSA to significantly exaggerate the

benefits of the final rule. Once those assumptions are removed, it becomes clear that the 2011 final rule, far from having net benefits, entails substantial net *costs*.

A. FMCSA Concluded That the 2011 Rule Has Net Benefits By Significantly Exaggerating the Percentage of Large-Truck Crashes Caused by Truck Driver Fatigue.

FMCSA's calculation of the supposed safety benefits of the restart restrictions and off-duty break provision hinges on the "average level of fatigue involvement in [large-truck] crashes" (RIA 4-21); a percentage increase or decrease in that average level leads to an equal increase or decrease in safety benefits. FMCSA's estimate that 13% of large-truck crashes are caused by truck driver fatigue is, however, unjustifiable.

That estimate derives from the Large Truck Crash Causation Study ("LTCCS"). The LTCCS, which was jointly conducted by FMCSA and the National Highway Traffic Safety Administration ("NHTSA"), includes data from a sample of large truck crashes that occurred between 2001 and 2003. Every LTCCS crash thus occurred under the pre-2003 rules—which, unlike the 2003 and 2005 rules, did not reflect contemporary scientific understanding of sleep and fatigue. But even the obsolete, overstated picture of fatigue provided by the LTCCS does not justify FMCSA's 13% estimate of the fatigue-caused crash rate. Although the LTCCS shows that truck driver fatigue was *present* in 13% of crashes before the 2003 rules took effect, that study makes no finding as to whether

and to what extent fatigue was a cause of truck crashes. Moreover, as set forth in the methodology of the LTCCS, mere presence is explicitly unrelated to causation.[2]

1. FMCSA Egregiously Misrepresented LTCCS Data Concerning Fatigue.

The core belief underlying the LTCCS is, as FMCSA has explained, that even factors "commonly identified as 'causes' of traffic crashes" do "not invariably, or even usually, result in crashes." FMCSA-2004-19608-3515, 6. As a result, the study distinguished between events and factors known to be causes of the crash and other factors that were merely present at the time a crash occurred. NHTSA experts coded every crash in the study for "critical events" and "critical reasons." *See* FMCSA-2004-19608-3971, 1-2. A critical event is the event that "made the crash unavoidable," such as a vehicle crossing the center line into oncoming traffic. FMCSA-2004-19608-28163/1, 5. The critical reason for a crash, meanwhile, "le[d] to the critical event" and "describes why the critical event occurred." FMCSA-2004-19608-11823, 13. Both critical events and critical reasons are necessarily related to, and are at least contributing causes of, the crash.

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[2] FMCSA also made no finding that any truck drivers involved in LTCCS crashes were fatigued either because of their use of the restart provision or because they failed to take breaks.

The NHTSA coders also listed "associated factors" for each collision in the LTCCS. The "approximately 1,000" associated factors in the data include weather, time of day, road type, and a variety of travel conditions, as well as driver fatigue. *See* FMCSA-2004-19608-11823, 12; FMCSA-2004-19608-3971, 16-17. Unlike critical events and reasons, an associated factor is merely a "condition[] or circumstance[] present at the time of the crash." FMCSA-2004-19608-11823, 12. As that definition suggests, associated factors are *not* necessarily related to the fact that a crash occurred. To the contrary, as FMCSA has explained, the LTCCS makes "no judgment . . . as to whether any [associated] factor is related to the particular crash." *Id.* at 12-13 (internal quotation marks omitted).

The 2011 final rule ignores the careful and crucial distinction between critical and associated factors. The LTCCS lists truck driver fatigue as an "associated factor" in 13% of crashes. FMCSA-2004-19608-3971, 16. In the RIA, FMCSA seized on that figure—which, again, means only that fatigue was "present" 13% of the time—and transformed it into the statement "13 percent of all [LTCCS] crashes" were "fatigue-related." 76FR81,176 n.17. The agency took its mistake further: FMCSA "assum[ed] that any crash that involves or is related to fatigue will be prevented if the fatigue [*sic*] driver involved in the crash is eliminated." RIA 6-18. FMCSA thus assumed that whenever fatigue was present,

fatigue represented the but-for cause of the crash. That assumption is, of course, inconsistent with the treatment of causation in the LTCCS.

FMCSA's assumption that fatigue is invariably causal also entails absurd consequences. *A different driver* caused many crashes in which truck driver fatigue was present, and the LTCCS lists almost every case in which fatigue was present is as having other associated factors as well. In the agency's judgment, then, if a mildly fatigued truck driver is traveling on an unfamiliar road in bad weather, and a crash occurs after a passenger car swerves immediately in front of the truck, truck driver fatigue alone caused the crash. That judgment is ridiculous: Removing the fatigue would not, and could not, prevent the crash.

2. The Restart Restrictions and Break Requirement Have No Net Benefits.

FMCSA misrepresented the meaning of the LTCCS data for a simple reason: doing so provides the only way to claim that anything approaching 13% of crashes are caused by truck driver fatigue. Studies conducted under the 2003 and 2005 HOS rules found that the rate of fatigue-caused crashes is dramatically lower: FMCSA's analysis of Trucks Involved in Fatal Accidents data from 2004-06, for instance, revealed that *just 2.2%* of large-truck crashes were related to fatigue. 73FR69,578. An analysis based on video footage of truck drivers similarly

demonstrated that 2.1% of crashes are related to fatigue. FMCSA-2004-19608-11823, 14.[3]

Applying this significantly reduced and evidence-based rate of fatigue-caused crashes instead of FMCSA's baseless estimate would erase the supposed safety benefits of the restart restrictions and break requirement. In the RIA, a percentage increase or decrease in crashes caused by fatigue translates into the same percentage increase or decrease in safety benefits. *See* RIA Exs. 6-5–6-7. Using a 2.2% rate of fatigue-caused crashes would thus decrease the estimated safety benefits of the rule by 83.08%, or roughly $233 million per year. *See* 76FR81,177 Table 8. Instead of bringing net benefits, then, the rule will yield $73 million in annual net *costs* under the agency's central case. *See* 76FR81,179 Table 13.

3. FMCSA Provided No Rational Explanation for Its Claim That Fatigue Causes 13% of Crashes.

Although FMCSA attempts to justify its view that truck driver fatigue causes 13% of all large-truck crashes in the preamble to the final rule, the agency's purported justifications do not provide a satisfactory explanation for its choice.

[3] Even studies conducted under the pre-2003 rules suggested that the percentage of fatigue-caused crashes under those rules was only 2.5% or 2.6%. *See* FMCSA-2004-19608-11823, 14.

The final rule asserts that "the chances of avoiding any given crash" are "much greater" if fatigue is eliminated. 76FR81,168. That argument, however, embodies a probabilistic view of fatigue's role in crashes that is inconsistent with both the definition of associated factors in the LTCCS and the methodology FMCSA employed in the RIA. As seen above, the LTCCS treats "fatigue" as a factor that is not necessarily related to—much less the cause of—any given crash. The RIA, meanwhile, views the elimination of fatigue as not merely reducing the chance of any given crash but as unerringly preventing *all* crashes in which fatigue is present. The agency's explanation thus provides no "rational connection" to either the underlying data or the "choice [FMCSA] made" to treat fatigue as causal in every instance. *OOIDA*, 494 F.3d at 203 (internal quotation marks omitted).

The final rule also asserts that the LTCCS "substantially understate[s]" the incidence of truck-driver fatigue in crashes. 76FR81,168. The opposite is true. For two reasons, the LTCCS significantly overstates the presence of fatigue.

First, the LTCCS oversampled single-vehicle crashes. Truck driver fatigue is unquestionably more prevalent in single-vehicle crashes: Fatigue appears as an associated factor in 7.5% of multiple-vehicle crashes in the LTCCS but in 28% of crashes involving only a single large truck. RIA 4-21.

