ORAL ARGUMENT SET FOR APRIL 15, 2004

No. 03-1165

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

PUBLIC CITIZEN, CITIZENS FOR RELIABLE AND SAFE HIGHWAYS, and PARENTS AGAINST TIRED TRUCKERS,

Petitioners,

v.

FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION and THE UNITED STATES,

Respondents.

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

FINAL REPLY BRIEF FOR PETITIONERS

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GLOSSARY

AHAS	Advocates for Highway and Auto Safety
ANPRM	Advance Notice of Proposed Rulemaking
ATA	American Trucking Associations
EOBR	Electronic onboard recorder
FHWA	Federal Highway Administration
FMCSA	Federal Motor Carrier Safety Administration
FR	Federal Register
HOS	Hours of service
IIHS	Insurance Institute for Highway Safety
JA	Joint Appendix
LTL	Less-than-truckload
NPRM	Notice of Proposed Rulemaking
NTSB	National Transportation Safety Board
PRE	Preliminary Regulatory Evaluation
RIA	Regulatory Impact Analysis and Small Business Analysis for Hours of Service Options

SUMMARY OF ARGUMENT

Contrary to FMCSA's suggestion, petitioners do not contend that the agency was bound to adopt the proposed rule or that the final rule is not the "logical outgrowth" of the proposed rule. *See* FMCSA Br. 31-33. "The ultimate issue," when an agency abandons a stance taken in a proposed rule, "is, of course, whether the agency engaged in reasoned decisionmaking." *NRDC v. EPA,* 822 F.2d 104, 112 (D.C. Cir. 1987). It has not.

FMCSA's opposition brief attempts to buttress the inadequate rationales it previously offered for the final HOS rule by advancing new arguments and citing studies it did not rely upon in the final rule (and, in some instances, had previously denigrated), by pressing misleading claims about how the rule works (*e.g.,* that it reduces total daily work hours), and by failing to grapple with many of petitioners' protests (*e.g.,* that the 34-hour restart provision dramatically increases weekly work hours by shortening much-needed rest). Nowhere does FMCSA even *cite,* much less satisfy, the specific statutory mandates that govern this rulemaking—that the rule reduce fatigue-related incidents and increase driver alertness and that the agency make safety its highest priority. The agency continues to downplay the significance of its having overlooked its statutory mandate to protect driver health. Finally, each of FMCSA's specific defenses of the challenged provisions fails to pass muster.

ARGUMENT

A. Overarching Considerations

1. Costs and Benefits

FMCSA argues that it properly declined to make changes that came with "a high price tag," FMCSA Br. 5, citing its statutory obligation to consider costs and benefits. *Id.* 3, 7-8, 40, 55, 59 (citing 49 U.S.C. §§ 31136(c)(2)(A) & 31502(d)). The agency's obligation to "consider" costs and benefits sheds no light on whether the specific challenged features of the rule withstand scrutiny because FMCSA's Regulatory Impact Analysis (2002) ("RIA") (JA 1663) analyzed the final rule and competing regulatory alternatives only as a whole, not by feature. Not one of the truck-safety improvements petitioners urge here was rejected by FMCSA because of its "high price tag."

Moreover, the RIA's benefits analysis is so hopelessly flawed in excluding the safety effects of increased consecutive and weekly driving hours, *see* Petitioners' Br. 46, 61-64, and the rule's health impact on drivers, *id.* 30, 59; Advocates for Highway and Auto Safety ("AAHS") Amicus Br., that FMCSA failed to comply even with this general mandate to "consider" costs and benefits. Nor did Congress, in requiring cost-benefit consideration, intend to suppress safety and health regulations because of uncertainty in quantifying costs or benefits.

S. Rep. 98-424 at 8 (1984), 1984 U.S.C.C.A.N. 4785, 4792.

Most importantly, because FMCSA's obligation to consider costs and benefits is only a general one, the more recent, specific congressional directives that this final rule "reduc[e] fatigue-related incidents and increas[e] driver alertness," 49 U.S.C. § 31136 note, and that the agency make safety its "highest priority," 49 U.S.C. § 113, take precedence. *HUD v. Rucker,* 535 U.S. 125, 133 n.5 (2002) ("[T]he general statutory provision . . . cannot trump the clear language of the more specific [provision]."); *United States v. Estate of Romani,* 523 U.S. 517, 530-31 (1998) ("[A] specific policy embodied in a later federal statute should control our construction of the [earlier] statute, even though it had not been expressly amended."). Because Congress explicitly made reducing fatigue-related crashes and improving truck safety the overriding considerations, FMCSA cannot meet its statutory obligations merely by "considering" or "balancing" costs and benefits of safer rules against those that would enhance industry productivity, but must "place a thumb on the safety side of the scale." *Public Citizen v. Mineta,* 340 F.3d 39, 58 (2d Cir. 2003).

2. New Drivers

FMCSA observes in the context of circadian schedules that "any requirement that results in the hiring of additional new drivers would diminish the

safety benefits of the new rule." FMCSA Br. 27, 35; *see generally* Intervenors Br. 5-7. Although the final rule cites a safety offset for hiring new drivers, 68 FR 22494, 22497, FMCSA did not rely on this alleged risk as justification for rejecting a 24-hour cycle, discussed *infra,* or for any other choice it made in the final rule. *See SEC v. Chenery,* 332 U.S. 194, 196 (1947) (reviewing court must judge propriety of agency action "solely by the grounds invoked by the agency").

