ORAL ARGUMENT NOT YET SCHEDULED

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

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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

Petitioners,

v.

FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION AND THE UNITED STATES,

Respondents.

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

PETITIONERS' FINAL REPLY BRIEF

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

Gregory A. Beck
Gupta Beck PLLC
1625 Massachusetts Ave. NW
Suite 500
Washington, DC 20036
(202) 470-3826

Scott L. Nelson
Allison M. Zieve
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

Attorneys for Petitioners

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GLOSSARY

FMCSA	Federal Motor Carrier Safety Administration
FMCSA Br.	Brief for Respondents FMCSA and United States
HOS	Hours of Service
JA	Joint Appendix in this case
OOIDA	Owner-Operator Independent Drivers Association, Inc.
PC Br.	Brief for Petitioners Public Citizen, et al.
RIA	Regulatory Impact Analysis

STATUTES AND REGULATIONS

Statutes and regulations are reproduced in petitioners' opening brief.

SUMMARY OF ARGUMENT

For the third time in nine years, the government seeks to persuade this Court that a rule substantially increasing the hours truck drivers may drive is consistent with statutory commands that the Federal Motor Carrier Safety Administration (FMCSA) issue an hours-of-service (HOS) rule that improves safety. The government even denies that petitioners have standing to challenge the HOS rule, although two of the petitioners are truck drivers it directly regulates, and one has submitted a declaration stating that her work schedule requires her to use the rule's restart provision and to drive 11 hours in a shift. Because the HOS rule permits the driver's employer to impose these otherwise unlawful work requirements, she has demonstrated an injury caused by FMCSA's issuance of the rule. *Animal Legal Def. Fund, Inc. v. Glickman,* 154 F.3d 426, 440-41 (D.C. Cir. 1998) (en banc).

The government's argument that petitioners waived their challenge to the HOS rule's restart provision is equally meritless. Petitioners' regulatory comments stated that, as a compromise, they would support a regulatory package including a limited 34-hour restart *if* it were accompanied by a 10-

hour-per-shift driving limit and additional changes to the restart to ameliorate its effects on drivers using eight-day, 70-hour work schedules. As FMCSA expressly acknowledged, petitioners preserved their opposition to a 34-hour restart if those conditions were not met—which they were not.

The government's defense of the 34-hour restart founders on FMCSA's failure to find that the substantial increases in driving it permits for drivers who maximize driving time are consistent with FMCSA's statutory obligation to adopt an HOS rule that reduces driver fatigue and improves safety. The government's brief attempts to downplay the increased driving permitted by the restart, but even as modified the restart allows drivers on eight-day schedules to drive more than 80 hours every eight days, and drivers on seven-day schedules to alternate weeks in which they drive 77 hours with weeks in which they drive 60 hours. By contrast, the pre-2003 rules imposed hard limits of 70 hours and 60 hours, respectively.

FMCSA's increase of the per-shift driving limit from 10 to 11 hours reflected its view that it had to choose a less safe rule over a safer one based on cost-benefit analysis. As the government argues, FMCSA must "consider" costs and benefits. But it is also required by statute to make safety its highest priority, a requirement that precludes it from "strik[ing] a different

balance than that struck by Congress," *American Textile Manufacturers Institute v. Donovan*, 452 U.S. 490, 509 (1981), by treating non-safety costs and benefits as determining factors in its rulemaking.

Even as an exercise in cost-benefit analysis, FMCSA's rulemaking was fatally flawed because FMCSA failed to conclude that the assumptions under which the 11-hour limit had greater net benefits than the 10-hour limit were more reasonable than those under which the 10-hour limit had greater benefits. The government's argument that FMCSA was justified in choosing the 11-hour limit because it had greater benefits in "most" analyses overlooks that a cost-benefit analysis is only as good as its assumptions. FMCSA cannot rationally prefer a rule because of the number of analyses in which it appears to have greater benefits without analyzing the reasonableness of their assumptions.