There is also no doubt the LTCCS includes a disproportionate number of single-vehicle accidents. The Fatality Analysis Reporting System—a "robust"

"census of all large truck fatal crashes" (73FR69,577)—reflects that 17.5% of all large-truck crashes involve no other vehicles. Similarly, roughly "20 percent of serious injury and fatal crashes" in NHTSA's General Estimates System for the years 2001-2003 were single-vehicle crashes. 76FR81,168. By contrast, 26.9% of the large trucks involved in LTCCS crashes were in single-vehicle accidents. *See* FMCSA-2004-19608-3971, 8; FMCSA-2004-19608-11823, 13 n.52. And because some crashes involved more than one truck, that figure necessarily functions as a lower bound on the proportion of LTCCS *crashes* involving only a single truck. For example, assume that 50 total trucks are involved in 40 crashes: 10 trucks have single-vehicle crashes, 20 trucks are involved in collisions with cars, and 20 trucks are involved in 10 two-truck accidents. In that scenario, 20% of trucks (10 of 50) are involved in single-vehicle crashes, but 25% of all accidents (10 of 40) are single-vehicle.

The LTCCS thus includes both a disproportionately high percentage of (single-vehicle) crashes that are more likely to involve truck driver fatigue and a disproportionately low percentage of (multi-vehicle) crashes that are less likely to involve truck driver fatigue. Inferences drawn from the LTCCS data that do not

correct for its oversampling of single-vehicle crashes will necessarily overstate the benefits of fatigue reduction.[4]

Second, as noted above, all of the collisions in the LTCCS took place before FMCSA's 2003 HOS rules took effect on January 24, 2004. *See* FMCSA-2004-19608-11823, 6. As FMCSA has repeatedly emphasized, because those rules reduced truck driver fatigue, pre-2003 data on fatigue cannot provide a reliable guide for estimating fatigue rates under the 2003 and 2005 HOS rules. *See* 70FR49,981, 49,997, 50,000, 50,012, 50,024. Contrary to FMCSA's purported explanation of its view that 13% of crashes are caused by truck driver fatigue, then, the LTCCS substantially *overestimates* the percentage of crashes in which fatigue is present.[5]

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[4] FMCSA has recognized both the LTCCS's "apparent over-representation of single vehicle crashes" and the possibility that the study therefore "overstates" fatigue. 73FR69,582 (emphasis omitted). In the 2011 rule, however, FMCSA contends that the difference between the LTCCS and the Fatality Analysis Reporting System estimates is "within what would be considered the margin of error." RIA 4-21. That contention rests on a basic factual mistake. FMCSA states that 21% of LTCCS collisions are single-vehicle. But the actual figure in the final, weighted data from which FMCSA derived its estimate of fatigue-caused crash rate is at least 27%. *See* FMCSA-2004-19608-3971, 8.

[5] FMCSA further argues that "13.24 percent of crashes recorded in LTCCS were coded as having an unknown cause" and assumes that some fraction of these crashes must have been caused by fatigue. RIA 4-21. FMCSA's premise is faulty. The critical event is coded for every collision in the LTCCS, and very few trucks were involved in collisions lacking a known critical reason. *See* FMCSA-2004-19608-3971, 10-15. FMCSA must therefore mean that 13.24% of crashes have un-

In short, FMCSA found that the 2011 rule has net benefits over the status quo only because it manipulated and misapplied LTCCS data concerning driver fatigue to greatly exaggerate the problem and the purported safety benefits of the rule.[6] The agency's conclusion that the 2011 final rule has net benefits therefore cannot stand.

B. The Purported Health Benefits of the 2011 Rule Are Illusory.

FMCSA's view that the restart restrictions and off-duty break requirement yield measurable health benefits is no more justifiable than its calculation of safety benefits. FMCSA admitted in the RIA that "the relatively small changes in work hours that will occur under the [new] rule" cannot be quantitatively linked to "health benefits." RIA 5-1. Immediately after conceding that it is "not possible" to "develop a quantitative estimate of" health benefits, however, FMCSA attempted to do precisely that. *Id.*

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known *associated factors*—and for the reasons above, unknown associated factors cannot be described as unknown "causes."

[6] FMCSA also took other unjustifiable steps to ensure that it could claim significant safety benefits for the 2011 rule. For instance, its safety benefit calculations partially turn on unrepresentative data concerning the total number of large-truck crashes in a year and the number of hours driven in a typical week. The agency chose to use 2003 data for the number of truck crashes, notwithstanding that truck crashes have steadily declined since that time. *See* RIA Ex. 6-22. And FMCSA drew its data on driver hours from a source it has previously admitted is statistically skewed. *See* 70FR50,001; 76FR81,175. In both cases, the agency's decisions led it to further exaggerate safety benefits. *See, e.g.*, RIA 6-16–6-17.

Specifically, FMCSA purported to quantify health benefits by drawing a causal chain from hours worked to hours slept and from hours slept to mortality risk. *See* RIA Ch. 5. The links in that chain of causation exist only in the agency's imagination. Absent any measurable health benefits, the 2011 rule results in annual net *costs* of $190 million per year when compared to the status quo under FMCSA's central case. *See* 76FR81,178 Table 10; 76FR81,179 Table 13.

1. FMCSA Has No Factual Basis for Believing the Final Rule Will Cause Drivers to Sleep More.

FMCSA based the first link in its chain from work to sleep to mortality on a weak observed correlation between longer workdays and less sleep. From that correlation, the agency assumed that shorter work days will necessarily cause drivers to sleep more. *See* RIA 5-3. FMCSA, in fact, assumed that the causal relationship holds even when drivers' daily work is decreased by *only minutes or seconds*: Under FMCSA's calculations, the 2011 final rule shortens 95% of driver workweeks by no more than 7.8 minutes per day and 85% of workweeks by only *36 seconds*. *Id.* Ex. 5-2. The agency believes that these tiny changes in work schedules cause measurable changes in sleep.

That belief is ludicrous. Nothing in the record suggests that an individual who leaves work at 4:59:24 p.m. instead of 5:00:00 p.m. will sleep longer as a result. Moreover, as FMCSA recognizes when convenient (*see* 76FR81,148), an observed correlation does not imply causation. That distinction applies here, as

illustrated by the very study on which FMCSA relies. The study's authors explained that individual drivers display "large day-to-day variations in total sleep time" and that long-haul drivers do not necessarily spend extra off-duty time sleeping. FMCSA-2004-19608-2007, ES-5, ES-8, 5-2.

FMCSA's own prior statements are to the same effect. The agency has previously recognized that, while its "regulations can provide an opportunity for sleep," HOS rules cannot *force* drivers to sleep. 70FR49,993; *see also* 73FR69,568. Even in the NPRM, FMCSA stated that it "has no basis for estimating the extent to which drivers who have an extra hour a day or extra hours per week off duty will use that time to exercise and sleep." 75FR82,190. Driver behavior, not working time, causes changes in sleep time; drivers will take the opportunity to gain more sleep only if they "maintain responsible sleeping habits" (70FR49,993) and if their current sleep is insufficient for their needs.

In sum, FMCSA has no basis for its conclusion that the changes in work caused by the final rule will cause drivers to gain additional sleep.[7] It therefore also lacks any basis for believing that the rule entails any measurable health benefits—or any total net benefits—when compared to the status quo.

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[7] The final rule notes that workers sleep more on weekends than during the workweek. 76FR81,170. But the fact that workers sleep more when they do not work at all does not imply that they will sleep more if they work seconds or minutes less per day.