The RIA assumed that industry would have to hire new drivers to cover all hours that current drivers would be prohibited from working. *See* JA 1685. Yet the NPRM repudiated this mode of analysis when it concluded "motor carriers could make up for lost drivers [sic] hours by increasing the efficiency of existing drivers." 65 FR 25573; *see also* Preliminary Regulatory Evaluation (2000) ("PRE") (JA 817-18, 857); Campbell & Belzer, *Hours of Service Regulatory Evaluation Analytical Support* (2000) ("Analytical Support") (JA 1028-30). As the latter found, if nondriving labors were cut by 25% and driving increased correspondingly, "the trucking industry could meet the HOS 60-hour-a-week regulation without hiring any new drivers." JA 1036, 1038-39. Neither the final rule nor the RIA offers a reasoned analysis for FMCSA's apparent reversal on this point.

More critically, however, the rationale that new drivers would diminish

safety benefits flies in the face of FMCSA's previous recognition that the potential safety risk of new drivers is outweighed by the danger of overworking the existing pool of drivers. As FMCSA explained in connection with the NPRM:

> FMCSA does not believe that new drivers are likely to have a significant offsetting safety impact. First, it is unlikely that drivers who would have to reduce their hours under the proposal are especially safe. We believe that drivers who operate over the current limit are more likely to be involved in all types of crashes, not just fatigue-related. Thus, it does not make sense to compare the (possibly elevated) crash rates of new drivers with those of the average current driver; a more reasonable comparison would be with the rates of current below average drivers.

PRE (JA 845). Moreover, FMCSA previously expressed doubts that "new" drivers would be as unsafe as suggested because if wages or other conditions improved, many experienced ex-truckers might return to driving. *Id.*; *see also* Roundtable One (JA 1182-83). Yet FMCSA, without explanation, ignored all of these considerations in predicting a safety offset for hiring new drivers in the final rule. *See* 68 FR 22494, 22497; RIA (JA 1726-29, 1736-37).

Finally, if FMCSA rejected more stringent proposals because they could require hiring new drivers, it would almost certainly bar *any* rule that would satisfy the legislative mandate and reduce fatigue-related incidents.

B. Challenged Aspects of the Final Rule

1. 24-Hour Cycle

FMCSA contends the final rule "permits" drivers to work a 24-hour circadian schedule. FMCSA Br. 3-4. That contention is a non sequitur. After all, nothing in the *old* rule *forbade* circadian schedules. Rather, the issue is whether a driver maximizing driving and minimizing rest under the rule would operate on a 24-hour cycle rather than a backward-rotating schedule that is so "detrimental to a driver's sleep, thereby increasing the risk that the driver will cause a crash." 68 FR 22491.

FMCSA contends (at 35-36) that the 21-hour schedule posited by petitioners (11-hours-driving followed by 10-hours-off-duty) is "contrary to the record," although it previously recognized that the rule establishes a 21-hour drive-rest cycle. 68 FR 22468. It is not petitioners, but FMCSA, that has imposed a new construct for whether the regulatory goal has been achieved. If the more relevant consideration in determining whether the rule institutes a circadian schedule were the total number of hours a driver could conceivably *work* added to off-duty hours, then the old rules already approximated a 24-hour schedule (15-duty-hours plus off-duty breaks, followed by 8-hours-off-duty). Yet FMCSA has always characterized the prior rules as establishing an 18-hour cycle (10-hours-

driving/8-hours-off-duty), not a 23- or 24-hour cycle. *See* 61 FR 57257; 65 FR 25548, 25558; 68 FR 22491.

FMCSA's former reliance on the *driving* cycle in evaluating circadian effects on long-haul drivers reflects how these drivers actually operate. There is nothing "patently unrealistic," FMCSA Br. 36, about the specter of long-haul truckers driving 11 hours, taking 10 off, and driving 11 again—just as they previously drove 10, took 8 off, and drove 10. To be sure, drivers have loading/unloading responsibilities that may extend their duty hours on days when they are picking up or dropping off loads, but these duties do not arise every driving shift. "Long-haul operations often require multi-day trips in which drivers spend multiple nights away from home." RIA (JA 1676). A recent survey found the average trip lasted approximately 13 days, and 18 days at the 75th percentile. Abrams et al., *Commercial Motor Vehicle Driver Fatigue, Alertness, and Countermeasures Survey* (1997) (JA 726-27). Drivers on these cross-country trips do not load/unload every shift, but maximize driving time.

Accordingly, the record reflects that driving 18-hour cycles "became the norm for a significant segment of the industry." Roundtable Two (JA 1309). That drivers under the old rules usually drove roughly 18-hour cycles is implicit in industry comments that a driver could "drive up to 15 hours in any given 24-hour

period, giving a range of 750 miles," 68 FR 22474, which necessarily entails maximizing *driving* (not duty) hours and cycling 18- or 19-hour days. Drivers freely admit driving that kind of schedule. *E.g.,* Public Hearing (JA 253) (drivers will drive 10 hours, take 8 hours off-duty, then drive another 10 hours); *id.* 255, 259, 261 (same); Public Hearing (JA 276-77) (same). There is every reason to believe drivers will similarly cycle 11 hours driving, 10 hours rest, under the new regime. As ATA acknowledged in its recent sleeper-berth petition (at 13): "FMCSA's new HOS rule contains a significant potential for work-rest cycles that are less than 24 hours and which result in backward rotation. Most notably, long-haul drivers can log 11 hours driving, 10 hours off-duty, 11 hours driving, 10 hours off-duty, and so on for an entire work week . . . ." www.truckline.com/safetynet/regulatory/110303FinalPetition.pdf.