ARGUMENT

I. The Government's Standing Argument Is Meritless.

To establish standing, petitioners submitted the declaration of petitioner Dana Logan, who is employed as a truck driver and whose work schedule regularly requires her to use the HOS rule's restart provision and to drive more than ten hours a day. Ms. Logan's declaration establishes that

she has suffered an injury-in-fact attributable to the HOS rule, which allows her employer to require her to work longer hours in a week (through the restart) and drive longer hours (because of the 11-hour driving limit) than would be permissible under petitioners' view of the law. That injury would be redressed by a decision setting aside those features of the HOS rule. Ms. Logan has thus established "the three familiar prerequisites to Article III standing—injury, causation, and redressability." *Town of Barnstable v. FAA*, 659 F.3d 28, 31 (D.C. Cir. 2011). And when multiple petitioners join in a challenge to agency action, "the standing of one petitioner is enough" to provide Article III jurisdiction. *WorldCom, Inc. v. FCC*, 246 F.3d 690, 696 (D.C. Cir. 2001); *see also, e.g.*, *Rumsfeld v. Forum for Academic & Inst. Rights, Inc.*, 547 U.S. 47, 52 n. 2 (2006); *Glickman*, 154 F.3d at 445.

The government does not (and could not reasonably) contest that having to work or drive more hours is an injury-in-fact. Nonetheless, the government claims Ms. Logan has no standing because "FMCSA does not control this driver's schedule, and she fails to connect her alleged harm to the HOS rules." FMCSA Br. 19. The suggestion that Ms. Logan has not shown causation is directly contrary to this Court's precedents. As the en banc Court explained in *Glickman*, "a plaintiff satisfies the causation prong of

constitutional standing by establishing that the challenged agency rule permitted the activity that allegedly injured her, when that activity would allegedly have been illegal otherwise." 154 F.3d at 440-41; *accord, e.g.*, *Shays v. FEC*, 414 F.3d 76, 92-93 (D.C. Cir. 2005). Moreover, "[t]he proper comparison for determining causation is not between what the agency did and the status quo before the agency acted," but "between what the agency did and what the plaintiffs allege the agency should have done under the statute." *Glickman*, 154 F.3d at 441.

Of course, FMCSA does not control Ms. Logan's schedule—her employer does.[2] But if FMCSA's rules did not permit truck drivers to use the restart and drive 11 hours per day, Ms. Logan's employer could not *lawfully* require her to drive the additional hours that the restart and the 11-hour

[2] Ms. Logan's original declaration, which stated that she is employed as a long-haul driver and that "her job" and "her schedule" require her to use the restart and drive 11-hour shifts, made clear that her employer imposes the schedule that requires her to drive the longer hours that the restart and 11-hour driving limit permit. The government apparently understands this point, as it does not claim Ms. Logan's injury is "self-inflicted." To avoid any doubt, the addendum to this reply brief contains another declaration from Ms. Logan stating that "[w]hen I stated in my declaration that my schedule sometimes requires me to drive 11 hour shifts and to use the 34-hour restart, I was referring to the hours of service schedule I must use in order to make the deliveries set by my employer." Second Declaration of Dana Logan ¶ 2. *See Am. Library Ass'n v. FCC*, 401 F.3d 489, 494 (D.C. Cir. 2005) (supplemental standing declarations may be submitted with reply brief).

limit allow the company to require. Moreover, petitioners contend that "what … the agency should have done under the statute," *id.*, was issue a rule that did not include the restart and limited driving to 10 hours per shift. Thus, FMCSA's action "permit[s] the activity that allegedly injure[s] her, when that activity would allegedly have been illegal otherwise." *Id.* Under this Court's precedents, that is enough to establish causation. It is therefore unsurprising that the government cites *no* authority holding that a worker lacks standing to challenge agency regulations permitting her employer to require her to work excessive hours.

II. The Restart Rule Must Be Set Aside.

A. Petitioners Have Not Waived Their Challenge to the Restart.

In issuing its final rule, FMCSA acknowledged that the organizational petitioners argued that FMCSA had never adequately justified the restart provision and that the restart, as well as the other features of the HOS rule, must improve safety and not impair driver health compared with the rules in effect before 2003:

> Advocates *et al.*, … stated that the 11th hour of driving and the 34-hour restart had never been adequately supported by evidence. They stated that unless the Agency can demonstrate that 2003 changes would improve safety and not adversely affect driver health, the 2003 provisions cannot stand. The baseline for the

> rulemaking, in their argument, should be the pre-2003 10-hour driving limit and no restart.

JA 1092. FMCSA rejected petitioners' position, stating:

> The proper baseline against which to evaluate this final rule is … the rule currently in effect. The Agency's obligation under the Administrative Procedure Act is to explain reasonably and persuasively why it has changed the rules in effect for the last 7 years.

