[ORAL ARGUMENT SCHEDULED FOR APRIL 25, 2022]

No. 20-1370

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

ADVOCATES FOR HIGHWAY AND AUTO SAFETY, et al.,

Petitioners,

v.

FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION, et al.,

Respondents,

OWNER-OPERATOR INDEPENDENT DRIVERS ASSOCIATION, INC.,

Intervenor.

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

FINAL BRIEF FOR RESPONDENTS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

A. Parties and Amici

Petitioners are Advocates for Highway and Auto Safety, International Brotherhood of Teamsters, Citizens for Reliable and Safe Highways, and Parents Against Tired Truckers.

Respondents are the Federal Motor Carrier Safety Administration, United States Department of Transportation, and United States.

The intervenor is Owner-Operator Independent Drivers Association, Inc. To date, there are no amici in this case.

B. Rulings Under Review

The ruling under review is a final rule of the Federal Motor Carrier Safety Administration titled "Hours of Service of Drivers" published in the Federal Register at 85 Fed. Reg. 33,396 (June 1, 2020) (JA 218-274).

C. Related Cases

This Court adjudicated petitions for review of earlier versions of the hours-of-service rules in *Public Citizen v. Federal Motor Carrier Safety Administration*, No. 03-1165; *Owner-Operator Independent Drivers Association v. Federal Motor Carrier Safety Administration*, Nos. 06-1035,

06-1078; and *American Trucking Associations v. Federal Motor Carrier Safety Administration*, Nos. 12-1092, 12-1113. Undersigned counsel is not aware of any related cases pending in this Court or any other court.

/s/ Brian J. Springer
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STATEMENT OF JURISDICTION

This is a challenge to a final rule of the Federal Motor Carrier Safety Administration (FMCSA) published in the Federal Register on June 1, 2020. 85 Fed. Reg. 33,396 (JA 218-274). On June 30, 2020, petitioners filed an administrative petition for reconsideration, which FMCSA denied on August 25, 2020. Petitioners timely filed their petition for review on September 16, 2020. This Court's jurisdiction rests on 28 U.S.C. § 2342(3)(A). As discussed below, petitioners have not submitted sufficient information or evidence to demonstrate that they have standing to challenge the final rule.

STATEMENT OF THE ISSUES

The hours-of-service rules concern the amount of time drivers of commercial motor vehicles may drive within certain daily and weekly on-duty periods. Here, FMCSA did not allow drivers any additional driving time but made incremental changes to allow greater flexibility without compromising driver health or safety. The questions presented are the following:

1. Whether FMCSA reasonably modified the prerequisites for the short-haul exception to an hours-logging requirement.

2. Whether FMCSA reasonably modified the parameters of the 30-minute break requirement.

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes and regulations are reproduced in the addendum to petitioners' brief.

STATEMENT OF THE CASE

I. Statutory Background

Congress authorized the Secretary of Transportation to "prescribe regulations on commercial motor vehicle safety" that include "minimum safety standards for commercial motor vehicles." 49 U.S.C. § 31136(a). The regulations must ensure, among other things, that "the responsibilities imposed on operators of commercial motor vehicles do not impair their ability to operate the vehicles safely," that "the physical condition of operators" is "adequate to enable them to operate the vehicles safely," and that "the operation of commercial motor vehicles does not have a deleterious effect on the physical condition of the operators." *Id.* § 31136(a)(2)-(4). The Secretary is also authorized to issue regulations pertaining to the hours of service for employees of motor carriers and motor private carriers. *See id.* § 31502(b).

Before prescribing such regulations, however, the Secretary must consider the "costs and benefits" of any proposal. 49 U.S.C.

§§ 31136(c)(2)(A), 31502(d). The Secretary has delegated authority under these statutes to FMCSA. 49 C.F.R. § 1.87(f), (i).

II. Prior Rulemaking Proceedings

A. Hours-of-service regulations governing commercial motor vehicles (colloquially, large trucks and buses) were initially promulgated by the Interstate Commerce Commission in the late 1930s, with the last major amendment in 1962. 84 Fed. Reg. 44,190, 44,193 (Aug. 22, 2019) (JA 92). In 1995, Congress directed FMCSA's predecessor, the Federal Highway Administration, to initiate a rulemaking to address "a variety of fatigue-related issues pertaining to commercial motor vehicle safety." 49 U.S.C. § 31136 note.

The Federal Highway Administration initiated the rulemaking in 1996. 61 Fed. Reg. 57,252 (Nov. 5, 1996). FMCSA continued with a notice of proposed rulemaking in 2000, 65 Fed. Reg. 25,540 (May 2, 2000), which led to a final rule in 2003, 68 Fed. Reg. 22,456 (Apr. 28, 2003). For drivers of property-carrying commercial motor vehicles, the 2003 rule set the maximum amount of daily driving at 11 hours, limited the shift in which driving could occur to a total of 14 hours (including off-duty time and breaks), and required

10 hours of off-duty time between shifts. *Id.* at 22,457, 22,473, 22,501.[1] In general, drivers could not drive after being on duty for more than 60 hours in 7 days or more than 70 hours in 8 days, though they could "restart" these weekly periods by taking at least 34 consecutive hours off-duty. *Id.* at 22,479.