2. FMCSA Has No Factual Basis for Believing the Final Rule Will Measurably Decrease Drivers' Mortality Risk.

The existence of a strong causal link between sleep and mortality risk is equally crucial to FMCSA's claim that the 2011 rule has health benefits. The agency contends, for instance, that it could generate $170 million in annual health benefits by causing 10% of drivers who currently sleep for 6.28 hours per night to add 4.8 extra minutes to that nightly total. *See* RIA Exs. D-18–D-19. FMCSA even suggests that it has the ability to generate over $20 million in yearly benefits by causing drivers who now sleep 6.66 hours per night to sleep an extra 14.4 *seconds* every weeknight. *See id.*

There is no basis for these claims. FMCSA based its analysis on a single sleep study published by Ferrie et al. in 2007. RIA 5-5–5-6. Ferrie's study analyzed British civil servants who reported their average weeknight sleep time as ≤ 5 hours, 6 hours, 7 hours, 8 hours, or ≥ 9 hours. FMCSA-2004-19608-3969, 1659-61 & Table 1. The authors found that, when compared with an average of seven hours of sleep per night, sleeping for either less than five hours or more than nine hours is positively and significantly correlated with mortality risk. *Id.* at 1661 Table 1. By contrast, individuals who reported sleeping six or eight hours a night were not at a statistically significantly increased risk of death. *Id.*

FMCSA piled three unjustifiable assumptions on these limited findings. FMCSA assumed that there is a continuous and *causal* relationship between sleep

and mortality that allowed it to confidently estimate the health effects of changes in sleep. RIA 5-5. The agency next assumed that this is true for *any* change in sleep, even one measured in minutes or seconds. *E.g.*, *id.* Exs. D-17 & D-18. Finally, FMCSA imposed the assumption that seven hours of sleep is an ideal point—and that any deviation from exactly seven hours per night leads to an increased risk of death. *Id.* Ex. 5-3.

None of these assumptions bears a rational relationship to Ferrie's data or findings. The correlation Ferrie observed between sleep and mortality does not suggest that sleep *causes* health outcomes; the correlation merely suggests that the factors behind increased mortality risk also express themselves in extreme sleeping patterns. Furthermore, Ferrie's study, which measured sleep in hour-long blocks, cannot justify FMCSA's belief that seconds or minutes of daily additional sleep lead to quantifiable changes in health. Given that the study also found no significant correlation between six and eight hours of sleep per night and mortality risk, it provides no support for FMCSA's notion that individuals who average anything other than precisely seven hours of sleep per night are at an increased risk of death.[8]

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[8] FMCSA will doubtless attempt to defend its calculation of health benefits by pointing to Ferrie's comment to the docket. That comment, however, did *not* condone either FMCSA's view that sleeping one moment less than seven hours carries quantifiable increases in mortality risks or its decision to infer substantial health

The other evidence in the administrative record illustrates the absurdity of FMCSA's assumptions. One of Ferrie's co-authors, for instance, has stated without qualification that *no* existing sleep study "ha[s] ever demonstrated health effects" from "minimal changes [in] sleep time." FMCSA-2004-19608-21675, 6. A 2010 review of the relevant literature by the same researcher, meanwhile, unambiguously concluded that "there is no evidence that sleeping habitually between 6 and 8 [hours] per day . . . is associated with . . . long term health consequences." FMCSA-2004-19608-4041, 591.

FMCSA's assumptions about the relationship between sleep and mortality therefore run counter to the evidence before the agency. Those assumptions are also central to FMCSA's belief that the 2011 final rule has measurable health benefits. Under the central case assumptions in the RIA, *all* drivers receive between 6.23 and 7.02 hours per night—and even under the agency's worst-case scenario, 95% of drivers sleep for at least six hours, and the remainder sleep for almost that long. *See* RIA Exs. 2-6, 5-2. Those amounts of sleep are consistent with good health. Moreover, in either the central or worst-case scenario, 95% of drivers would receive less than 0.13 hours (7.8 minutes) of additional sleep per

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benefits from microscopic increases in sleep. Ferrie opined only that the curve FMCSA fit to her data presents "a relatively good approximation" of the general relationship between sleep and mortality. FMCSA-2004-19608-20703, 1.

night under the final rule (*see id.*)—and therefore cannot possibly receive health benefits from the rule.

For these reasons, FMCSA has no factual basis for concluding that the new restrictions included in the 2011 final rule will yield any kind of measurable health benefits.[9]

C. FMCSA's Entire Cost-Benefit Analysis Is Predicated on a Fundamental Error.

FMCSA's claim that the restart restrictions and off-duty break requirement will yield net benefits is further undermined by a fundamental flaw that pervades the RIA—the agency's absurd assumption that any given individual driver works the same number of hours every week.

FMCSA reached this assumption in three steps. First, FMCSA took data from its 2007 Field Survey showing the length of drivers' workweeks. *Compare* FMCSA-2004-19608-2538, 3 (table showing the percentage of qualified workweeks falling within certain categories of hours), *with* RIA Ex. 2-6 (redrawing the boundaries between categories and describing the data in terms of "average weekly work time"). Second, although FMCSA simply copied Field Survey data

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[9] The final rule appeals to what FMCSA calls the "potentially significant but unquantifiable health benefits of reductions in maximum working and driving hours." 76FR81,179. The RIA, however, admits that those so-called benefits are also ephemeral: they uniformly depend on individual choices and are almost all "linked to obesity," a condition that HOS rules are powerless to affect. RIA 5-17.

in the RIA, it relabeled that data. Each data point in the Field Survey represents a single "weekly [work] period[]," and the Field Survey categories show the percentage of workweeks that were of certain lengths. FMCSA-2004-19608-2538, 3. The RIA, by contrast, treats the Field Survey data points as individual drivers and views the categories as "Driver Groups." FMCSA thus claimed to have "assigned *drivers* to four intensity groups, based on their average weekly hours of work." RIA 2-6 (emphasis added).

Third, even though it transformed the Field Survey's workweeks into drivers, FMCSA treated each "driver" as rigidly adhering to the boundaries of his or her "intensity group." In other words, FMCSA assumed that *every individual driver in a given intensity group works roughly the same number of hours every week* for their entire driving careers. *See id.* More specifically, because about 5% of workweeks in the Field Survey exceed 75 hours (*see* FMCSA-2004-19608-2538, 3) the agency assumed the same 5% of drivers consistently works to the limits of the HOS rules—and therefore accounts for *all* of the longest workweeks (*see* RIA 2-6).

That assumption is demonstrably fallacious. The Field Survey data does not provide a basis for drawing any conclusions about the work patterns of individual drivers. That 5% of driver workweeks are more than 75 hours long can reflect any number of patterns. The data could reflect, as FMCSA assumes, that 5% of drivers

work more than 75 hours per week 100% of the time. But the Field Survey is equally consistent with a pattern under which 100% of drivers work more than 75 hours per week 5% of the time. Or it could be that 50% of drivers work at least 75 hours 10% of the time—or any one of a huge number of other patterns. FMCSA's assumption that the same drivers are responsible for *all* of the longest weeks is assuredly incorrect.

FMCSA's assumption is also contradicted by both the agency's prior statements and the evidence in the record. Although the RIA assumes that 5% of drivers consistently work to the limits of the rules, FMCSA has repeatedly emphasized that a driver can "reach the maximum driving or driving and on-duty hours" only in circumstances that involve "nearly perfect logistics." 70FR50,022. As the agency put it in 2007, those circumstances are "so unrealistic that seeing this type of driving behavior [recorded] would cast doubt on the accuracy of the logbooks." 72FR71,258. The assumption in the RIA that the same drivers can always maximize hours in this way is even less realistic.

Moreover, as FMCSA explained in 2005, "independent survey data collected since the 2003 rule was adopted indicate[s] that drivers are not, in fact, maximizing their driving hours or total on-duty time." 70FR50,022. The Field Survey itself strongly supports that conclusion: It reveals that drivers do not use the restart to maximize hours but to avoid "waiting out the 60- or 70-hour clock at some truck

stop far from home." 73FR69,570; *see also* FMCSA-2004-19608-2538, 2-4 (showing the breakdown of driver workdays, workweeks, and restarts by length). A 2007 survey of ATA's members, meanwhile, reveals that long driving days are spread among nearly half of drivers, even in the course of a single month. *See* 72FR71,265.

Most importantly, FMCSA's assumption that the same drivers always work extremely long weeks is anything but innocuous, because it leads FMCSA to substantially overstate the apparent health benefits of the 2011 final rule. As discussed above, those benefits depend on increasing driver sleep by decreasing driver hours. The vast majority of reductions in work FMCSA ascribes to the new regulations—and thus the vast majority of the rule's asserted health benefits—stem from the once-per-week restriction on the restart. RIA Ex. 6-21. That restriction, however, affects only drivers who average more than 70 hours of work per week for at least two *consecutive* weeks. 76FR81,157.