JA. 1092. Accordingly, FMCSA gave no further consideration to petitioners' contention that the restart did not satisfy statutory mandates that the HOS rulemaking improve safety and prevent adverse effects on driver health, relative to the rules in effect *when those statutes were enacted*. *See* Motor Carrier Safety Act (1984), 49 U.S.C. §§ 31131, 31136; ICC Termination Act of 1995, Pub. L. No. 104-88, § 408(a), 109 Stat. 803, 958-59 (49 U.S.C. § 31136 note); Motor Carrier Safety Improvement Act of 1999, Pub. L. No. 106-159, § 3(7), 113 Stat. 1748 (1999) (49 U.S.C. § 113 note).

The government's brief does not defend FMCSA's actual rationale, but instead offers a different defense of FMCSA's failure to determine whether the restart provision can be justified in comparison to the pre-2003 rules: It contends that the organizational petitioners did not contest the justification for the restart before FMCSA, and instead unequivocally endorsed FMCSA's proposal to use a restart modified to include two periods of night

rest and the limitation that it only be used once in a 168-hour period. FMCSA Br. 57-61. According to the government, petitioners waived their argument by "depriv[ing] [FMCSA] of a meaningful opportunity to respond to the argument," *id.* at 61 (quoting *Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1040 (D.C. Cir. 2012)), and "induc[ing] [the] agency to fail to address [the] issue." *Id.* at 60 n.16 (citing *City of Brookings Mun. Tel. Co. v. FCC*, 822 F.2d 1153, 1164 (D.C. Cir. 1987)).

As FMCSA's own recognition of petitioners' position makes clear, the government's argument is erroneous. Far from being induced not to address petitioners' argument, FMCSA understood the argument and responded by taking a legal position that the government's brief does not defend—namely, that FMCSA was not obligated to justify its rule by comparison to the pre-2003 rules in effect when Congress mandated rulemakings to improve safety. FMCSA's recognition that petitioners continued to assert that the restart had never been adequately justified, and its response to that argument, refutes the government's contention that FMCSA had no fair opportunity to address the issue. An issue is "adequately raised" when the agency understands the argument has been presented and actually addresses it. *NetworkIP, LLC v. FCC*, 548 F.3d 116, 122 (D.C. Cir. 2008); *see also, e.g.*,

Time Warner Entertainment Co. v. FCC, 144 F.3d 75, 80-81 (D.C. Cir. 1998) (no waiver when an issue is "necessarily implicated by the argument made to the [agency]" and the issue is "'flagged,' or to use a sports metaphor, 'teed up,' before the [agency]"); *NRDC v. EPA*, 824 F.2d 1146, 1151 (D.C. Cir. 1987) (no waiver where "the [agency] actually did consider the issue raised … in [the] petition for review" and prior litigation put it on notice of the issue).

Despite the impression the out-of-context quotations in the government's brief (at 57-59) may create, FMCSA was not imagining things when it recognized that petitioners maintained that it had failed to justify the restart. The organizational petitioners stated directly in their comments that they remained "opposed to the use of a restart." JA 637. They reiterated their view expressed in prior rulemakings that "far more off-duty time than the currently permissible minimum of just 34 hours is necessary to overcome accumulated sleep debt and cumulative fatigue produced by intense work schedules among drivers who maximize the use of their driving hours and minimize their off-duty time." JA 637. Moreover, "[t]he short off duty period of just 34 hours compares poorly to the end of week off-duty time required under the prior HOS rule, which mandated that drivers who exhaust their weekly on-duty hours must remain off duty until the end of their work week,

either the 7th or 8th day, depending on their work schedule." JA 638; *see also* JA 648-49 (describing "the minimum 34-hour restart" as "ill-advised" and "not sufficient to provide adequate time for rest and recovery or sleep from the previous work week").

Petitioners' description of the deficiencies in FMCSA's previous efforts to revise the HOS rule and the reasoning of the judicial decisions invalidating those efforts also made clear that their position was that permitting substantial increases in work and driving time through the restart provision "violated Congressional intent to improve the serious problem of driver fatigue." JA 639; *see also* JA 640-42. Petitioners emphasized this Court's statements "regarding the lack of legally sound rationales for including the 11th hour of driving and the 34-hour restart." JA 642. They stated that FMCSA's proposal to include a restart provision "does not meet the optimal HOS requirements previously articulated by safety groups." JA 637. They explained that they "have consistently opposed the use of a short, 34-hour restart because it allows drivers to exchange off-duty time that was required at the end of the driving week under the previous (pre-2003) HOS rule, for additional on-duty hours of driving and work." JA 648. And they reiterated that they "have objected to the inclusion of a restart provision." JA 649.