Of particular relevance here, drivers were generally obligated to use a paper graph grid to record their time spent in each duty status (e.g., driving, on duty but not driving, off duty). *See* 49 C.F.R. § 395.8 (2003). In some circumstances, short-haul drivers who operate within a geographic radius of a normal work reporting location and return to that location at the end of a workday were entitled to an exception from these records of duty status requirements (but not from the substantive limits on driving and on-duty time). *See id.* § 395.1(e) (2003). To qualify for the so-called short-haul exception, those drivers had to stay within a 100-air-mile radius of their reporting location and finish their shift within 12 hours. *Id.* § 395.1(e)(1)-(2) (2003). Their employers were still required to maintain at the place of business time records showing each driver's start time, total time on duty,

[1] Drivers of passenger-carrying vehicles are subject to slightly different restrictions, but this brief only refers to drivers of property-carrying vehicles for ease of reading.

and end time (as well as total time for the preceding 7 days for new or intermittent drivers). *Id.* § 395.1(e)(5) (2003).

In *Public Citizen v. FMCSA*, 374 F.3d 1209, 1216-17 (D.C. Cir. 2004), this Court held that FMCSA's failure to consider the statutorily mandated factor of driver health required vacatur of the 2003 rule. The Court noted that while FMCSA could weigh other factors, it was also required to consider driver health. *Id.* at 1217. The Court discussed "concerns" regarding petitioners' other objections to the rule (none of which pertained to the short-haul exception), but declined to rule on those objections and left the agency "free in its further proceedings to consider the other objections anew in light of this opinion and its own responses to the driver health requirement." *Id.* at 1216-18. Before the mandate issued, Congress enacted legislation to make the 2003 rule effective for one year or until the effective date of a new rule. *See* Surface Transportation Extension Act of 2004, Pub. L. No. 108-310, § 7(f), 118 Stat. 1144, 1154.

B. In early 2005, FMCSA published a notice of proposed rulemaking that recommended following the substance of the 2003 rule and asked the public to comment on multiple substantive issues as well as any changes necessary to comply with the *Public Citizen* decision. 70 Fed. Reg. 3339

(Jan. 24, 2005). FMCSA subsequently issued a new rule in August 2005 that largely retained the substantive driving and on-duty limitations. 70 Fed. Reg. 49,978 (Aug. 25, 2005).

The rule also adopted the short-haul exception "for drivers who meet specific duty time requirements (report to and leave from work within 12 consecutive hours) and operate in a 100 air-mile radius of their work reporting location." 70 Fed. Reg. at 50,032. The agency explained that these drivers are exempt from preparing records of duty status because short-haul operations "make frequent stops, deliveries, and pick-ups throughout the day," which would create a "paperwork burden" if the drivers had to log "entries" every time that they switched from driving to non-driving tasks. *Id.* For similar reasons, the rule included another exception from these logging requirements for short-haul operations not requiring a commercial driver's license, with a 150 air-mile operating radius and a 14-hour workday (extendable to 16 hours twice a week). *Id.* at 50,033.

In *Owner-Operator Independent Drivers Association v. FMCSA*, 494 F.3d 188 (D.C. Cir. 2007), this Court considered dual challenges to the 2005 rule. This Court granted a petition for review filed by safety groups and vacated two hours-of-service provisions on procedural grounds, but denied a

petition filed by trucking organizations. *Id.* at 201-08. No party challenged the short-haul exception, and the Court did not address it.

C. FMCSA subsequently promulgated an interim final rule and request for comments in 2007. 72 Fed. Reg. 71,247 (Dec. 17, 2007). The agency fixed the procedural problems identified by this Court and, ultimately, retained the provisions that had been vacated on non-substantive grounds. *Id.* at 71,248, 71,253-56. In 2008, FMCSA issued a final rule identical to the 2007 interim final rule. 73 Fed. Reg. 69,567 (Nov. 19, 2008). Although a petition for review was filed, that petition was settled and ultimately dismissed. *See Public Citizen v. FMCSA*, No. 09-1094 (D.C. Cir. Feb. 8, 2012).

Following a 2010 notice of proposed rulemaking, 75 Fed. Reg. 82,170 (Dec. 29, 2010), FMCSA promulgated a final rule in 2011, 76 Fed. Reg. 81,134 (Dec. 27, 2011). Two aspects of that rulemaking are particularly relevant here. First, without formally proposing revisions, the agency solicited comments on the effects of having one consolidated short-haul "exemption from the logging requirement" for vehicles that do and do not require a commercial driver's license, with an accompanying extension of "the 100 air-

mile radius . . . to 150 miles." 75 Fed. Reg. at 82,184. In the final rule, FMCSA decided not to make this modification. 76 Fed. Reg. at 81,160.

Second, the 2011 rule included an off-duty break provision, which required a 30-minute break off duty after 8 hours on duty before any further driving. 76 Fed. Reg. at 81,154. Citing a 2011 study, the agency noted that accident risks generally fall after a break and claimed that, while all "non-driving activities (both work- and rest-related)" reduce these risks, off-duty breaks provide the greatest benefit. *Id.* The provision was designed to allow drivers greater flexibility in scheduling breaks during the day and applied to both long- and short-haul drivers. *Id.* at 81,136.

In *American Trucking Associations v. FMCSA*, this Court largely upheld the final rule against challenges from safety groups and trucking organizations. 724 F.3d 243 (D.C. Cir. 2013). However, the Court vacated "the agency's application of the 30-minute break to short-haul drivers" because the rule distinguished between long- and short-haul operations but justified applying the new requirement only to the former. *Id.* at 245, 253. Short-haul drivers remain exempt from the 30-minute break requirement (in addition to the hours-logging requirements) because FMCSA has not received new evidence warranting a different conclusion.