By assuming that a small group of "extreme" drivers always works the longest weeks, FMCSA has treated *all* of the longest workweeks in the Field Survey as consecutive. If FMCSA had, consistent with the record and its own prior statements, treated the longest driver weeks as distributed across the driver population, many of those weeks would occur between two shorter workweeks.

Those weeks would neither trigger the once-per-week restriction nor result in health benefits.

The outcome would almost certainly be a rule with net costs instead of net benefits. FMCSA estimated that, under its central assumptions, the rule will generate $327 million in annual health benefits for "extreme" drivers (*see* RIA Ex. D-19), but will yield less than half that figure in annual net benefits—only $160 million overall. *See* 76FR81,179 Table 13.[10] Presumably, then, if only half as many long weeks occurred consecutively, the net benefits of the rule would vanish entirely. And redistributing *all* of the workweeks that exceed 70 hours across the entire driver population would almost certainly reduce the number of weeks that trigger the once-per-week restriction by at least 50%. FMCSA's groundless assumption that a few drivers account for all of the longest workweeks by consistently working to the limits of the rule is therefore central to its view that the 2011 final rule has net benefits.[11]

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[10] Exhibit D-19 concerns a regulatory option that FMCSA ultimately did not adopt. FMCSA, however, viewed that option and the final rule as having identical effects on the health of "extreme" drivers. *See* RIA Exs. 5-2, D-18.

[11] Without further information, it is not possible to estimate the impact of the agency's assumption on its calculation of costs and safety benefits. But it is likely that removing the assumption would decrease safety benefits and costs in equal measure by reducing the number of workweeks affected by the rule. An equal percentage decrease in costs and benefits would result in a substantial diminution in the net benefits FMCSA may claim for the rule. FMCSA-2004-19608-11823, 7.

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In sum, FMCSA sought to justify the restart restrictions and the off-duty break requirement largely through a showing of net benefits that rests on irrational assumptions and analyses that are unsupported by the record.[12] *See, e.g.*, *State Farm*, 463 U.S. at 43; *Thompson v. Clark*, 741 F.2d 401, 405 (D.C. Cir. 1984) (where data before the agency shows that "the rule constitutes such an unreasonable assessment of social costs and benefits as to be arbitrary and capricious, the rule cannot stand" (internal citation omitted)).

II. THE ONCE-PER-WEEK RESTRICTION ON USE OF THE RESTART PROVISION IS ARBITRARY AND CAPRICIOUS.

A. The Once-Per-Week Restriction Must Be Vacated Because It Is Wholly Dependent on FMCSA's Unjustifiable Cost-Benefit Analysis.

FMCSA's flawed cost-benefit analysis undermines FMCSA's other justifications for the once-per-week restriction on the use of the restart. Indeed, all

[12] FMCSA's analysis of the rule's costs is also arbitrary. The agency simply ignored the substantial adjustment and productivity costs the rule places on shippers. Moreover, when calculating the productivity costs the rule imposes on carriers, FMCSA chose to discard the sophisticated logistics model it used in prior rulemakings. FMCSA-2004-19608-11823, 11. The agency instead imposed a series of ad hoc guesses about the rule's impact on the trucking industry based on its own "judgment." *See* RIA 2-7–2-8, 3-5–3-6. Because the RIA does not fully disclose FMCSA's calculations, it is impossible to estimate the impact of those assumptions. *See* FMCSA-2004-19608-11823, 11. Given the numerous steps FMCSA took to inflate the rule's supposed net benefits, however, there is strong reason to believe that this decision was equally results-oriented.

of the preamble's purported justifications for that restriction ultimately rest on the defective RIA.

The agency asserts that use of the restart provision must be limited to one time per week because the restart could otherwise be used to work long hours over time. 76FR81,158. FMCSA relies on this assertion to claim the limitation has safety and health benefits: By preventing drivers from maximizing hours, FMCSA contends, the once-per-week restriction will alleviate the "higher risk of crashes, sleep loss, and negative health effects" it believes are caused by working long hours. 76FR81,134. These statements do nothing more than repeat the logic and conclusion of FMCSA's skewed and impermissible cost-benefit analysis. Parroting the results of that analysis in a different document cannot render the once-per-week restriction non-arbitrary.

B. FMCSA's Purported Explanations for the Once-Per-Week Restriction Are Indefensible.

Even if FMCSA's purported justifications could be seen as independent of its inexcusable manipulation of the RIA, however, they would not survive even cursory scrutiny. The agency's reasoning silently discards multiple longstanding agency positions and is irreconcilable with the administrative record.

FMCSA claims the once-per-week restriction is necessary because, in its pre-2011 form, the restart "allow[ed] a driver to work as many as 84 hours in 7 days" and to "average 82 hours a week." 76FR81,155. In previous rulemakings,

however, FMCSA consistently rejected any suggestion that the hours permitted by the restart provision needed to be further capped. In 2005, for example, the agency stated that "independent survey data collected since the 2003 rule was adopted indicate that drivers are not, in fact, maximizing their driving hours or total on-duty time." 70FR50,022. In 2007, FMCSA reiterated that hour-maximization "is so unrealistic that seeing this type of driving behavior during the course of an inspection would cast doubt on the accuracy of the logbooks." 72FR71,258. And in 2008, FMCSA emphasized that "[c]ommenters ha[d] not provided," and FMCSA itself had not "seen[,] any contrary evidence." 73FR69,570. To the contrary, FMCSA's "more realistic scenarios," under which drivers do not consistently work to the outermost limits of the rule, "have been borne out by all recent evidence." *Id.*

The 2011 final rule does not acknowledge FMCSA's prior, evidence-based view, much less point to evidence showing that drivers use the restart to consistently maximize working hours, as FMCSA now claims. As discussed in Section I.C above, FMCSA instead invented hour-maximizing drivers by assuming, contrary to the record evidence, that drivers who work one particularly long workweek *always* work to the limits of the rules. Actual drivers do not do so. Instead, they use the restart for flexibility—and the once-per-week restriction will significantly reduce that flexibility, not increase safety.

FMCSA's underlying claim that the restart provision poses a threat to driver safety and health is equally without foundation. The administrative record compels the conclusion that the restart provision improved, rather than diminished, safety. As shown in the figure below, which is derived entirely from FMCSA's own data, large-truck crashes have declined significantly since 2003:

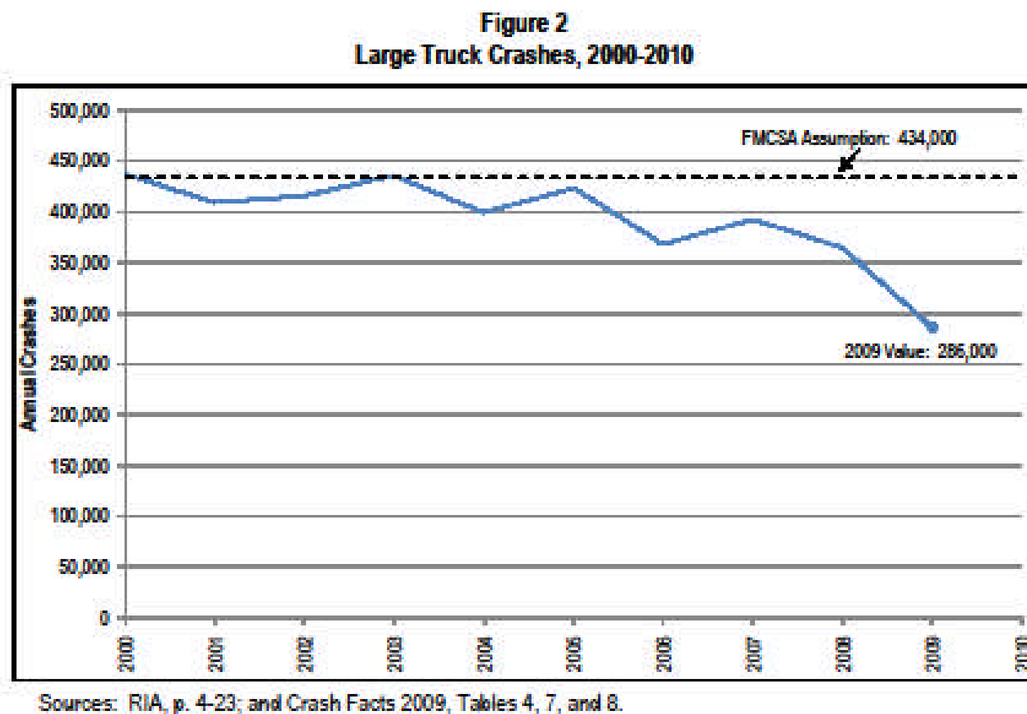

Figure 2
Large Truck Crashes, 2000-2010

Sources: RIA, p. 4-23; and Crash Facts 2009, Tables 4, 7, and 8.