Thus, the problem of noncircadian schedules under the final rule is real. FMCSA's chief objection to a 24-hour drive-rest cycle is that a "rigid" start time would mean that drivers who drove significantly fewer hours than permitted would have to take 16 hours off before they could resume driving. FMCSA Br. 34-35. The agency is trying to have it both ways in arguing both that drivers will tend to work 14-10 shifts and thus be on a circadian schedule, while maintaining that an actual 24-hour schedule is too "rigid" and "inflexible" to demand of industry. In

any event, FMCSA posits a false conundrum: The proposed rule (and petitioners' variation, Petitioners' Br. 38-39) did not require all drivers to operate on a circadian schedule *regardless of their driving hours*. Schedules followed by truckers are diverse, and backward-rotating schedules are tolerable for those drivers operating well below the maximum. But HOS regulations seek to address the worst-case scenario of drivers working to their limits, regulating *maximum* driving hours while specifying the minimum off-duty time. Thus, the rules address not only the "average" driver who works 64.3 hours per week, but long-haul drivers at the 75th and 90th percentiles working 80 and 96 hours per week, driving 12 and 15 hours per day, and as many as 170,000 miles annually. 65 FR 25558; Petitioners' Br. 11-12.

There is no need, then, to compel a trucker who drives for 3 hours to remain off-duty for another 21—or, perhaps, even a driver working 8 hours to remain off-duty for 16. But a trucker at or near the 10- or 11-hour maximum is already straining against human limits for safe operations. FMCSA offers no justification for allowing that driver, who is most fatigued and at greatest risk of a crash, to start each successive shift 3 hours earlier. Furthermore, if FMCSA is correct that many of these drivers will be on circadian schedules anyway because they will work full 14-hour shifts followed by 10 hours off-duty, Br. 36, then there is no downside to

petitioners' variation, which would require drivers driving at or near the maximum to add unused duty hours to their off-duty time.

2. Split Sleeper-Berth Time

FMCSA repeats its error regarding noncircadian schedules by asserting that the sleeper-berth rules provide an "opportunity" for drivers to receive "eight consecutive hours of uninterrupted sleep every day." FMCSA Br. 41 (quoting 68 FR 22469). The agency has it exactly backwards. The question is not whether the rule provides an "opportunity" for drivers to take their rest in a single block, but whether the rule *requires* drivers to take a long enough block of off-duty time to obtain the uninterrupted sleep FMCSA found they need. The answer is no.

FMCSA contends that its decision to continue allowing split sleeper-berth rest was consistent with its statutory charge not to revise the rules "without properly considering the costs and benefits of such a change," *id.* 40; *see also id.* 5. Yet the agency concedes that the RIA did not even purport to evaluate the sleeper-berth provision. Br. 58. FMCSA's own argument—that nearly three-quarters of drivers who use sleeper berths take their sleep in a single period, *id.* 41—suggests that requiring the remaining quarter to follow suit would be neither costly nor impracticable.

Remarkably, the agency continues to rely on the Dingus study (JA 1636),

maintaining that its findings show that single drivers were exhausted only *in comparison to team drivers.* FMCSA Br. 39. Dingus's findings were hardly that narrow. Instead, "the findings of this study strongly suggest that single drivers are greatly affected by drowsiness, which in turn compromises their ability to safely operate their vehicles." JA 1641, 1654, 1660. The study drew comparisons to team drivers to highlight "[t]he benefits of reducing drowsiness." *Id.* 1641. FMCSA notes that critical incidents did not increase for hours driven over regulatory limits, Br. 39—small comfort when, out of 30 single drivers studied over 6-10 days, JA 1639-40, *a full one-third* were involved in 19 "critical incidents," including 2 collisions and 17 near-collisions. *Id.* 1649-52. That single drivers were so significantly impaired is hardly surprising given that they obtained only 6 hours' sleep per 24-hour period. *Id.* 1647. And as dispiriting as Dingus's findings are regarding the overall safety of single-driver sleeper operations, the study did not even attempt to evaluate the effects of split rest. The hazards of split-sleep patterns and their strong correlation with fatigue-related crashes were thoroughly addressed, however, in the 1995 NTSB (JA 35) and Hertz (JA 178) studies. *See* Petitioners' Br. 6-7, 39; *see also* 68 FR 22464; 65 FR 25561,

25586-87.[1]