D. A related rulemaking also provides helpful context for the current rule. To improve compliance with existing hours-of-service rules, Congress in 2012 enacted a statute directing the Secretary of Transportation to issue regulations requiring most commercial motor vehicles to install electronic logging devices, which must meet technical specifications and performance and design standards in order to synchronize with the engine and automatically record driving hours. 49 U.S.C. § 31137(a)-(b). In 2015, FMCSA promulgated a final rule mandating that most motor carriers and drivers who were required to prepare and retain paper records of duty status instead use electronic logging devices to record the driver's duty status and clarifying the necessary supporting documents. 80 Fed. Reg. 78,292 (Dec. 16, 2015); *see Owner-Operator Indep. Drivers Ass'n v. U.S. Dep't of Transp.*, 840 F.3d 879 (7th Cir. 2016) (after vacating prior iteration of the rule, upholding 2015 final rule).

The agency explained that drivers operating under the short-haul exception (who use timecards and are not required to keep records of duty status) need not use an electronic logging device. 80 Fed. Reg. at 78,294. Nothing precludes carriers from installing such devices or drivers from using them, *id.* at 78,307, but FMCSA concluded in its regulatory impact analysis

that requiring the use of such devices was "not a cost-effective solution to improving [hours-of-service] compliance" for this group of drivers, FMCSA, U.S. Dep't of Transp., *Regulatory Evaluation of Electronic Logging Devices and Hours of Service Supporting Documents Final Rule* at v (2015), *available at* https://www.regulations.gov/document/FMCSA-2010-0167-2281. The rule also permits operating outside the short-haul exception for up to 8 days of any 30-day period without incurring the expense of installing and using an electronic logging device, provided that drivers keep paper logs of their records of duty status for those days. 80 Fed. Reg. at 78,313.

III. Current Rulemaking Proceeding

A. The use of electronic logging devices to record driving time demonstrated "the rigidity of [certain hours-of-service] provisions and the practical ramifications drivers faced." 84 Fed. Reg. at 44,195 (JA 94). Prompted by requests from Congress and other interested parties, and consistent with agency practice to periodically review regulations, FMCSA published an advance notice of proposed rulemaking and held several listening sessions in 2018 to receive information on areas covered by the hours-of-service rules, including short-haul operations and the 30-minute break requirement at issue in this case. *Id.* at 44,195-96 (JA 94-95). In 2019,

FMCSA issued a notice of proposed rulemaking, in which the agency proposed rule revisions "to provide greater flexibility for drivers . . . without adversely affecting safety." *Id.* at 44,190-91 (JA 89-90).

The agency noted that it was considering an expansion of the short-haul exception, which would increase the number of drivers and trips eligible to use time cards instead of paper or electronic records of duty status. 84 Fed. Reg. at 44,198 (JA 97). With support from a large proportion of commenters, the notice proposed extending the "distance restriction . . . from 100 air miles to 150 air miles" and the "maximum allowable work day . . . from 12 to 14 hours." *Id.* (JA 97); *id.* at 44,196 (JA 95) ("Drivers and individuals supported other issues raised in the [notice], especially extending the short-haul duty period from 12 hours to 14 hours."). Nevertheless, "[t]ruck drivers would continue to be limited to 11 hours of driving time" and "would need to complete their work day within 14 hours of the beginning of the work shift." *Id.* at 44,198 (JA 97).

As the agency described, the modifications would bring the eligibility criteria for the short-haul exception in line with the distance restriction for short-haul drivers who do not hold a commercial driver's license and the driving window restriction for long-haul drivers. 84 Fed. Reg. at 44,198 (JA

97). These modifications would also provide carriers with greater "flexibility to meet existing and future market demands within the area" because "more drivers or more trips would now be eligible for the short-haul exception" and avoid "incurring the costs of preparing [records of duty status] and retaining supporting documents." *Id.* (JA 97).

FMCSA did "not anticipate any adverse impact on safety" or driver health, particularly given that its short-haul proposal "would allow neither additional drive time during the work day nor driving after the 14th hour from the beginning of the work day." 84 Fed. Reg. at 44,198 (JA 97). The agency identified limitations in a North Carolina study cited by commenters and adduced nationwide data on one type of short-haul operation showing that "increasing the duty day from 12 to 14 hours did not statistically increase the share of [drivers] involved in crashes." *Id.* (JA 97). And the agency specifically invited comments on this determination. *Id.* (JA 97).

The notice separately proposed modifying the requirement that long-haul truck drivers take a 30-minute break off duty after 8 hours on duty. 84 Fed. Reg. at 44,200 (JA 99). Instead, drivers would be required to take a 30-minute break from driving after 8 hours of cumulative driving time. *Id.* (JA 99). This change would promote "flexibility" by allowing non-driving, on-

duty tasks—like "completing paperwork," "stopping for fuel," and "waiting at a loading dock"—to "count as an interruption of the 8 hours of driving status" and "would allow drivers to take an off-duty break when they believe it would be most helpful at preventing them from driving while fatigued, as opposed to requiring a break regardless of the warning signs of fatigue." *Id.* at 44,200-01 (JA 99-100).

FMCSA expected this revision to be safety- and health-neutral because evidence supported that "breaks of any type reduced [safety critical events]." 84 Fed. Reg. at 44,201 (JA 100). And FMCSA reiterated that its proposal "would not allow an increase in maximum driving time during the work shift or driving after the 14th hour from the beginning of the work shift." *Id.* at 44,200 (JA 99). The agency also sought "further information on the effect of eliminating the break requirement altogether" because numerous commenters advocated this alternative. *Id.* at 44,202 (JA 101).

B. On June 1, 2020, FMCSA issued the current hours-of-service final rule, in which the agency determined to revise the short-haul exception and the 30-minute break requirement in the manner recommended in the notice of proposed rulemaking. 85 Fed. Reg. 33,396 (JA 218).