At the same time, petitioners acknowledged that by requiring two night-time periods in the 34-hour restart and allowing use of the restart only once every 168 hours, FMCSA's proposal would "improve safety compared to the current HOS rule." JA 637.[3] Petitioners explained, however, that drivers on eight-day, 70-hour schedules would derive essentially no benefit from the once-in-168-hours limitation. *See* JA 637, 651. Thus, petitioners expressed a carefully qualified support for the *total package* of reforms FMCSA proposed (that is, a 10-hour daily driving limit plus modifications to the restart) if, *but only if*, FMCSA limited use of the restart by drivers on eight-day, 70-hour schedules to once every 192 hours. *See* JA 637, 649-52. Petitioners explicitly stated that their support for this "compromise" (JA 642) was "contingent" *both* "on the restoration of the 10-hour limit on the number of consecutive hours of driving permitted in each work shift," JA 636, *and* on "FMCSA applying a similar [restart] limitation to drivers who operate on 70 hour/8-day schedules." JA 649.

Petitioners thus preserved their longstanding opposition to the restart absent an overall package that satisfied their concerns. FMCSA did not

[3] Likewise, Ms. Logan's comment reflected her view that a limited restart was better than an unlimited one (JA 607); that view certainly has no impact on her *standing*, as the government suggests (FMCSA Br. 19).

adopt that package, and its acknowledgment that petitioners continued to take the view that the restart "had never been adequately supported by evidence," JA 1092, reflected its understanding that petitioners did not support the modified restart if FMCSA did not adopt the complete package petitioners were willing to accept as a compromise.

B. FMCSA Has Not Justified the Restart.

The government's brief does not contest that even as limited in its latest iteration, the restart permits truck drivers to work, and drive, significantly more hours in a seven- or eight-day period than did the pre-2003 rules. Moreover, the government's brief effectively acknowledges that FMCSA did not conclude either (1) that the restart provision resulted in improved safety and driver health relative to the pre-2003 rules that had no restart, or (2) that the new HOS rule has greater safety and health benefits than would an alternative rule without a restart provision. Nor did FMCSA conduct an overall cost-benefit analysis of the alternative of dropping the restart. Thus, FMCSA has no basis for concluding that the restart has graeter safety benefits or total net benefits than a rule with no restart.

The government's brief does not justify FMCSA's failure to consider the potential benefits of abandoning the restart. The government begins with

the erroneous assertion that the petitioners "conflate driving hours and working hours" and that "[t]he restart relates only to working hours." FMCSA Br. 61. The restart *functions* by resetting weekly limits on drivers' total working hours. But driving hours are, necessarily, working hours, and permitting drivers to work longer hours permits them to drive longer hours. For drivers who maximize driving hours there is a one-to-one correlation between working hours and driving hours. This Court thus recognized in *Public Citizen v. FMCSA* that "for those drivers maximizing weekly driving time and who take advantage of the thirty-four-hour restart provision," the restart allows not only more working hours, but also "increased weekly driving hours." 374 F.3d 1209, 1218 (D.C. Cir. 2004).

The government argues that the limitations on the restart reduce the increased hours permitted by the version of the restart that this Court invalidated in 2004 and 2007 and that FMCSA then cast aside to avoid a third legal challenge. FMCSA Br. 62. But it is not enough to say the revised restart is an improvement—for some drivers—over versions of the rule that *themselves* failed to fulfill FMCSA's statutory mandate to conduct an HOS rulemaking that improves safety and protects driver health. FMCSA must conclude that the substantial increase in weekly driving still permitted by the

restart (in conjunction with the 11-hour driving limit) improves safety and protects driver health relative to the rules when Congress imposed the statutory requirements FMCSA is still laboring to fulfill.

The government's brief acknowledges "that drivers can work more weekly hours under the new rules than under the pre-2003 rules" but contends that the increase "does not mean that the new rules are less safe" because "[w]eekly hours are only part of the overall safety picture." FMCSA Br. 63. Thus, the government implicitly concedes that the rule should be judged in comparison to the pre-2003 regime, but argues that it should be upheld despite the increased driving and work hours it allows because it is *possible* that it may be safer than the pre-2003 rules. What is missing, however, is an actual determination by FMCSA, rationally based on the evidence before it, that the increased driving the restart permits improves safety and protects driver health relative to the more limited hours permitted before 2003. For this reason, this Court previously expressed skepticism of the government's reliance on other aspects of the rule to justify the increased hours allowed by the restart and 11-hour limit, noting that "the agency cited absolutely no studies" that these other aspects would "compensate for the[] conceded and documented ill effects from the