FMCSA's insistence that sleeper-berth "proximity and convenience" obviates the need for an uninterrupted off-duty period ignores how the rule works. The *only* basic life activity (eating, dressing, exercising, bathing, recreation, commuting, personal errands, etc.), 65 FR 25554; 68 FR 22469, not implicated for a sleeper-berth driver is commuting to his bed. A driver splitting rest in the berth, however, is barred from *any* other activity because, under the sleeper-berth exception, *all split-rest time must be spent in the sleeper berth*. 68 FR 56211 (§ 395.1(g)). Thus, FMCSA's reasoning that if a driver obtained seven hours' sleep in his berth, it would be unnecessary for him to remain there an additional three, FMCSA Br. 21, makes little sense. If the driver were not *splitting* his rest, he could spend his 10 off-duty hours however he wished (7-8 hours to sleep and 2-3 for meals, showering, other activities) because only *split* rest in a berth is restricted. Even if 10 hours off-duty were unnecessary, FMCSA makes no effort to defend allowing drivers to split their sleep in two equal or roughly equal segments (5-5 or 6-4 splits), which guarantees they will not get the 7-8 hours of continuous

[1] Inexplicably, at Br. 39, FMCSA also cites Wylie et al., *Commercial Motor Vehicle Driver Fatigue and Alertness Study* ("Wylie") (JA 281), but that study did not address sleeper-berth usage at all. The drivers there slept in hospitals or motels. JA 286.

sleep they need.

Finally, any suggestion that drivers know best how much rest they need, *id.* 20, is readily refuted. As the agency has recognized, drivers "may overestimate their ability to operate under fatigued conditions." FHWA, *HOS Study: Report to Congress* (1990) (JA 149); *see also* 1995 NTSB (JA 86). Indeed, this is why the agency has promulgated HOS regulations.

3. Consecutive Driving Hours

FMCSA's primary justification in the final rule for expanding consecutive driving hours from 10 to 11—despite its admission that risk increases geometrically during the 10th and 11th hours—was that the RIA demonstrated safety benefits because drivers would now receive 10 hours off-duty instead of 8. 68 FR 22471. As we demonstrated, however, the RIA showed the final rule had "safety benefits" only because it *excluded* from its model the effects of increased daily and weekly driving hours, *the very change in need of justification*. Petitioners' Br. 46, 61-64.

FMCSA now attempts to defend the driving increase on the alternative theory that it is the total amount of *duty* time that determines the safety of driving longer hours. Claiming that it has reduced daily on-duty time from 15 to 14 hours, the agency asserts that drivers will be less tired and better able to drive for 11,

instead of 10, hours without rest. It also cites studies that purportedly demonstrate that the effects of time-on-task are insignificant. FMCSA Br. 4, 42-45. The problems with this rationale are that it was suggested only in passing in the final-rule commentary, the rule does not actually reduce on-duty time, and the agency previously declined to rely on the studies cited in the brief—and with good reason.

To be sure, the final rule stated that "the more relevant issue is how long a driver can be awake and 'at work' and still be allowed to drive," 68 FR 22471, but that was the sum total of its analysis. None of the studies cited at FMCSA Br. 42-43 was discussed. FMCSA cannot now defend its shift in long-standing policy by relying on a "passing reference" to the interaction between driving hours and overall on-duty hours. *See Missouri Pub. Serv. Comm'n v. FERC,* 234 F.3d 36, 41 (D.C. Cir. 2000) ("passing reference" to relevant factors insufficient").

In any event, the proposition FMCSA now urges—that "on-duty hours in general (and not just driving hours) contribute to a driver's fatigue," Br. 42-43—is unexceptionable, but beside the point. Contrary to the agency's misleading suggestion, *see id.* 28, 42, 44, the final rule *does not* reduce total on-duty hours. It merely reduces from 15 to 14 hours the on-duty hours during which a driver is permitted to *drive*. No driver may *drive* after being on-duty for 14 hours, 68 FR 22516 (§ 395.3(a)(2)), but a driver may remain on-duty indefinitely (subject to

weekly limits) and resume driving after 10 hours' rest. As FMCSA put it:

> The new rule, like the current rule, does not limit the length of time a person can be on duty. The current rule states that a driver cannot drive after being on duty for 15 hours, but the driver could remain on duty indefinitely. This final rule states that a driver cannot drive after being on duty after the end of the 14th hour after coming on duty, but the driver also can remain on duty indefinitely.

Id. 22504. If drivers have extensive non-driving duties, as FMCSA and intervenors claim (FMCSA Br. 36; Intervenors' Br. 22), these responsibilities will not evaporate simply because the agency prohibits *driving* after 14 hours. If anything, because drivers may now drive 11 hours rather than 10, their total duty hours are likely to be *longer*, not shorter. If it takes 5 hours to unload a truck, the driver's day under the new regime will last 16 hours rather than 15. The exhausting and inefficient burdens of waiting, loading, and unloading placed on drivers have been extensively chronicled. *See* 65 FR 25573; PRE (JA 817-18, 857); Analytical Support (JA 1028-30, 1035-36, 1038-39); Phipps Comment (JA 18) (4-6 hours to unload); Brown Comment (JA 34) (8 hours to unload); Public Hearing (JA 270) (11-hour delay to unload); Public Hearing (JA 279) (3 or 7 hours unloading). Truckers generally log this unpaid time "off-duty," allowing them to work even longer hours while making their logs look "legal." Analytical Support

(JA 1029); Intervenors' Br. 34 n.20.[2]

Thus, far from being energized to drive that extra hour because their total labors will have diminished, drivers under the new regime will work *at least as much, if not more,* than under the old rules—leaving aside the massive weekly increases enabled by the 34-hour restart provision, discussed below.