1. The rule "extends the scope of [the short-haul hours-logging] exception from a 100- to a 150-air-mile radius" and "extends the driver's maximum workday from 12 to 14 hours." 85 Fed. Reg. at 33,437 (JA 259); *see* 49 C.F.R. § 395.1(e)(1). However, "short-haul drivers remain subject to the existing [daily and weekly] limit[s] on hours spent driving." 85 Fed. Reg. at 33,437, 33,446 (JA 259, 268).

FMCSA noted that this "revision would only benefit [covered drivers] who travel between 100 and 150 air miles of the normal work reporting location, and return to that location between 12 and 14 hours from the beginning of the work shift." 85 Fed. Reg. at 33,409 (JA 231). FMCSA does not expect "a significant change in the number of drivers or motor carriers operating under the short-haul exception." *Id.* (JA 231); *see also, e.g.*, *id.* at 33,442 (JA 264) (discussing reports that drivers usually were able to "return[] to their work reporting location within 12 hours" but sometimes "needed an additional 2 hours" due to "detention time, longer-than-expected customer service stops, traffic, or other unforeseen events").

The agency explained that these changes "will simplify motor carriers' ability to comply with and enforce the [hours-of-service] rules." 85 Fed. Reg. at 33,409 (JA 231). For example, the 150-air-mile radius is "consistent with

the distance limitation" for short-haul drivers "who are not required to possess a [commercial driver's license]," and the 14-hour duty period is "consistent with the rule" for long-haul drivers, which will simplify enforcement where motor carriers use multiple types of drivers. *Id.* (JA 231); *see id.* at 33,407 (JA 229) (noting that current rule "align[s]" with "existing [hours-of-service] requirements" and "thereby simplif[ies] enforcement and improve[s] compliance"). Additionally, the rule provides carriers with "flexibility to meet existing and future market demands for services within a larger area" by "allow[ing] more drivers to be consistently eligible" for the exception while avoiding the burden of "preparing [records of duty status] and retaining supporting documents." *Id.* at 33,405 (JA 227).

The agency documented why the changes to the short-haul exception "are safety- and health-neutral" based on "the current scientific information and [FMCSA's] own experience with Hours of Service regulation." 85 Fed. Reg. at 33,403 (JA 225). Notably, the rule does not modify the daily or weekly maximum driving hours, and "the primary factors influencing safety outcomes for short-haul drivers are the continued adherence to the 11-hour driving time limit and the continued prohibition against driving after the 14th hour of the beginning of the work shift." *Id.* at 33,411 (JA 233); *see id.* at

33,408 (JA 230) (stating that these "factors are most critical for ensuring safe operations among short-haul operators"). Since 2011, "non-[commercial driver's license] drivers have been allowed to use, and presumably have used, the 14-hour driving window in short-haul operations, within 150 air miles of the normal work reporting location." *Id.* at 33,408 (JA 230). The extension of the workday "from 12 to 14 hours simply gives short-haul carriers the same driving window that other carriers have used for many years." *Id.* at 33,403 (JA 225). Moreover, the changes "will reduce potential pressure on drivers for timely completion of their duty day," *id.* at 33,412 (JA 234), including the need "to drive at a higher speed to finish their 11 hours of driving time" before 12 hours elapse, *id.* at 33,406 (JA 228).

FMCSA also cited data supporting the conclusion that expanding the driving window from 12 to 14 hours would not compromise safety. Congress mandated the same change to the short-haul exception for drivers of ready-mixed concrete delivery trucks in 2015. 85 Fed. Reg. at 33,446 (JA 268). FMCSA analyzed nationwide crash data for these vehicles and concluded that the percentage of crashes occurring "at later hours of the day (5:00 p.m. to 11:59 p.m.—when drivers are more likely to be close to their maximum hours for the day) has been declining in recent years, falling from 7.6 percent

in 2013 to 5.8 percent in 2017." *Id.* (JA 268). Examining these vehicles' share of the "total number of crashes" for "the 2 years before and after the congressionally mandated change went into effect," FMCSA also found that the "very minor increase" by approximately one hundredth of a percent from 2013 to 2017 "is not statistically significant." *Id.* (JA 268). These "analyses suggest that . . . extending the short-haul exception" from 12 to 14 hours "did not increase the share of concrete mixers involved in crashes." *Id.* (JA 268).

FMCSA recognized the imperfection of this data, which might not be fully "representative of all short-haul operations." 85 Fed. Reg. at 33,446 (JA 268). Nevertheless, "the analysis was offered as the best available data with a before and after comparison of changes like the changes proposed." *Id.* (JA 268). In contrast, the study cited by petitioners drew conclusions based on "a very small sample size" of North Carolina short-haul drivers that "was not nationally representative." *Id.* (JA 268). Furthermore, the authors of the North Carolina study themselves "noted that other related factors unobserved in the study," such as the age or poor condition of the trucks, "may have led to th[e] result." *Id.* (JA 268). FMCSA relied on available data because it "did not receive comments with additional data on the impact that the [short-haul changes] would have on crash rates." *Id.* (JA 268).

The agency further explained that "[n]either of the changes to the short-haul exception increase the opportunities to falsify time records." 85 Fed. Reg. at 33,406 (JA 228); *id.* at 33,410 (JA 232) ("Nothing in the changes to the short-haul exception creates additional opportunities for short-haul drivers to falsify time records."). Under the rule, "short-haul carriers must maintain accurate records . . . document[ing] when drivers report to work and are released from work," *id.* at 33,405 (JA 227), as has long been allowed for short-haul drivers, *id.* at 33,410 (JA 232).