increase." *Public Citizen v. FMCSA*, 374 F.3d at 1218. Moreover, the government's repeated pleas for deference to agency determinations concerning scientific and technical questions are unavailing, because the Court cannot defer to determinations FMCSA never made. *See, e.g., Public Citizen Health Research Group v. Tyson*, 796 F.2d 1479, 1505 (D.C. Cir. 1986) ("[W]e cannot defer when the agency simply has not exercised its expertise."); *Int'l Longshoremen's Ass'n v. Nat'l Mediation Bd.*, 870 F.2d 733, 736 (D.C. Cir. 1989) ("We cannot defer to what we cannot perceive.").

The government suggests that the absence of a determination by FMCSA that the modified restart improves safety and does not impair driver health need not trouble the Court because "the reductions in overall crash rates since 2003 … suggest that the new rules have not compromised safety." FMCSA Br. 63. Elsewhere, however, the government strongly repudiates the idea that overall crash rates reliably indicate that the HOS rules in force since 2003 adequately protect safety. *See* FMCSA Br. 47 ("Indeed, the current trend of decreased crashes cannot be directly traced to the 2003 and later HOS rules because it began in the late 1970s and is likely attributable to improved vehicle safety and road design, increased seat-belt usage, and, more recently, economic recession."). More importantly, *FMCSA* repudiated

this reasoning when promulgating the rule: It stated explicitly that "the recent declines in crashes cannot be specifically attributed to [the 2003] rule," and it added that crash rates remained "far too high." JA 1067; *see also* JA 1070 (describing other factors behind declines in crash rates). FMCSA's action cannot be upheld on a rationale that it not only did not assert, but *rejected*. "[I]f … an agency's stated rationale for its decision is erroneous, [a court] cannot sustain its action on some other basis …." *PDK Labs. Inc. v. U.S. DEA,* 362 F.3d 786, 798 (D.C. Cir. 2004) (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 200 (1947)). "An 'agency's action must be upheld, if at all, on the basis articulated by the agency itself.'" *Butte County, Cal. v. Hogen*, 613 F.3d 190, 196 (D.C. Cir. 2010) (citations omitted).

The government's defense of the modified restart is further undermined by its erroneous attempt to minimize the additional driving time the restart permits. The government fails to acknowledge that the one-restart-per-168-hour-period limitation does nothing to prevent drivers on eight-day, 70-hour work schedules from using the restart to drive more than 80 hours in an eight-day period, week in and week out. As illustrated by the chart in petitioners' opening brief (at 35), a driver on an eight-day, 70-hour schedule who maximizes driving time can drive 70 hours in approximately

five-and-a-half days, restart his schedule by taking the remainder of the sixth day and most of the seventh as his 34-hour restart, and then drive another 13.5 hours before the expiration of the eighth calendar day, for a total of 83.5 hours of driving in eight days—19% more than the pre-2003 rules permitted.

Moreover, that heavy period of driving will not be followed by a "recovery week." FMCSA Br. 62. Rather, the driver can complete the remaining 57.5 hours of his "restarted" eight-day period in approximately another four-and-a-half days, and then, with only one more hour of rest, begin another 34-hour restart, because more than 168 hours will have elapsed since the previous restart period began. The driver can then again begin driving, and once more total more than 80 hours of driving within an eight calendar-day period.

Thus, by taking the restart once in each 168-hour period, as the rule permits, a driver on an eight-day schedule can use the restart ad infinitum to drive many more hours every eight days than was permitted under the pre-2003 rules.[4] The government's attempt to obscure this substantial increase

[4] Such a driver may average about 70 hours of driving in a *seven*-day period, as the government says, but that is just another way of saying the rule permits substantially increased driving: Under the pre-2003 rules, a driver on an eight-day schedule had to spread 70 hours of driving over eight days; now she can cram them into seven days, week after week.

underscores FMCSA's broader failure to consider whether the increased driving hours permitted by the restart comport with its statutory duty to promulgate a rule enhancing safety and protecting driver health.