Even if it were true that drivers will work "only" 14-hour days under the final rule, nowhere has FMCSA established that this so-called "reduction" will mitigate the geometrically increased risk of longer driving hours. This is no quibble about the agency's "science" versus the petitioners'. FMCSA's own data, 65 FR 25544 (Chart 5), which it studiously ignores, and repeated controlled studies of actual truck crashes confirm that risk increases with hours driven—and sharply after 8 hours. *Id.* 25546; *see* Petitioners' Br. 17-18 & n.3, 42-44, 62-63; Insurance Institute for Highway Safety ("IIHS") Amicus Br. 14-15.[3]

In a quest for more "helpful" scientific research, FMCSA cites three studies,

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[2] In denying that split sleeper-berth time plays into this abuse, Br. 41-42, FMCSA turns a blind eye to reality. *See* Ray Comment (JA 28) (drivers show 2-8 hours unloading time as "sleeper time"); Schobert Comment (JA 22); Jones Comment (JA 31-32); Public Hearing (JA 262); Public Hearing (JA 269); Public Hearing (JA 275).

[3] In particular, see the studies controlling for time-of-day effects by Lin (1993) (JA 745), Jones & Stein (1987) (JA 613-46), Saccomanno (1996) (JA 647-65), Lin (1994) (666-74), and Frith (1994) (JA 675-88).

on which it previously did not rely, to support extending consecutive driving hours. FMCSA Br. 44-45. Two were cited in a string-cite in the part of the final rule addressing why 14 hours on-duty "is long enough." 68 FR 22492; *see* O'Neill et al., *Effects of Operating Practices on Commercial Driver Alertness* (1999) (JA 768); Folkard, *Black Times: Temporal Determinants of Transport Safety* (1997) (JA 719). None figured in FMCSA's non-analysis of why driving an extra hour would be safe.

FMCSA's quotation from Folkard (Br. 44) is taken out of context. That study of transport accidents generally showed that "the safest duty durations may lie in the region of 8-10 hours." JA 721. It says nothing about how long truckers may safely drive. The O'Neill study, conducted by ATA's research arm, tested a tiny sample of drivers (10) in a simulator.[4] The drivers drove the simulator only during the daytime, took 3 scheduled breaks throughout the day, rested for 10 consecutive hours at night, and received a weekly 58-hour recovery period allowing 3 separate sleep periods between 12-6 a.m. *See* JA 770-75. In short, the drivers worked under ideal conditions far removed from the realities of long-haul

[4] The limitations of simulator studies are well known. *See* 1995 NTSB (JA 76) ("Studies of subjects in a laboratory environment or controlling driving experiments cannot provide such evidence [as studies of actual crashes] of the factors that lead to fatigue-related accidents (or any accidents for that matter).").

trucking. Both the study's authors and FMCSA recognized that because this schedule was so "benign," the study's results "may not be generalizable to operations that are not day shifts, have shorter post-shift off-duty periods, have few or no breaks during the duty period, or vary from what the driver is accustomed to in terms of circadian disruptions or longer-than-usual on-duty periods." FHWA, *An Annotated Literature Review* (1999) (JA 920); *see* O'Neill (JA 770-71, 790). Yet now FMCSA, for the first time, makes that leap.

The Wylie study cited by FMCSA (at 44-45), also conducted in partnership with ATA's research arm, was the subject of such a blistering report by the agency's peer-review panel that FMCSA steered clear of relying on it in the final rule to justify increasing consecutive driving hours. The panel report concluded that "[t]he Driver Fatigue and Alertness study suffered from poor design and an inappropriate statistical approach to address its major objectives." David Shinar & Robert M. Nicholson, *Peer Review Report of Commercial Driver Fatigue Research* (1995) (JA 393). It found that outcome measures used to gauge potential degradation in driving performance were "sometimes unreliable and not validated relative to the underlying concept they were attempting to measure." *Id.* The study's objectives included, among others, measuring loss of alertness due to fatigue and determining the effects of various work/rest schedules. *Id.* 395. The

panel concluded that the study's satisfaction of these objectives varied from "fair" to "not at all," *id.* 396, and that its "analyses look like a fishing expedition rather than a properly designed plan for a test of predetermined hypotheses." *Id.* 397; *see* 1997 AHAS Comments (JA 301-08, 330-71) (critique of Wylie); 1997 IIHS Comments (JA 405-08) (same).

Wylie not only failed to control for the effects of time of day (JA 393, 397), (in contrast to studies cited *supra* note 3, *see* 1999 IIHS Comments (JA 611-12); 2000 IIHS Comments (JA 1150-52)), and used questionable performance measures, but it did not keep track of driver naps, Wylie (JA 285), which obviously would affect performance. The study's comparison of drivers on 10-hour and 13-hour schedules was incomplete because it was not designed to evaluate their performances at night. *Id.* 284. In short, Wylie's findings are not sound or credible, and FMCSA was right to disregard them in the final rule.