Although these drivers are excused from keeping records of duty status, "the nature of short-haul operations, with frequent delivery stops" and the "requirement to return to the reporting location," mean that these drivers "rarely approach the 11-hour driving limit" and that "an increase in violations of the 11-hour driving limit is highly unlikely." 85 Fed. Reg. at 33,408 (JA 230). Enforcement officials also have "a better opportunity to investigate compliance with the hours-of-service requirements" at a reporting location, where they can "request certain records . . . identify[ing] where the driver traveled and the time spent at those locations" that might not otherwise be available. *Id.* at 33,407 (JA 229). And motor carriers are subject to penalty if they "coerc[e] drivers to operate [vehicles] in violation of

. . . the [hours-of-service] regulations." *Id.* at 33,404 (JA 226) (citing 49 C.F.R. § 390.6).

2. As to the 30-minute break requirement, the final rule provides that "a driver may not drive more than 8 hours without an interruption of at least 30 consecutive minutes," which may be satisfied "by spending the time off-duty [or] on-duty (not driving)." 85 Fed. Reg. at 33,438 (JA 260); *see* 49 C.F.R. § 395.3(a)(3)(ii). Previously, truck drivers could not perform any "work, including paperwork" during the 30-minute break, "regardless of driving time." 85 Fed. Reg. at 33,436 (JA 258). Many commenters opposed to the change "admit[ted] that an on-duty break provides real-world advantages since it allows drivers to perform routine but necessary non-driving tasks, such as refueling, instead of sitting idle and frustrated." *Id.* at 33,420 (JA 242). The agency highlighted the "scheduling flexibility" afforded by the rule, which "give[s] drivers greater ability to plan their breaks, and allow[s] for on-duty activities such as time spent at loading docks to fulfill the break requirement." *Id.* at 33,418-19 (JA 240-241); *id.* at 33,398 (JA 220) (noting that the rule may "allow drivers to reach their destination earlier").

FMCSA received numerous comments "show[ing] that the changes to the 30-minute rule are not likely to have an adverse impact on safety because

the changes would not significantly decrease the number of breaks being taken by drivers." 85 Fed. Reg. at 33,418 (JA 240). Information submitted during the rulemaking process suggested that drivers already "routinely take breaks during their work shifts." *Id.* (JA 240); *id.* at 33,419 (JA 241) ("Drivers and carriers also noted that drivers take bathroom and food breaks within their 11-hour driving window, regardless of a mandated break."). The "30-minute off-duty break generates pressure as drivers attempt to keep on schedule," possibly leading "them to drive more aggressively than they would otherwise have" near the end of their shift. *Id.* at 33,416 (JA 238). Like the short-haul provision, the 30-minute break requirement does not "allow truck drivers additional driving time beyond the 11-hour limit" or "allow drivers to operate a [vehicle] after accumulating 14 hours of on-duty time during a work shift." *Id.* at 33,405-06 (JA 227-228).

In its accompanying regulatory impact analysis, FMCSA noted that it has granted several exemptions from the 30-minute break requirement, including some to allow the requirement to "be satisfied with on-duty not driving time," after "determining that they would not result in any decrease in safety." FMCSA, U.S. Dep't of Transp., *Regulatory Evaluation of the 2020 Hours of Service Final Rule* 48 & n.52 (2020) (*Regulatory Evaluation*)

(JA 216). These "exempt carriers have reported few crashes," and no crash "has been determined to be directly attributed to an exemption." *Id.* at 48 (JA 216). As an example, FMCSA described that drivers transporting certain hazardous materials were granted an exemption in August 2015 to "satisfy the 30-minute break requirement using" on-duty time attending to the hazardous load. *Id.* (JA 216). Looking at crash data "for the two years before and after the exemption went into effect," FMCSA found a "slight decrease in the percentage of [motor vehicle] crashes involving placarded [hazardous material vehicles] compared to all large truck crashes," which might "suggest that the 'attendance' exemption did not increase crash risk for operators of [these] vehicles." *Id.* at 48-49 (JA 216-217). More broadly, "FMCSA has not discovered evidence of adverse safety impacts that would require withdrawal of any 30-minute exemption." *Id.* at 49 (JA 217).

"[A]fter reviewing available research," FMCSA concluded that "an on-duty break from driving, will not adversely affect safety relative to the previous requirements." 85 Fed. Reg. at 33,445 (JA 267). Based on a reevaluation of the 2011 study on which the off-duty requirement was premised, the agency determined that "both on-duty breaks and off-duty breaks provide safety benefits essentially equivalent to those produced by an

off-duty break (as well as productivity benefits)." *Id.* at 33,416-17 (JA 238-239); *id.* at 33,417 (JA 239) ("The study found that any type of break was beneficial to the driver, whether the break consisted of work activities or rest."). And because "multiple research efforts [demonstrate] that time on task is a leading contributor to driver fatigue," a break after 8 hours of driving time "addresses this concern more adequately than" a break after 8 hours of on-duty time. *Id.* at 33,412 (JA 234); *see also id.* at 33,417 (JA 239) (citing another article's conclusion that "breaks were found to be a successful countermeasure to address the negative effects of time-on-task").

The agency, however, rejected the proposal supported by a majority of commenters to eliminate the 30-minute break requirement. 85 Fed. Reg. at 33,401 (JA 223). This option would "be more flexible than the preferred alternative" and "would result in an equivalent level of motor carrier cost savings," but FMCSA explained that it "would allow drivers the opportunity to operate a vehicle for 11 hours without stopping." *Id.* at 33,445 (JA 267). FMCSA considered this possibility "detrimental to safety" (even if it would occur infrequently) and therefore adopted the current break requirement that did not "lead to a reduction in safety benefits." *Id.* (JA 267).