For drivers on seven-day, 60-hour schedules, the effect is also substantial: The restart allows such a driver to drive 55 hours in approximately four days (97.5 hours), take the 34-hour restart period during the fifth and part of the sixth days, and drive 22 more hours during the rest of the sixth and seventh days, for a total of *77 hours* in a period during which, before 2003, she would have been permitted to drive only 60 hours. That driver will complete the remaining hours of driving permitted during the second "week" too soon to take the restart, and will thus have a more extended rest period (approaching the length of a normal worker's weekend) before she may drive again. But even after that break she will be able to drive enough to bring her total hours for the second seven-calendar-day period up to 60. FMCSA did not consider whether a rule that permits alternating exceptionally heavy 77-hour, seven-day driving periods with somewhat less onerous 60-hours-in-seven-days stints is safer and less detrimental to driver health than the pre-2003 rule, which never allowed

more than 60 hours of driving in seven days for drivers on seven-day schedules.

The government wrongly contends that Congress validated the restart when it enacted temporary legislation permitting the 2003 rule to remain in effect during the remand to FMCSA following this Court's ruling in *Public Citizen v. FMCSA*, 374 F.3d 1209. FMCSA Br. 63 (citing Pub. L. No. 108-310, § 7(f), 118 Stat. 1144, 1154 (2004)). That legislation only filled a potential regulatory void by permitting the regulations to stay in effect for, *at most*, one year while FMCSA responded to this Court's decision. Had Congress affirmatively approved the invalidated rule, it would not have strictly limited the period in which it could remain in effect. Instead, what Congress did was grant a legislative "stay"—"Rule Stay" is the title of the relevant subsection—an action that expressed no view on the appropriate content of whatever final rule resulted from the administrative and legal processes.

The government's reliance on the recent passage of Public Law No. 112-141, § 32301(a)(1), 126 Stat. 405 (2012) (FMCSA Br. 64), is still less persuasive: That legislation, which requires FMCSA to "complete a field study on the efficacy of the restart rule," *id.*, certainly reflects *awareness* of the restart, but it indicates congressional skepticism, not endorsement.

III. FMCSA Impermissibly Adopted the 11-Hour Driving Limit Based on Cost-Benefit Analysis.

A. FMCSA Unlawfully Made Net Benefits Determinative.

Faced with statutory mandates to "reduc[e] fatigue-related incidents and increase[e] driver alertness,"[5] "improve safety,"[6] and "consider the assignment and maintenance of safety as the highest priority,"[7] FMCSA adopted an 11-hour continuous driving limit rather than the 10-hour limit it had proposed—not because the 10-hour limit was not safer, nor even because the 10-hour limit would have costs that outweighed its safety benefits, but because FMCSA concluded that when *non-safety* costs and benefits were considered, the 11-hour limit might have greater average net benefits. Specifically, FMCSA said that absent "compelling scientific evidence demonstrating the safety benefits of a 10-hour driving limit," the "strong evidence that the 11-hour limit could well provide higher net benefits" precluded it from finding "adequate and reasonable grounds" for adopting a

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

[6] Motor Carrier Safety Improvement Act of 1999, Pub. L. 106-159, § 3(7), 113 Stat. 1748 (1999) (49 U.S.C. § 113 note).

[7] 49 U.S.C. § 113(b).

10-hour limit. 76 Fed. Reg. 81,135. FMCSA thus made cost-benefit analysis the determinative consideration.

The government's brief does not defend FMCSA's statement that it must have "compelling scientific evidence" to justify a safer standard, which flies in the face of the principle that agencies charged with protecting public health and safety can and must act in the face of scientific uncertainty. *See* PC Br. 36-37 (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 51-52 (1983), and *Ctr. for Auto Safety v. Peck*, 751 F.2d 1336, 1349 (D.C. Cir. 1985)). Instead, the government asks the Court to ignore that statement (*see* FMCSA Br. 68) and affirm FMCSA's use of cost-benefit analysis as an appropriate exercise of discretion consistent with its statutory obligation to "consider" costs in rulemakings. *See id.* at 65 (citing 49 U.S.C. § 31136(c)(2)(A)); *id*. at 68-69,.

It is one thing to "consider" costs, however, and another to do what FMCSA did here: make cost-benefit analysis the determining factor. *See Nat'l Ass'n of Home Builders*, 682 F.3d at 1032. By choosing a less-safe rule over one that would improve safety—even when the one that improved safety also had net benefits under the more reasonable assumptions considered by the agency in its cost-benefit analysis—FMCSA allowed its pursuit of net

benefits unrelated to safety to overcome the statutory command that FMCSA "consider the assignment and maintenance of safety as the highest priority." 49 U.S.C. § 113(b).