4. 34-Hour Restart

To this day, FMCSA refuses to acknowledge forthrightly that the 34-hour restart allows drivers to rack up almost 30% more driving hours and 40% more duty hours weekly than the old rules, effectively abolishing weekly limits. *See* Petitioners' Br. 25-28, 47-50. Elsewhere, however, the agency hints that "carrier revenue and net income will return to, or surpass, their current levels" as soon as

"carriers increase shipments to take advantage of these extra hours." 68 FR 22505-06. The intervenors concede that the provision "authorizes drivers to work more hours per week than they had worked under the prior rule," Intervenors' Br. 27; *see also id.* 13 n.13, 21, but claim there is no evidence that a driver who "has received the mandatory 10-continuous-hour break each day needs *any* weekly break." The 34-hour restart, they contend, may "leave a driver little time for hobbies or outside interests," but creates no safety risk. *Id.* 19.

The intervenors' argument is twice flawed: First, its premise is false, as drivers are not required to take a 10-continuous-hour break, but may split their sleep in a sleeper-berth, thus "spend[ing] a significant portion of the work shift in a state of partial sleep deprivation." Balkin et al., *Effects of Sleep Schedules on Commercial Motor Vehicle Driver Performance* (2000) (JA 1092). We also know that drivers cheat their sleep to load and unload, *see supra* at 15-16 & n.2, and that violations of the old 10/8 rule are the most pervasive. Commercial Vehicle Safety Alliance Comments (2000) (JA 1536, 1542-43).

Equally important, FMCSA *rejected* the intervenors' argument that no weekly time off is necessary, conceding that drivers need extended "recovery periods" after sustained daily work—not to pursue "hobbies," but to avoid "cumulative fatigue and/or sleep deprivation." 68 FR 22478; *id.* 22465 ("[T]he

combination of long driving times and multiple days provides the greatest concern . . . ."); *see also* 65 FR 25555-56 (citing need for weekly recovery period to address "increased crash risk associated with long driving times over two or more days of a week").

FMCSA never abandoned that position, which makes the resulting 34-hour restart even more irrational. To this day, FMCSA "[r]ecogniz[es] the need for 'recovery periods after a sustained period of work,'" Br. 46 (quoting 68 FR 22478), but concludes that "a 34-hour rest period would meet this need." *Id.* This position is unreasoned and contrary to statutory mandates.

First, the final rule does not demand that every long-haul driver receive 34 hours off-duty. *See* 68 FR 22516 (§ 395.3(c)); http://www.fmcsa.dot.gov/Home_Files/hos/hos_faqs.asp, E-4 (34-hour restart "optional"). As FMCSA put it, many drivers, such as LTL drivers, work on schedules "in which a restart provision will be unnecessary in the absence of an unforseen circumstance." FMCSA Br. 48. Yet because LTL drivers usually drive between terminals at night, RIA (JA 1684), they still suffer from cumulative fatigue and sleep deprivation. *See* 68 FR 22478-79; RIA (JA 1698-99). And while FMCSA now touts the virtues of "regular sleep schedule[s]," Br. 47—which has nothing to do with the 34-hour restart—it previously conceded that "*even when a consistent schedule is established,*"

nightworkers are susceptible to sleep deprivation. 65 FR 25554 (emphasis added).

Second and more fundamentally, FMCSA never comes to grips with the central thrust of petitioners' challenge to the 34-hour restart: for drivers maximizing either driving or duty hours (and the number of such drivers is significant, *see* Petitioners' Br. 11-12, 44-45, 55), the 34-hour restart allows carriers to force them to drive nearly 30% or work 40% more hours than under the old rules. *See id.* 25-28, 47-50. The reason they can do so is because their weekly rest is being reduced *by more than half*. FMCSA attempts to discard this problem as a "parade of horribles," maintaining that the possibility is remote that drivers will maximize driving hours without breaks. Apart from the fact that its optimism is unfounded, FMCSA conflates the question of how many continuous hours a driver might drive with the total hours he might work weekly.

Suppose we accept, *arguendo,* FMCSA's and intervenors' view that drivers will be on an approximately circadian schedule because they will work 14 hours (rather than merely drive for 11) and then take 10 off. FMCSA Br. 36; Intervenors' Br. 22. As shown in the third graph at Petitioners' Br. 27, a driver on an 8-day schedule would reach his 70-hour limit toward the end of his 5th day of work (8 p.m. Friday in this illustration). If there were no restart provision, that driver would then have 82 hours off-duty until he was eligible to resume driving at

6 a.m. the following Tuesday morning. With the new restart, however, his employer can compel him to resume driving at 6 a.m. Sunday after only 34 hours off-duty and work an additional two shifts within that 8-day period, *reducing his block of rest by 48 hours*. Comparisons of drivers maximizing driving hours under the old rules and final rule, shown in the first two graphs, also yield a 50% or more reduction in recovery time.[5]

The 34-hour restart, then, fails to benefit those nighttime drivers who now receive no extended weekly time off and dramatically *shortens* time off for the rest of those drivers who most need it. In sum, *no driver,* regardless of schedule, benefits from the 34-hour restart and many are affirmatively harmed by it.