C. Petitioners here are safety and labor organizations. They filed a joint administrative petition for reconsideration of the final rule. In identical letters, FMCSA denied that petition. FMCSA, U.S. Dep't of Transp., *Letter* (2020) (JA 291-292). The agency stated that the petition did "not present any new data or information concerning the rulemaking." *Id.* at 1 (JA 291). And the agency explained that "the changes adopted . . . will not result in adverse safety consequences," particularly when "the basic parameters of the [hours-of-service] rule that are essential to safety remain unchanged." *Id.* (JA 291). Additionally, the various studies that FMCSA cited in the rule "provide valuable information that supports the safety rationale for the current rules and the proposed changes." *Id.* (JA 291).

SUMMARY OF ARGUMENT

The incremental changes to the hours-of-service rules challenged here reflect FMCSA's weighing of scientific evidence and its careful consideration of the potential impacts on driver health and highway safety. The current rule does not alter the length of time a driver may drive, and it generally requires a 30-minute driving break after 8 hours of driving. It represents a modest expansion of the conditions a driver must meet to qualify for an exception to logging requirements and permits truck drivers to use their 30-

minute break to perform "on-duty" activities like refueling or paperwork. Even if petitioners had established standing to challenge the final rule, FMCSA's exercise of its expertise and discretion to modify existing hours-of-service rules was appropriate and reasonable, and the petition for review should be denied.

FMCSA reasonably explained its conclusion that the modifications to the prerequisites for the short-haul exception promote greater flexibility without compromising driver health or safety. The changes simply provide short-haul drivers with the same driving window that other truck drivers have used for many years. The agency bolstered its safety determination by comparing crash data from before and after a similar change was made for a specific class of truck drivers. In response to this sound decision-making, petitioners raise studies that the agency already considered and addressed and fail to grapple with the limited nature of the modifications adopted by FMCSA. Petitioners provide no basis to overturn FMCSA's reasoned judgment.

FMCSA also properly justified the modifications to the 30-minute break requirement. That change promotes greater flexibility without compromising driver health or safety: the change does not alter the

applicable driving limits and continues to require that truck drivers take a break from driving. It removes the limitation that drivers not attend to certain duty-related tasks during the break. Evidence supports the conclusion that it is the break from driving itself that counteracts negative effects from fatigue, and the agency did not observe an increase in crash risk after granting an exemption similar to the current rule in a related context. Again, petitioners' arguments misunderstand the limited nature of the modification. The petition for review should be denied.

STANDARD OF REVIEW

The challenged provisions of FMCSA's final rule may not be set aside unless they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). This standard is "highly deferential" and "presumes agency action to be valid." *American Trucking Ass'ns v. FMCSA*, 724 F.3d 243, 245 (D.C. Cir. 2013) (quoting *American Wildlands v. Kempthorne*, 530 F.3d 991, 997 (D.C. Cir. 2008)).

ARGUMENT

I. Petitioners Have Failed to Establish Standing

Petitioners bear the burden of establishing all of the elements of standing with satisfactory evidence in the record. *Twin Rivers Paper Co.*

LLC v. SEC, 934 F.3d 607, 613 (D.C. Cir. 2019). No individual driver and no representative from any of the safety organizations filed an affidavit—the lone declaration was submitted by an employee of the labor union. Petitioners have failed to provide the Court with sufficient evidence to support a claim of standing.

The labor union primarily asserts "standing to sue on behalf of [its] members" (Opening Br. 20-21). That representational standing theory fails at the outset because "it is not enough to aver that unidentified members have been injured." *Chamber of Commerce of U.S. v. EPA*, 642 F.3d 192, 199 (D.C. Cir. 2011). The labor union has not even attempted to "specifically identify members who have suffered the requisite harm," *id.* (quotation marks omitted), despite the clear obligation to do so, *see Twin Rivers*, 934 F.3d at 613 (finding no standing where petitioner failed "to submit any member affidavits with its opening brief" or "to identify any individual members" in "its own affidavit").

That deficiency is all the more glaring because the asserted harms to members rest on speculation about steps that employers may (or may not) take. For example, the labor union's bare assertion that their members "can be required by their employers to drive even if they have not had a 30-minute

off-duty or sleeper-berth break in the previous eight hours" (Opening Br. 20-21; Byrd Decl. ¶ 4) is insufficient. The evidence before FMCSA showed that the modest changes to the break requirement "would not significantly decrease the number of breaks being taken by drivers." 85 Fed. Reg. at 33,418 (JA 240); *see also, e.g.*, *id.* at 33,417 (JA 239) (quoting long-time member of trucking association who stated that "99.9 percent of all drivers will take a break of more than 30 minutes in any given 8-hour period"). In the face of this record, it was incumbent on petitioners to make specific allegations about members being held to mandated breaks by their employers.

The conjectural nature of the harm is even more apparent with respect to the short-haul exception. The labor union suggests that its members "who are short-haul drivers can be required by their employers to drive farther and work longer hours than before" (Opening Br. 20; Byrd Decl. ¶ 3). But the short-haul exception governs which drivers must prepare logbooks of duty status, and the labor union makes no effort to demonstrate that its members' employers will respond to the marginal changes to the driving distance and window when drivers could already exceed those limits provided that they kept the requisite logs. *See* 85 Fed. Reg. at 33,405-06 (JA 227-228).

Although FMCSA observed that some "individual drivers *may* see a change" in hours or miles, *id.* at 33,397 (JA 219) (emphasis added), petitioners do not establish that any of their members is among the affected subset.

Petitioners' remaining allegations are similarly flawed. The labor union's statement (Opening Br. 21; Byrd Decl. ¶ 5) that it may have to negotiate over the scope of the short-haul exception and the 30-minute break requirement assumes that members want the union to secure such terms in collective bargaining agreements.[2] Furthermore, the union's usual business is to engage in such negotiations on behalf of workers, *see* Byrd Decl. ¶ 2, and the union has neither asserted nor established that it would need to divert resources or make additional expenditures, *see Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982).