FMCSA-2004-19608-11823, 17.

This decline is no anomaly. The number of fatalities and injuries from large-truck crashes has also declined markedly since 2003, both in absolute terms and as a rate per miles traveled. *See* FMCSA-2004-19608-20873, 2-3. So, too, has the rate of HOS rule violations—a rate that is strongly correlated with crash rates.

See id. 3-4. FMCSA's claim that safety concerns require changes to the restart provision is contrary to the evidence.

FMCSA's contention that limiting hours by limiting use of the restart will improve driver health requires the agency to ignore its previous positions. In prior rulemakings, FMCSA recognized that "there is no clear evidence that the work hours allowed by [the HOS] rule[s] will have any impact on driver health." 70FR50,026. It did so largely because "[r]esearch indicates that psychological factors . . . play a role in the health of" truck drivers. *Id.* at 50,025. Specifically, the agency acknowledged that "drivers generally want the freedom to manage their workplace and schedule" and that "working long hours is an individual choice." *Id.* Once that freedom, "compensation, and degree of control over one's work schedule" are taken into account, there is no settled basis for concluding that long working hours "are associated with poor health." *Id.* at 50,026; *see also, e.g.*, *id.* at 49,990. The 2011 rule neither mentions this prior position nor attempts to explain why it is no longer relevant.

Accordingly, even if FMCSA's attempt to justify the once-per-week restriction on the restart is independent of the agency's irrational assumptions in the RIA, that explanation cannot be squared with either the record or the agency's prior positions. FMCSA's decision to impose the restriction is therefore arbitrary and capricious. *See, e.g.*, *Dillmon*, 588 F.3d at 1090; *State Farm*, 463 U.S. at 43.

III. THE TWO-NIGHT REQUIREMENT IS ARBITRARY AND IRRECONCILABLE WITH FMCSA'S PRIOR VIEWS ON DRIVER SAFETY AND HEALTH.

The requirement that every restart include two periods from 1 a.m. to 5 a.m. must also be vacated. Although FMCSA's conclusion that this provision has net benefits is arbitrary for the reasons discussed in Part I above, FMCSA does advance one argument for the restriction that is unrelated to the RIA. It seeks to show that the two-night restriction has benefits by arguing "that 2 consecutive nights off duty [are] necessary to ensure that the drivers who take a restart are adequately rested when they resume driving." 76FR81,145. FMCSA admits this rationale is of very limited scope: it applies only to "drivers who both routinely work at night and put in very long work weeks." 76FR81,135. The agency nevertheless suggests that such drivers will require two extended periods of sleep to recover from cumulative fatigue—and that the periods must be taken at night, because daytime sleep is of generally lower quality. 76FR81,147.

In short, FMCSA argues that "the circadian advantages of nighttime sleep" cause the two-night restriction to have benefits. RIA 6-14. Those purported benefits are not captured in the RIA, and FMCSA's rationale for them is arbitrary. FMCSA has discarded four prior positions—and has not adequately explained any of those departures.

First, FMCSA previously acknowledged that the restart provision provides sufficient rest for all drivers. As FMCSA explained in 2005, there is "no scientific basis for concluding that every driver, or even every nighttime driver, is sleep deprived." 70FR50,024. Moreover, "the two 8-hour sleep periods give drivers an adequate opportunity to help minimize acute and cumulative fatigue, *regardless of their driving schedule*." 70FR50,039 (emphasis added); *see also* 73FR69,575. FMCSA thus concluded that a two-night limitation on the restart would amount to unjustified "overreach[ing]." 68FR22,477. By contrast, FMCSA now treats sleep deprivation as an inevitable feature of nighttime driving and claims "that 2 consecutive" nights of sleep are required to recover. 76FR81,145. And by imposing the two-night requirement, FMCSA has effectively increased the minimum length of many restarts—from 34 hours to as much as 48 hours or more[13]—despite its previous view that 34 hours is enough time for *all* drivers to "'zero out' their fatigue." 73FR69,569.

The final rule does not provide an "adequate explanation for [these] departure[s]." *Dillmon*, 588 F.3d at 1090. FMCSA's revised view that the restart does not provide nighttime drivers with sufficient sleep opportunities rests on a

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[13] A driver who begins a restart at 2 a.m. Monday, for instance, would be off-duty for 34 hours as of noon Tuesday. Under the two-night requirement the driver could not resume driving until 5 a.m. Wednesday—51 hours after the restart began.

single two-phase study the agency commissioned. That study, however, says nothing directly relevant to the policy choice FMCSA faced.

The study tested the effects of neither the minimum restart permitted by the 2003 rules—which is to say, a 34-hour restart including two daytime sleep periods—nor the 34-hour period with two periods of nighttime sleep mandated by the 2011 final rule. Instead, it compared the effects of a restart including only one extended sleep period with the effects of a 58-hour restart. *See* FMCSA-2004-19608-4121, xi, 1. In other words, the study's supposed proxy for the 2003 rule provided *less* sleep than that rule, while its proxy for the 2011 rule provided significantly *more* sleep than the new HOS regulations. And even though the deck was stacked in FMCSA's favor, the study's authors conceded that "further research is needed" before conclusions can be drawn about the effects of the restricted restart on "real-world driving performance, safety, and cost." FMCSA-2004-19608-4120, 54. The study cannot provide a satisfactory justification for the two-night requirement.

Second, FMCSA previously understood that the two-night provision would shift driving from overnight hours to the daytime, increasing daytime congestion. 70FR50,021, 50,023. Increases in congestion lead to an increased risk of collisions. 70FR50,023. FMCSA thus expressly concluded in 2005 that a two-night requirement would "result in an increase in truck-related crashes" that

"offset[s] any potential safety benefits" potentially caused by "nighttime driving restrictions." *Id.*

The 2011 final rule feigns ignorance of the agency's prior views and attributes them only to commenters. FMCSA instead claims that "[i]t is difficult to see how" the two-night requirement "would increase congestion." 76FR81,145. Because FMCSA has not even demonstrated awareness of its prior position, the two-night provision must be vacated. *See Dillmon*, 588 F.3d at 1090.

Third, FMCSA's prior rulemakings consistently stressed the importance of circadian stability—the maintenance of a consistent, 24-hour daily schedule instead of a constantly shifting or rotating schedule. In both 2005 and 2008, FMCSA expressed the firm belief that circadian stability is vital for safety because "[c]ircadian de-synchronization" causes "poor quality sleep" and "accumulated fatigue." 70FR50,016; *see also* 73FR69,568. The 2003 rule thus, in FMCSA's own words, "aid[ed] driver health in regard to shift work" (70FR49,991) and had "positive safety benefits" (70FR50,039) in part because the rules "avoid[ed] the shifting of daytime to nighttime schedules" (70FR50,025).