With respect to the timing and duration of any weekly off-duty period, FMCSA claims that "[a]s available research attests, allowing drivers to obtain two uninterrupted sleep *periods* . . . provides for a sufficient period of recovery to permit a driver to restart the work week." Br. 48 (emphasis added). This argument simply repeats the sleight of hand in the middle column on 68 FR 22479, where FMCSA moves from research citing the need for two *nights*' sleep to a conclusion

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[5] Petitioners' first two graphs also show why FMCSA's contention that the 34-hour period would permit the driver to begin his "new work week" at approximately the same time as his previous shift is baseless. FMCSA Br. 46. Only a driver rotating precisely 14/10 shifts will resume work after 34 hours off-duty at the same time as his previous shift.

that two sleep *periods* would suffice. *See* Petitioners' Br. 52.[6] Moreover, if the 34-hour off-duty period begins at any time other than at night, drivers will likely sleep only once—during the single night encompassed by the 34-hour off-duty period—not twice. *See* Public Hearing (JA 273) ("Now, who's going to sleep from 3:00 p.m. to 11:00 p.m."); 274 ("I'm telling you, trying to sleep in the middle of the daytime doesn't work."); 278 ("Like I said who sleeps eight hours anyway at 12:00 or 2:00 in the afternoon."), 280 ("I don't sleep at 1:00 o'clock in the afternoon."). Although both FMCSA and intervenors insist that providing long-haul drivers two consecutive nights off "would shift significant amounts of driving that presently occurs at night to daytime," Intervenors Br. 29; *see also id.* 8; FMCSA Br. 18, 29, 47-48, their briefs, like the final rule, are devoid of critical analysis. FMCSA offers no explanation why, for instance, if a driver is permitted to drive for five nights but then takes two nights off while another driver replaces him, nighttime traffic would be forced to shift to daytime. *See* Petitioners' Br. 53-54. Nor would a two-night off-duty requirement be any more likely to "strand" a driver away from home, *see* Intervenors' Br. 30, than the 60- or 70-hour weekly ceilings established by the old rules and maintained by the final rule (subject to the

[6] Even the O'Neill study FMCSA now cites (at 47) recommended two *nights* off, even under the unusually favorable conditions tested. JA 790; *see also* Petitioners' Br. 49 (citing other evidence).

34-hour restart).

5. EOBRs

Petitioners never argued that Congress expressly mandated the installation of EOBRs, but only that Congress directed the agency to "deal[] with . . . automated and tamper-proof recording devices," 49 U.S.C. § 31336 note, and that FMCSA has not done so. Petitioners' Br. 12 n.2, 54-55. In a stab at creative statutory reconstruction, FMCSA argues that Congress "merely directed the agency to promulgate an advance notice of proposed rulemaking on the issue, which is precisely what the agency did." Br. 29; *id.* 49-50.

The statutory directive is not limited to an ANPRM. The statute goes on to require the agency to "issue a notice of proposed rulemaking *dealing with such issues* within 1 year" after the ANPRM, and then to "issue a final rule *dealing with those issues* within 2 years" after that. § 31136 note (emphasis added).

FMCSA and the intervenors never dispute, and hence concede, the underlying justification for mandating EOBRs—that abuse of HOS rules is rampant and the handwritten logs virtually worthless. Petitioners' Br. 10-12, 44-45, 55; IIHS Amicus Br. 8-9. As one driver put it: "Even if you're a church deacon *you will* lie on your log." Horner Comment (JA 26). Yet FMCSA offers only a litany of excuses for failing to decide whether to mandate use of technology

that would accurately record driving hours.

FMCSA continues to cite uncertainty regarding the cost of EOBRs and whether they operate as claimed, Br. 24, 52, as if some obstacle prevented it from assessing costs and testing the devices. Particularly dismaying is FMCSA's mischaracterization of the record to dismiss IIHS's repeated citation of three vendors, including VDO, that offer EOBRs for $500 or less. *See* IIHS Amicus Br. 10. U.S. companies did *not* say that VDO's technology would not meet the FMCSA's requirements. *See* FMCSA Br. 51. Rather, the final rule says that "VDO had talked to several U.S. companies and was told by Qualcomm and Cadec that they believed *they* could not meet the requirements for EOBRs as proposed." 68 FR 22488 (emphasis added).[7]

In any event, if FMCSA is uncertain about whether certain products would meet regulatory requirements, it should test them. The Intervenors' Brief does not even raise the cost issue, a tacit acknowledgment that cost is not a credible concern when up to 70% of industry already uses onboard electronic technology that can be used or modified to record driving hours. Petitioners' Br. 29 & n.6; *see also id.*

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[7] In a sign of how fast technology responds in a regulation-driven market, both companies now advertise EOBRs that will monitor compliance with the new rules. *See* http://www.qualcomm.com/press/pr/releases2003/press1279.html; http://www.cadec.com/news/press_release_detail.asp?id=31.

21-22 & n.4, 57 n.10 (paperwork savings from EOBR mandate).

It also matters little that EOBRs automatically monitor only driving time, not nondriving duties. Driving in excess of limits is the most common and unsafe abuse of HOS rules. As for tamper-resistance, EOBRs have been in use for over 15 years, and FMCSA cites no problems on that score. The remaining excuses simply involve details of implementation that can be worked out during a phase-in period (if one is warranted). If FMCSA agrees that standardization is sensible, it can promulgate design standards.