[2] Petitioners misread *Clinton v. City of New York*, 524 U.S. 417 (1998), to the extent they suggest (Opening Br. 21) that unions have standing whenever a regulatory change may theoretically affect tradeoffs in future negotiations. In that case, the Supreme Court concluded that a farmer's cooperative demonstrated "a sufficient likelihood of economic injury to establish standing" to challenge the constitutionality of the Line Item Veto Act when the President cancelled a tax benefit designed to facilitate the acquisition of processing plants by a defined category of potential purchasers that included the cooperative. *Clinton*, 524 U.S. at 432-33 & n.22. This case is materially distinct from that situation.

Any supposed competitive injury is self-inflicted. The fact that some employers might "choose to continue to abide by [previous] limitations" that are no longer in effect or that some collective bargaining agreements may already memorialize such provisions (Byrd Decl. ¶ 6) is "not fairly traceable" to the final rule. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 418 (2013). And petitioners nowhere explain how the rule puts them or their members at a comparative disadvantage or "allow[s] increased competition against them," given that the rule does not permit drivers to drive for a longer time. *International Bhd. of Teamsters v. U.S. Dep't of Transp.*, 724 F.3d 206, 211-12 (D.C. Cir. 2013). Accordingly, this Court should dismiss the petition for lack of standing.

II. FMCSA's Incremental Changes to the Hours-of-Service Provisions Were Not Arbitrary and Capricious

FMCSA's changes to the hours-of-service rules reflect a detailed analysis of extensive technical evidence and a careful balance of safety considerations, costs and benefits, and the practical effects of the rule on the regulated industry. The agency plainly satisfied its obligation to "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto.*

Ins. Co., 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)). This Court applies a high degree of deference where, as here, the administrative determinations are "based upon highly complex and technical matters" within the agency's experience and expertise. *Domestic Sec., Inc. v. SEC*, 333 F.3d 239, 248 (D.C. Cir. 2003) (quoting *Appalachian Power Co. v. EPA*, 251 F.3d 1026, 1035 (D.C. Cir. 2001)).

A. FMCSA Provided Ample Explanation and Empirical Evidence to Support the Modifications to the Short-Haul Exception from the Hours-Logging Requirement

1. FMCSA Reasonably Determined that the Short-Haul Changes Promote Flexibility Without Adversely Affecting Driver Safety or Health

a. As FMCSA detailed, the modifications to the short-haul exception were a response to the rigidity of the prior rule. *See* 85 Fed. Reg. at 33,396 (JA 218). The agency had expected that drivers "qualifying for the short-haul exception would be able to take advantage of the exception," but that was not always true in practice due to "[carriers'] business practices and normal operating conditions." *Id.* at 33,442 (JA 264). For example, drivers sometimes "needed an additional 2 hours in their workday" to account for delays resulting from "detention time, longer-than-expected customer

service stops, traffic, or other unforeseen events." *Id.* (JA 264). And because there was "uncertainty surrounding the driver's [short-haul] eligibility at the beginning of the workday," carriers sometimes incurred "unnecessary [electronic logging device] expenses" by needlessly treating drivers as though they were not eligible. *Id.* (JA 264).

To provide greater "flexibility to meet existing and future market demands for services within a larger area" and greater consistency in determining which drivers need not prepare records of duty status, 85 Fed. Reg. at 33,405 (JA 227), the agency extended "the scope of [the short-haul] exception from a 100- to a 150-air-mile radius" and "the driver's maximum workday from 12 to 14 hours." *Id.* at 33,437 (JA 259). These changes were also intended to simplify compliance and enforcement with the hours-of-service rules because they create harmony with distance and workday limits applicable to other drivers that carriers may have as part of their fleet. *See id.* at 33,409 (JA 231).

FMCSA amply explained and substantiated its determination that the changes to the short-haul exception "are safety- and health-neutral." 85 Fed. Reg. at 33,403 (JA 225). Under the revised rule, "short-haul drivers remain subject to the existing [daily and weekly] limit[s] on hours spent driving." *Id.*

at 33,437, 33,446 (JA 259, 268). As the agency repeatedly emphasized, the rule "allow[s] neither additional drive time during the workday, nor driving after the 14th hour from the beginning of the workday." *Id.* at 33,405 (JA 227); *see also, e.g.*, *id.* at 33,411, 33,446 (JA 233, 268). Given FMCSA's determination that these are the "most critical" factors for ensuring safe operations, *id.* at 33,408 (JA 230), it was reasonable to conclude that the changes "will not affect the crash risk of drivers operating under the short-haul exception," *id.* at 33,446 (JA 268).

FMCSA justified that conclusion with various pieces of evidence. Drawing on its own experience with hours-of-service regulation, the agency listed many types of drivers that already operate under these conditions. The short-haul exception for vehicles not requiring a commercial driver's license uses a 150-air-mile radius and a 14-hour (or sometimes 16-hour) shift. 85 Fed. Reg. at 33,407 (JA 229). Long-haul drivers have a 14-hour driving window (without a distance restriction), for which the agency thoroughly analyzed the health and safety impacts in a prior rule. *Id.* at 33,447 (JA 269). Several industry groups and carriers have an exemption extending the 12-hour short-haul limit to 14 hours based on a showing that it would achieve at least an equivalent level of safety. *Id.* at 33,401-02 (JA 223-224). And even

drivers who typically fall under the short-haul exception may exceed its distance and workday limits for 8 out of every 30 days so long as they keep paper records of duty status for those days. *Id.* at 33,406 (JA 228).