This Court has emphasized that the statute's prioritization of safety is not merely hortatory. FMCSA is "required" to make safety its highest priority. *Owner-Operator Independent Drivers Ass'n v. FMCSA* ("*OOIDA*"), 494 F.3d 188, 194 (D.C. Cir. 2007). When FMCSA treats safety benefits as fungible with non-safety costs and benefits, and concludes that it must choose a less safe rule because it "could well" have higher net benefits, it has not made safety its highest priority.

In *American Textile Manufacturers Institute v. Donovan*, 452 U.S. 490 (1981), the Supreme Court considered whether using cost-benefit analysis to establish Occupational Safety and Health Act standards was permissible. That Act required the relevant agency to give priority to health and safety by providing that standards must "assure[], to the extent feasible, … that no employee will suffer material impairment of health …." 29 U.S.C. § 655(b)(5). The Supreme Court held that "by placing the 'benefit' of worker health above all other considerations save those making attainment of this 'benefit' unachievable," Congress precluded the agency from making its

decisions based on netting health benefits against other costs: "Any standard based on a balancing of costs and benefits by the [agency] that strikes a different balance than that struck by Congress would be inconsistent with the [statutory] command." *Donovan*, 452 U.S. at 509. The same is true here: Because Congress required FMCSA to make safety its highest priority, a cost-benefit calculation that strikes a different balance by equating safety benefits with non-safety costs and benefits is inconsistent with the statutory command.[8]

FMCSA's action here is equally inconsistent with the statutory commands that it act to reduce fatigue-related accidents, increase driver alertness, and improve safety. The government dismisses these requirements as merely hortatory, but a review of the history set forth in our opening brief (at 6-12) of Congress's repeated enactments, all aimed at forcing the agency to improve rules that had remained largely unaltered since 1962, demonstrates that they are anything but. Congress's direction that FMCSA conduct an HOS rulemaking to improve safety does not dictate

[8] Unlike in *Donovan*, the statute here requires FMCSA to "consider" costs and benefits. Nonetheless, it is wholly unlike the examples cited in *Donovan* in which Congress dictated that weighing costs and benefits *determine* an agency's action. *See* 452 U.S. at 510. Here FMCSA must "consider" costs and benefits, but such consideration must be consistent with prioritizing safety, which precludes making net benefits dispositive.

specific features of the rule by "mandat[ing] that the agency reach any particular substantive result." FMCSA Br. 66 (quoting *OOIDA*, 494 F.3d at 207-208). But it does preclude FMCSA from choosing a *less* safe option over one that is both safer and has net benefits under reasonable assumptions merely because the less safe rule may have higher net benefits attributable to non-safety factors.

Congress did not ratify FMCSA's 11-hour driving limit when it temporarily stayed the effect of this Court's 2004 ruling in *Public Citizen v. FMCSA*, 374 F.3d 1209, as the government suggests. *See* FMCSA Br. 67 (citing Pub. L. No. 108-310, § 7(f), 118 Stat. 1144, 1154 (2004)). As explained above, Congress merely froze the regulatory situation for a maximum of one year to allow FMCSA to address the Court's decision, and did not address the proper outcome of FMCSA's deliberations. By contrast, when Congress *did* speak to the question of a 10-hour driving limit, in the legislation that required FMCSA to undertake this rulemaking and continues to define its parameters, Congress directed the agency to "deal[] with a variety of fatigue-related issues … including 8 hours of continuous sleep after 10 hours of driving." ICC Termination Act of 1995, Pub. L. 104-88, § 408(a), 109 Stat. 803, 958-59 (49 U.S.C. § 31136 note). Thus, "to the extent Congress has

opined at all" (FMCSA Br. 66), it contemplated retention of the 10-hour driving limit, not its replacement with a less safe limit based on cost considerations.

FMCSA's Analysis of Benefits Is Irrational.

Even assuming cost-benefit analysis could be dispositive, FMCSA's choice of an 11-hour driving limit based on net benefits was irrational because FMCSA did not explain why the assumptions under which the 11-hour limit had greater net benefits than the 10-hour limit were more reasonable than those under which the 10-hour limit came out ahead. The government's brief does not contest that FMCSA's cost-benefit analyses showed that under some assumptions, the 10-hour driving limit was more beneficial. Nonetheless, the government asserts that FMCSA was justified in preferring the 11-hour rule because it conducted analyses reflecting 18 combinations of assumptions and found that in "most cases" the 11-hour limit appeared to have greater benefits. FMCSA Br. 70.