By contrast, the 2011 rule is designed to result in circadian de-synchronization. Because it requires restarts to include two overnight periods, the rule strongly encourages nighttime drivers, who sleep during the day when on duty, to switch to nighttime sleep during their weekend-type breaks. The 2011

final rule thus discards FMCSA's prior position regarding circadian stability—and it does so without either acknowledging the existence of that position or attempting to explain it away.[14]

Fourth, although FMCSA claims that the two-night restriction has health benefits (76FR81,156), the agency concluded in 2008 that drivers operating under the 2003 rules "sleep[] within normal ranges that are consistent with a healthy lifestyle" (73FR69,574). As discussed in Section I.B above, that statement remains true: under the agency's central assumptions, all drivers sleep six to eight hours per night. And "there is no evidence that sleeping habitually between 6 and 8[hours] per day" is correlated with "long term health consequences." FMCSA-2004-19608-4041, 591.

In addition, the two-night requirement is arbitrary and capricious because FMCSA requires drivers to adhere to the time zone of the driver's home terminal.

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[14] FMCSA claims that nighttime drivers switch to day-oriented schedules on the weekend. Commenters directly contradicted that conclusion. *See, e.g.*, FMCSA-2004-19608-21698, 2; FMCSA-2004-19608-20982, 18. And although FMCSA cites two articles that it claims support its view (75FR82,182 n.38; 76FR81,156), neither can be used to justify the final rule. One of the articles—Kecklund & Akerstedt (1995)—says only that sleep deficits increase *if* workers flip their schedules, not that workers actually do so. The other (Monk (2000)), does contend that "married night workers with family commitments typically do not retain a day sleeping regimen during their off-duty (weekend type) break." 76FR81,156. But while Monk's article has been available since 2000, this is the first time FMCSA has mentioned it. FMCSA must therefore explain why it now believes Monk's article is persuasive—and the agency provides no such explanation.

See 49 C.F.R. § 395.8(f)(8)(i). An east-coast based driver on a west coast run, for instance, must take restarts that include two periods from between 10 p.m. and 2 a.m. west coast time; restarts taken by west-coast drivers working in the east must include two periods ending at 8 a.m. local time. This requirement defeats FMCSA's stated purpose for the two-overnight rule by forcing many restarts to include two periods outside "the core portion of the window of circadian low." 76FR81,145.

For these reasons, the requirement that every restart include two overnight periods should be vacated as arbitrary and capricious.

IV. THE REQUIREMENT THAT DRIVING BREAKS BE TAKEN OFF-DUTY IS ARBITRARY AND CAPRICIOUS.[15]

As with the two-night requirement, FMCSA argues that the off-duty break requirement will yield benefits not captured by the agency's cost-benefit analysis. In this case, the agency argues that the requirement "provide[s] very substantial crash reduction benefits" not captured in the RIA (RIA 6-14) because "break[s] from the driving task" serve to "reduce the risk of crashes after the break" (76FR81,154). More specifically, FMCSA believes the crash-reduction benefits of off-duty breaks are greater than the benefits of breaks that involve other working tasks, such as fueling the truck or waiting for cargo to be off-loaded. *See id.* The

[15] OOIDA does not join the argument in Part IV.

final rule thus requires drivers to go *completely off duty* for at least 30 minutes before driving in the latter portions of the daily duty period. *See id.* As the agency openly acknowledges, the "break" requirement therefore amounts to a mandatory reduction of the maximum daily tour of duty from 14 hours to 13½ hours. 76FR81,136.

ATA agrees with FMCSA that *breaks from driving* improve safety. The administrative record, however, contradicts FMCSA's claim that off-duty breaks yield greater reductions in crash risk. To the contrary, *any* break from driving yields substantial gains in safety, and the benefits of off-duty breaks are no greater than the benefits of breaks involving other kinds of work.

FMCSA primarily bases its claim that off-duty breaks are better on a study conducted by Blanco et al. 76FR81,154. The results of that study, however, unambiguously demonstrate that working breaks are as effective at reducing crash risk as non-working breaks.

Blanco analyzed four types of breaks from driving: breaks that involved other kinds of work, and breaks that involved non-work activities and were coded as occurring while the driver was either on duty, off duty, or both. *See* FMCSA-2004-19608-27612, xviii, 18. Using data collected by sensors and cameras fitted to trucks, Blanco compared the number of safety-critical events in the hour before and the hour following each type of break from driving.

Blanco's regression analysis demonstrates that both working breaks and non-working breaks significantly decreased the risk of a safety-critical event in the hour of driving immediately following the break. *See id.* at 75 Table 41. The magnitude of the effect was approximately equal for both types of breaks. *See id.* Put another way, working and non-working breaks were equally effective at restoring safety.

The agency, however, ignored the regression analysis and turned to the study's raw data. The data demonstrates that, on average, 30.37% fewer safety-critical events occurred during the hour following a working break than during the hour before the break. *See id.* at 74 Table 40. The three types of non-working breaks, meanwhile, were not uniform in their effects. Safety-critical events declined by 28% following on-duty non-working breaks, by 33.5% after off-duty non-working breaks, and by 51.2% following mixed non-working breaks coded as occurring both on and off duty.

FMCSA seized on this last bit of data to claim that non-working breaks yield greater safety benefits. The data does not justify that claim. The relatively low number of mixed breaks strongly suggests that no single type of non-working break produced a statistically significant decline in safety-critical events. The agency, in other words, decided to require off-duty breaks on a single finding *likely to have been produced by chance*.

Moreover, the agency makes no attempt to explain why one type of non-working break would be more effective at improving safety than other types of non-working breaks. In fact, there is no basis for drawing meaningful distinctions among the three types of non-working breaks in Blanco: all three provided the opportunity for rest and sleep, while both mixed and "off-duty" breaks include physical activities outside of work. *See id.* at 18 Table 8. The "mixed" breaks simply produced an outlying result—and, absent any explanation for the agency's reliance on that result, Blanco's study cannot justify FMCSA's decision to impose an *off-duty* break requirement.[16]

In short, the evidence before the agency contradicts FMCSA's view that off-duty breaks are more effective at reducing crashes than breaks from driving that involve other working tasks. Because FMCSA has "offered an explanation for"

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[16] The final rule also mentions two other studies. As FMCSA recognizes, the article by Jovanis (2011) "was unable to distinguish between on-duty breaks from driving and off-duty breaks." 76FR81,154.

FMCSA mischaracterizes the findings of the second study. The agency describes that study as concluding "that loading and unloading"— one type of working break activity—"had mixed effects on driving performance, but that off-duty breaks improved performance." 76FR81,154. Both halves of that statement are incorrect. The study found that the "invigorating effect" of loading and unloading caused "an improvement in driver response to crash-likely situations." FMCSA-2004-19608-0071, 29. That effect was "mixed" only because it "faded with the passage of a driving day." *Id.* Moreover, the study concluded that off-duty breaks *also* had mixed effects and should be the subject of further analysis. *Id.* at 3, 48-49.

the off-duty break requirement "that runs counter to the evidence," that portion of the final rule must be vacated. *State Farm*, 463 U.S. at 43.

V. FMCSA'S MODIFICATION OF THE SHORT-HAUL EXEMPTION IN 49 C.F.R. § 395.1(E)(2) IS PROCEDURALLY DEFECTIVE AND ARBITRARY AND CAPRICIOUS.

Even if FMCSA's off-duty break requirement were not arbitrary, the agency's application of that requirement to drivers operating under the short-haul exemption in § 395.1(e)(2) would have to be vacated for three reasons. FMCSA's decision to apply the off-duty break requirement to short-haul drivers—who typically make local deliveries using small trucks—does not represent a logical outgrowth of the NPRM; that decision is never explained in the final rule; and the agency's choice to subject short-haul drivers to an off-duty break requirement is arbitrary and capricious.