The privacy argument is a makeweight. FMCSA conflates drivers' concerns regarding their personal privacy with carriers' fears of litigation, which have nothing to do with "privacy." *See* FMCSA Br. 53-54. Nor would it be good public policy to restrict access to information recorded by EOBRs when it might show that a driver had exceeded his hours, was speeding, or had committed another transgression. Furthermore, EOBRs are as likely to help a faultless carrier or driver defend litigation. *See* NTSB, *Fatigue, Alcohol, Other Drugs, and Medical Factors in Fatal-to-the-Driver Heavy Truck Crashes (Volume 1)* (1990) (JA 220-21) (onboard recorders helpful in crash investigations).

Where Congress directed FMCSA to "deal with" EOBRs by 1999, it is insufficient for FMCSA to say, years later, that it is not prepared to require EOBRs

"at this time" and must research the problem indefinitely. If more research is necessary, which is doubtful, FMCSA must provide a definite and short timetable for resolving outstanding issues. *See National Congress of Hispanic American Citizens v. Marshall,* 626 F.2d 882, 890-91 (D.C. Cir. 1979) (agency must have "plan" and "timetable" to complete rulemaking); *see also Public Citizen Health Research Group v. Chao,* 314 F.3d 143, 156 (3d Cir. 2002) (refusing to tolerate indefinite delay by agency that had done nothing over prior four years to resolve remaining uncertainties).

6. Driver Health

Where, as here, an agency fails even to *acknowledge* its clear statutory mandate to ensure that drivers' responsibilities do not adversely affect their health or consider the medical and health costs associated with agency action, the resulting final rule is contrary to law. *See* Petitioners' Br. 30, 59; AHAS Amicus Br. The rule's discussion of rest, fitness, etc. all occurred from a highway-safety/industry-productivity standpoint, without regard to the rule's impact on driver health.

7. The RIA

FMCSA baldly asserts that any error in its releasing the RIA after issuance of the final rule, without opportunity for public comment, was harmless. FMCSA

Br. 56. The agency does not explain *how* the error could conceivably be harmless. FMCSA does not and cannot dispute that it relied on the RIA. *See, e.g.,* 68 FR 22471, 22479, 22494-501. Nor does the agency deny that public comments on the RIA's model could have influenced its adoption or the resulting final rule. This Court's precedents are clear: The most critical factual material used to support the agency's position must be made public and exposed to refutation. *See* Petitioners' Br. 60-61.

FMCSA's defense of the RIA's "model" of crash-reduction benefits is similarly perfunctory, despite its obligation, where the methodology of a model is challenged, to "provide a complete analytic defense." *United States Air Tour Ass'n v. FAA,* 298 F.3d 997, 1008 (D.C. Cir. 2002) (citation omitted). As petitioners demonstrated, Br. 46, 61-64, the RIA's model is entitled to no weight because it assumes away the very changes to the rules most wanting justification—the dramatic expansion of consecutive and weekly driving hours. FMCSA contends it was reasonable to disregard the effect of time-on-task "because there was no reliable data on the subject." Br. 58. Perversely, it says that, because the old HOS rules prohibited truckers from driving after 10 hours (because that was believed unsafe), the agency lacked the necessary data to demonstrate that 11 hours of driving would *not* jeopardize safety, *id.* 58-59—so it went ahead with the change

anyway. Yet FMCSA's own data and multiple studies document the common-sense notion that longer driving hours are less safe, and there is no basis for assuming that the exponentially heightened driving risk at 10 hours will evaporate at 11. FMCSA did not allow statistical uncertainty to get in the way of estimating that hiring new drivers might increase risk—which is based on far less data—where that estimate would tend to cut *against* adopting safer rules. *See* 68 FR 22494, 22497; RIA (JA 1726-29, 1736-37).

Other comments by FMCSA on the RIA's model reflect its misunderstanding of petitioners' challenge. Petitioners' observation (at 32, 61) that the RIA counter-factually assumed that drivers take their rest in single blocks, for example, was not an attack on the sleeper-berth provision, but rather on a key factual assumption underlying the RIA model: namely, that the rule produces safety benefits because drivers will now obtain 10-hour blocks of rest.

FMCSA piously concludes (at 59) that the RIA is consistent with the "congressional directive to balance *all* costs and benefits of a proposed regulation," but, in reality, the agency balanced only those costs (industry costs associated with safer rules, not driver-health costs associated with less restrictive rules) and those benefits (benefits of allegedly longer rest periods but not negative benefits from dramatically longer driving hours) that would favor the predetermined outcome—a

final rule that saves industry $1 billion annually, requires 58,500 fewer drivers, and does nothing to alleviate, and much to worsen, truck-driver fatigue.

CONCLUSION

The Court should vacate the final rule and remand to FMCSA to promulgate a new final rule.

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

I hereby certify that the foregoing Final Reply Brief for Petitioners complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B). The brief is composed in a 14-point proportional typeface, Times New Roman. As calculated by my word processing software (WordPerfect), the Brief (exclusive of those parts permitted to be excluded under the Federal Rules of Appellate Procedure and the D.C. Circuit Rules) contains 6,998 words.

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CERTIFICATE OF SERVICE

The undersigned counsel certifies that on this 27th day of February, 2004, she caused two copies each of the foregoing Final Reply Brief for Petitioners to be served by first-class U.S. mail, postage prepaid, on the following:

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