The government's "majority rules" approach only makes sense if FMCSA has concluded that the assumptions underlying the various analyses are equally likely to be valid. Otherwise, the number of analyses in which one alternative has higher net benefits than another is meaningless, providing no

basis for a rational agency decision. If 50 analyses using *unreasonable* assumptions ascribe greater benefits to alternative A and five analyses using *reasonable* assumptions show alternative B to be more beneficial, it is surely arbitrary and capricious to choose alternative A just because it appears more beneficial in more analyses.

The government does not demonstrate that FMCSA ever determined that the assumptions under which the 11-hour limit showed greater benefits were as reasonable as those under which the 10-hour limit did. Indeed, FMCSA itself affirmatively stated that the assumptions that drivers get high amounts of sleep and that low percentages of crashes are fatigue-related were less realistic than the alternatives. *See* PC Br. 41-44. Nor does the government contest that excluding the assumptions as to driver sleep amounts and percentages of fatigue-related crashes that FMCSA itself viewed as unrealistically high and low (respectively) would eliminate most of the cases in which the 11-hour limit had greater benefits. *See* PC Br. 42, 44. It was arbitrary and capricious for FMCSA to choose the 11-hour limit based on apparent net benefits under assumptions it has never concluded (and even now does not argue) are as reasonable as those under which a 10-hour limit has greater benefits.

The government thus again falls back on waiver: Because the petitioners did not object when FMCSA announced that the regulatory impact analysis (RIA) would consider costs and benefits using the challenged assumptions, the government contends that petitioners cannot challenge FMCSA's conclusion that the 11-hour driving limit "could well" have greater benefits than a 10-hour limit. But petitioners do not challenge FMCSA's inclusion of the alternative analyses in the RIA. Rather, they contend it was irrational for FMCSA to *rely* on those analyses to dictate its driving limit without ever deciding that their underlying assumptions were reasonable, and in the face of its own statements indicating that they were not.[9] The government cites no authority holding that petitioners must object to the inclusion of an analysis in an RIA in order to challenge the way the agency uses the results to determine a regulation's substance.

Without its waiver argument, the government is left with nothing but generalizations about how an agency need not precisely determine costs and benefits, and how FMCSA *could* have found a range of assumptions on the disputed points equally reasonable. FMCSA Br. 70-75. Those points are

[9] Similarly, that the Office of Management and Budget requires agencies to run analyses using both 3% and 7% discount rates (FMCSA Br. 74) does not mean that agencies must, without explanation, treat those rates as equally pertinent to their substantive decisionmaking.

unavailing where FMCSA did *not* determine that the various assumptions were equally reasonable, but made a decision that would make sense only if they were.

CONCLUSION

This Court should set aside the HOS rule's provisions establishing an 11-hour driving limit and permitting a 34-hour off-duty period to restart weekly on-duty limits.

Respectfully submitted,

/s/ Scott L. Nelson

Scott L. Nelson
Allison M. Zieve
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

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

Gregory A. Beck
Gupta Beck PLLC
1625 Massachusetts Ave. NW
Suite 500
Washington, DC 20036
(202) 470-3826

Attorneys for Petitioners

November 20, 2012

CERTIFICATE OF COMPLIANCE PURSUANT TO FRAP 32(A)(7)(C) AND CIRCUIT RULE 32-1

I hereby certify that the foregoing Petitioner's Final Reply Brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) and the orders of the Court in this case. The brief is composed in a 14-point proportional typeface, Century Expanded BT. As calculated by my word processing software (Word 2010), the brief (excluding those parts permitted to be excluded under the Federal Rules of Appellate Procedure and the D.C. Circuit Rules) contains 5,973 words.

/s/ Scott L. Nelson
Scott L. Nelson

CERTIFICATE OF SERVICE

I certify that on November 20, 2012, I caused the foregoing to be filed through the Court's ECF system, which will serve notice of the filing on all parties, all of whom are or are represented by registered ECF users.

/s/ Scott L. Nelson
Scott L. Nelson

ADDENDUM

SECOND DECLARATION OF DANA E. LOGAN

1. On July 19, 2012, I signed a declaration that was later filed in this case, in which I stated that my job requires me to make deliveries between locations in the Midwest and the East Coast.

2. When I stated in my declaration that my schedule sometimes requires me to drive 11 hour shifts and to use the 34-hour restart, I was referring to the hours of service schedule I must use in order to make the deliveries set by my employer.

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

Dana E. Logan

Dana E. Logan

Dated: 10-15-12