In the 2010 NPRM, FMCSA indicated that it was "considering rescinding [the short-haul exemption] and requiring the drivers who now use it to comply with the standard HOS limits." 75FR82,184. This suggestion was tied to FMCSA's proposal to extend the on-duty window to 16 hours twice a week for all drivers. *See id.* That change, the agency said, would make the general HOS rules "similar in some respects" to the exemption, removing any need for special short-haul rules. *Id*. But because the agency had "little hard information" about use of the exemp-

tion, it asked drivers and carriers "to explain how" removing the short-haul exemption "would affect them." *Id.*

The final rule did not remove the short-haul exemption. Because FMCSA "dropped the proposed 16-hour provision," the agency reasoned that any potential similarities between the general rules and the provisions of the short-haul exemption were "moot." 76FR81,136. But the agency also did not retain the short-haul exemption in its previous form. Instead, FMCSA decided to limit that exemption by applying the off-duty break requirement to short-haul drivers.

That decision is procedurally invalid, because the agency's decision to narrow the exemption does not represent "a logical outgrowth of" the NPRM. *OOIDA*, 494 F.3d at 209 (internal quotation marks omitted). To satisfy that standard, the NPRM must give notice of "the range of alternatives being considered with reasonable specificity; otherwise, interested parties will not know what to comment on." *Id.* (internal quotation marks and alterations omitted).

Here, however, the NPRM suggested only that FMCSA might eliminate the exemption in its entirety, not that the exemption would be narrowed or that short-haul drivers would be subjected to mandatory off-duty breaks. Commenters accordingly had no basis for suspecting that FMCSA would retain the exemption but apply the off-duty break requirement to short haul drivers.

In any event, FMCSA's decision to apply the off-duty break requirement to short-haul drivers is arbitrary and capricious. The preamble to the final rule never explains that decision; instead, it simply notes FMCSA's choice not to eliminate the exemption. 76FR81,136. Absent any such explanation—let alone a "satisfactory explanation"—for its action, FMCSA's decision to subject short-haul drivers to the break provision must be vacated. *State Farm*, 463 U.S. at 43.

FMCSA's application of the off-duty break requirement to short-haul drivers is also irrational. The purpose of that requirement is ostensibly to reduce the crash risk that is associated with long hours of driving. 76FR81,154. But as FMCSA has previously recognized, short-haul drivers "do not drive for long periods of time." 70FR50,033. Rather, as FMCSA admits in the final rule, short-haul drivers "typically drive regular schedules of limited mileage during daylight hours, with frequent non-driving breaks, and return to their home terminal in time to sleep in their own bed virtually every night." 76FR81,160. Drivers operating under the exemption consequently have a greatly reduced risk of fatigue. *See id.*; 70FR50,033.

In short, FMCSA has expressly acknowledged that the asserted rationale for its off-duty break requirement *does not apply to short-haul drivers*. Absent any alternative explanation for forcing short-haulers to take off-duty breaks, FMCSA's

decision to apply that requirement to drivers operating under the exemption in § 395.1(e)(2) is arbitrary.

CONCLUSION

For the foregoing reasons, the Court should vacate FMCSA's decisions to (1) limit use of the restart provision to one time per week; (2) require every restart to include two periods from 1 a.m. to 5 a.m.; (3) prohibit driving if more than 8 hours have passed since the end of the driver's last off-duty break of at least 30 minutes; and (4) extend that off-duty break requirement to drivers operating under the exemption in 49 C.F.R. § 395.1(e)(2).

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(B) AND CIRCUIT RULE 32(a)(3)(B)(i)

I hereby certify that—according to the word-count facility in Microsoft Word—this brief, excluding those portions omitted under Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and Circuit Rule 32(a)(1), consists of 11,998 words and thus complies with Circuit Rule 32(a)(1) and this Court's Order dated July 6, 2012.

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CERTIFICATE OF SERVICE

I hereby certify pursuant to Fed. R. App. P. 25(c) that on this 24th day of July, 2012, the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system, which will send a notification to the attorneys of record and the unrepresented intervenor in this matter, who are registered with the Court's CM/ECF system.

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ADDENDUM A

STATUTES AND REGULATIONS

Table of Contents

5 U.S.C. § 706 ....A-1

49 U.S.C. § 31502 (Motor Carrier Safety Act,
Pub. L. 74-255, 49 Stat. 543 (1935)) A-2

49 C.F.R. part 395.1 (2006) (superseded) A-3

49 C.F.R. part 395.3 (2004) (superseded) A-4

Final Rule, Docket No. FMCSA-2004-19608,
76 Fed. Reg. 81134 (Dec. 27, 2011) A-5

5 U.S.C. § 706 provides in pertinent part:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

49 U.S.C. § 31502 (Motor Carrier Safety Act, Pub. L. 74-255, 49 Stat. 543 (1935)) provides in pertinent part:

(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.

* * *

(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. 395.1 (2006) (superseded) provides in pertinent part:

(e) Short-haul operations—

(2) *Operators of property-carrying commercial motor vehicles not requiring a commercial driver's license.* Except as provided in this paragraph, a driver is exempt from the requirements of § 395.3 and § 395.8 and ineligible to use the provisions of § 395.1(e)(1), (g) and (o) if:
(i) The driver operates a property-carrying commercial motor vehicle for which a commercial driver's license is not required under part 383 of this subchapter;
(ii) The driver operates within a 150 air-mile radius of the location where the driver reports to and is released from work, *i.e.*, the normal work reporting location;
(iii) The driver returns to the normal work reporting location at the end of each duty tour;
(iv) The driver has at least 10 consecutive hours off duty separating each on-duty period;
(v) The driver does not drive more than 11 hours following at least 10 consecutive hours off duty;
(vi) The driver does not drive: (A) After the 14th hour after coming on duty on 5 days of any period of 7 consecutive days; and (B) After the 16th hour after coming on duty on 2 days of any period of 7 consecutive days;
(vii) The driver does not drive: (A) After having been on duty for 60 hours in 7 consecutive days if the employing motor carrier does not operate commercial motor vehicles every day of the week; (B) After having been on duty for 70 hours in 8 consecutive days if the employing motor carrier operates commercial motor vehicles every day of the week;
(viii) Any period of 7 or 8 consecutive days may end with the beginning of any off-duty period of 34 or more consecutive hours;
(ix) The motor carrier that employs the driver maintains and retains for a period of 6 months accurate and true time records showing:
(A) The time the driver reports for duty each day;
(B) The total number of hours the driver is on duty each day;
(C) The time the driver is released from duty each day;
(D) The total time for the preceding 7 days in accordance with § 395.8(j)(2) for drivers used for the first time or intermittently.

49 C.F.R. 395.3 (2004) (superseded) provides:

Subject to the exceptions and exemptions in § 395.1:

(a) 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:
(1) More than 11 cumulative hours following 10 consecutive hours off duty; or
(2) For any period after the end of the 14th hour after coming on duty following 10 consecutive hours off duty, except when a property-carrying driver complies with the provisions of § 395.1(o).

(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 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) Any period of 7 consecutive days may end with the beginning of any off duty period of 34 or more consecutive hours; or
(2) Any period of 8 consecutive days may end with the beginning of any off duty period of 34 or more consecutive hours.

PART 395—HOURS OF SERVICE OF DRIVERS

■ 7. The authority citation for part 395 continues to read as follows:

Authority: 49 U.S.C. 504, 31133, 31136, 31137, and 31502; sec. 113, Pub. L. 103–311, 108 Stat. 1673, 1676; sec. 229, Pub. L. 106–159 (as transferred by sec. 4115 and amended by secs. 4130–4132, Pub. L. 109–59, 119 Stat. 1144, 1726, 1743, 1744); sec. 4133, Pub. L. 109–59, 119 Stat. 1144, 1744; sec. 108, Pub. L. 110–432. 122 Stat. 4860–4866; and 49 CFR 1.73.

■ 8. Amend § 395.1 as follows:
■ a. Revise the paragraph (b) heading and paragraph (b)(1) introductory text;
■ b. Revise pargraph (d)(2);
■ c. Revise paragraphs (e)(1)(iv) and (e)(2);
■ d. Revise paragraphs (g)(1)and (g)(2)(ii); and
■ e. Revise paragraph (q).

The revisions read as follows:

§ 395.1 Scope of rules in this part.

* * * * *

(b) *Driving conditions.* (1) *Adverse driving conditions.* Except as provided in paragraph (h)(2) of this section, a driver who encounters adverse driving conditions, as defined in § 395.2, and cannot, because of those conditions, safely complete the run within the maximum driving time permitted by §§ 395.3(a) or 395.5(a) may drive and be permitted or required to drive a commercial motor vehicle for not more than 2 additional hours beyond the maximum time allowed under §§ 395.3(a) or 395.5(a) to complete that run or to reach a place offering safety for the occupants of the commercial motor vehicle and security for the commercial motor vehicle and its cargo.

* * * * *

(d) * * *

(2) In the case of specially trained drivers of commercial motor vehicles that are specially constructed to service oil wells, on-duty time shall not include waiting time at a natural gas or oil well site. Such waiting time shall be recorded as ''off duty'' for purposes of §§ 395.8 and 395.15, with remarks or annotations to indicate the specific off-duty periods that are waiting time, or on a separate ''waiting time'' line on the record of duty status to show that off-duty time is also waiting time. Waiting time shall not be included in calculating the 14-hour period in § 395.3(a)(2). Specially trained drivers of such commercial motor vehicles are not eligible to use the provisions of § 395.1(e)(1).

(e) * * *

(1) * * *

(iv)(A) A property-carrying commercial motor vehicle driver does

not exceed the maximum driving time specified in § 395.3(a)(3) following 10 consecutive hours off duty; or

(B) A passenger-carrying commercial motor vehicle driver does not exceed 10 hours maximum driving time following 8 consecutive hours off duty; and

* * * * *

(2) *Operators of property-carrying commercial motor vehicles not requiring a commercial driver's license.* Except as provided in this paragraph, a driver is exempt from the requirements of § 395.3(a)(2) and § 395.8 and ineligible to use the provisions of § 395.1(e)(1), (g), and (o) if:

(i) The driver operates a property-carrying commercial motor vehicle for which a commercial driver's license is not required under part 383 of this subchapter;

(ii) The driver operates within a 150 air-mile radius of the location where the driver reports to and is released from work, *i.e.,* the normal work reporting location;

(iii) The driver returns to the normal work reporting location at the end of each duty tour;

(iv) The driver does not drive:

(A) After the 14th hour after coming on duty on 5 days of any period of 7 consecutive days; and

(B) After the 16th hour after coming on duty on 2 days of any period of 7 consecutive days;

(v) The motor carrier that employs the driver maintains and retains for a period of 6 months accurate and true time records showing:

(A) The time the driver reports for duty each day;

(B) The total number of hours the driver is on duty each day;

(C) The time the driver is released from duty each day;

(D) The total time for the preceding 7 days in accordance with § 395.8(j)(2) for drivers used for the first time or intermittently.

* * * * *

(g) * * *

(1) *Property-carrying commercial motor vehicle.* (i) *In General.* A driver who operates a property-carrying commercial motor vehicle equipped with a sleeper berth, as defined in §§ 395.2 and 393.76 of this subchapter,

(A) Must, before driving, accumulate

(*1*) At least 10 consecutive hours off duty;

(*2*) At least 10 consecutive hours of sleeper-berth time;

(*3*) A combination of consecutive sleeper-berth and off-duty time amounting to at least 10 hours; or

(*4*) The equivalent of at least 10 consecutive hours off duty if the driver does not comply with paragraph (g)(1)(i)(A)(*1*), (*2*), or (*3*) of this section;

(B) May not drive more than the driving limit specified in § 395.3(a)(3)(i) following one of the 10-hour off-duty periods specified in paragraph (g)(1)(i)(A)(*1*) through (*4*) of this section. *After* June 30, 2013, however, driving is permitted only if 8 hours or fewer have passed since the end of the driver's last off-duty break or sleeper-berth period of at least 30 minutes; and

(C) May not drive for more than the period specified in § 395.3(a)(2) after coming on duty following one of the 10-hour off-duty periods specified in paragraph (g)(1)(i)(A)(*1*)–(*4*) of this section; and

(D) Must exclude from the calculation of the 14-hour period in § 395.3(a)(2) any sleeper-berth period of at least 8 but less than 10 consecutive hours.

(ii) *Specific requirements.* The following rules apply in determining compliance with paragraph (g)(1)(i) of this section:

(A) The term ''equivalent of at least 10 consecutive hours off duty'' means a period of

(*1*) At least 8 but less than 10 consecutive hours in a sleeper berth, and

(*2*) A separate period of at least 2 but less than 10 consecutive hours either in the sleeper berth or off duty, or any combination thereof.

(B) Calculation of the driving limit includes all driving time; compliance must be re-calculated from the end of the first of the two periods used to comply with paragraph (g)(1)(ii)(A) of this section.

(C) Calculation of the 14-hour period in § 395.3(a)(2) includes all time except any sleeper-berth period of at least 8 but less than 10 consecutive hours and up to 2 hours riding in the passenger seat of a property-carrying vehicle moving on the highway immediately before or after a period of at least 8 but less than 10 consecutive hours in the sleeper berth; compliance must be re-calculated from the end of the first of the two periods used to comply with the requirements of paragraph (g)(1)(ii)(A) of this section.

(2) * * *

(ii) The driving time in the period immediately before and after each rest period, when added together, does not exceed the limit specified in § 395.3(a)(3);

* * * * *

(q) *Attendance on commercial motor vehicles containing Division 1.1, 1.2, or 1.3 explosives.* Operators who are required by 49 CFR 397.5 to be in attendance on commercial motor vehicles containing Division 1.1, 1.2, or 1.3 explosives are on duty at all times while performing attendance functions or any other work for a motor carrier. Operators of commercial motor vehicles containing Division 1.1, 1.2, or 1.3 explosives subject to the requirements for a 30-minute rest break in § 395.3(a)(3)(ii) may use 30 minutes or more of attendance time to meet the requirement for a rest break, providing they perform no other work during the break. Such drivers must record the rest break as on-duty time in their record of duty status with remarks or annotations to indicate the specific on-duty periods that are used to meet the requirement for break.

* * * * *

■ 9. Amend § 395.2 by revising the definition of ''on-duty time'' to read as follows:

§ 395.2 Definitions.

* * * * *

On-duty time means all time from the time a driver begins to work or is required to be in readiness to work until the time the driver is relieved from work and all responsibility for performing work. *On-duty time* shall include:

(1) All time at a plant, terminal, facility, or other property of a motor carrier or shipper, or on any public property, waiting to be dispatched, unless the driver has been relieved from duty by the motor carrier;

(2) All time inspecting, servicing, or conditioning any commercial motor vehicle at any time;

(3) All driving time as defined in the term *driving time;*

(4) All time in or on a commercial motor vehicle, other than:

(i) Time spent resting in or on a parked vehicle, except as otherwise provided in § 397.5 of this subchapter;

(ii) Time spent resting in a *sleeper berth;* or

(iii) Up to 2 hours riding in the passenger seat of a property-carrying vehicle moving on the highway immediately before or after a period of at least 8 consecutive hours in the sleeper berth;

(5) All time loading or unloading a commercial motor vehicle, supervising, or assisting in the loading or unloading, attending a commercial motor vehicle being loaded or unloaded, remaining in readiness to operate the commercial motor vehicle, or in giving or receiving receipts for shipments loaded or unloaded;

(6) All time repairing, obtaining assistance, or remaining in attendance upon a disabled commercial motor vehicle;

USCA Case #12-1092 Document #1385232 Filed: 07/24/2012 Page 75 of 75

(7) All time spent providing a breath sample or urine specimen, including travel time to and from the collection site, to comply with the random, reasonable suspicion, post-crash, or follow-up testing required by part 382 of this subchapter when directed by a motor carrier;

(8) Performing any other work in the capacity, employ, or service of, a motor carrier; and

(9) Performing any compensated work for a person who is not a motor carrier.

* * * * *

■ 10. Revise § 395.3 to read as follows:

§ 395.3 Maximum driving time for property-carrying vehicles.

(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.

Issued on: December 16, 2011.

Anne S. Ferro,

Administrator.

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