FMCSA further cited data supporting the conclusion that expanding the driving window would not compromise safety. In 2015, Congress extended the short-haul exception for concrete mixers from a 12-hour to a 14-hour workday. 85 Fed. Reg. at 33,446 (JA 268). Based on an analysis of nationwide crash data for these vehicles, FMCSA observed a decline from 7.6% in 2013 to 5.8% in 2017 of crashes occurring in the evening (when drivers are likely to be near the end of their shift). *Id.* (JA 268). For the same period, the agency saw a "very minor increase" from 0.907% to 0.919% in concrete mixers' share of total large truck crashes. *Id.* (JA 268). Recognizing that this data was not conclusive or perfectly analogous to all short-haul operations, FMCSA concluded that its analyses "suggest" that extending the short-haul exception from 12 to 14 hours "did not increase the share of concrete mixers involved in crashes." *Id.* (JA 268).

With no "additional data on the impact that the [changes] would have on crash rates" from commenters, FMCSA relied on the concrete-mixer data as "the best available data with a before and after comparison of changes."

85 Fed. Reg. at 33,446 (JA 268). FMCSA identified several problems and limitations with the Teoh study cited by petitioners. *See* Eric R. Teoh, et al., *Crash Risk Factors for Interstate Large Trucks in North Carolina*, 62 J. Safety Res. 13 (2017) (Teoh). Although that study's finding that drivers operating in North Carolina under the short-haul exception "had a crash risk 383 percent higher than those not using the exception" was statistically significant, the "very small sample size" meant that the authors could not perform a robust analysis "restricted to drivers operating under a short-haul exception." 85 Fed. Reg. at 33,446 (JA 268). The authors themselves also "noted that other related factors unobserved in the study," such as the age or poor condition of the trucks, "may have led to [the] result." *Id.* (JA 268). FMCSA's safety determination reflects a careful weighing of the entire evidentiary record.

b. With respect to driver health, FMCSA broadly recognized that drivers might experience a change in driving or working hours "on a given day," but that these "time shifts" are not likely to "negatively impact drivers' health." 85 Fed. Reg. at 33,447 (JA 269). To the contrary, drivers' increased flexibility to make decisions may lead to "decrease[s] in stress" as well as "increases in health benefits." *Id.* (JA 269). The changes to the short-haul

exception "simply give[] short-haul carriers the same driving limit and driving window that other carriers have utilized for many years." *Id.* (JA 269). Indeed, the rule cites the 2005 rule's extensive discussion of health with respect to the 11-hour driving limit and 14-hour driving window, which remain in effect. *See id.* at 33,403 (JA 225).

In response to a comment from one of the petitioners about short-haul drivers suffering injuries on the job, FMCSA explained that "some carriers [may] make longer runs with fewer deliveries than before, which may minimize, or even eliminate, an increase in the number of stops, where [petitioner] claims workplace injuries typically occur." 85 Fed. Reg. at 33,409 (JA 231). FMCSA was not aware of, and petitioner did not submit, "any study that purports to establish a dose-response curve showing workplace injuries as a function of each hour worked." *Id.* (JA 231). Similarly, "[n]o data was provided to suggest that driving distance was directly related to injuries received by short-haul drivers." *Id.* at 33,408 (JA 230).

c. FMCSA further explained that the "expansion of the short-haul provision (both the extension of the time and distance limits)" would allow more drivers to opt out of using electronic logging devices, but that fact alone "does not mean that the carriers in question would experience increased

levels of non-compliance with the applicable [hours-of-service] rules." 85 Fed. Reg. at 33,406-07 (JA 228-229). By making the limits in the short-haul exception more consistent with other provisions, the changes will simplify compliance and enforcement for carriers with diverse fleets. *Id.* at 33,409 (JA 231).

Under the threat of penalty if they coerce drivers to commit hours-of-service violations, 85 Fed. Reg. at 33,404 (JA 226), carriers must ensure that their short-haul drivers do not exceed 11 hours of driving time per day, *id.* at 33,409 (JA 231). To that end, carriers must keep records of short-haul driver start and end times at the driver's reporting location. *Id.* at 33,407 (JA 229). Performing compliance investigations at these sites has the benefit of allowing enforcement personnel to examine on-duty time and total distance traveled, with "access to" supporting records about "where the driver traveled and the time spent at those locations" when more information is needed. *Id.* (JA 229).

As the agency noted, it is nothing new for short-haul drivers to be excepted from logging duty status. 85 Fed. Reg. at 33,410 (JA 232). Indeed, the exception at issue in this case has long allowed drivers to operate without preparing such records under slightly different distance and workday limits.

See id. at 33,397 (JA 219). And since 2005, drivers operating vehicles not requiring a commercial driver's license have had a short-haul exception with the same "time and distance limits" adopted in the current rule. *Id.* at 33,407 (JA 229). The agency discussed that because of the "nature of short-haul operations," which entail frequent delivery stops and a return to the reporting location at the end of each workday, "an increase in violations of the 11-hour driving limit," which applies regardless of any exception to logging requirements, "is highly unlikely." *Id.* at 33,408 (JA 230). These drivers have "rarely approach[ed] the 11-hour driving limit" in the past, and FMCSA found that "total driving time will usually continue to fall short of the 11-hour limit" after the changes. *Id.* (JA 230). In short, FMCSA "engaged in reasoned decisionmaking" by describing its evidence-supported rationales for the modifications to the short-haul exception. *FERC v. Electric Power Supply Ass'n*, 577 U.S. 260, 292, 295 (2016).

2. Petitioners' Contentions Before This Court Should Be Rejected Because They Misunderstand the Regulatory Changes and Were Fully Considered and Addressed by FMCSA

In their effort to overcome the reasonableness of FMCSA's modification of the prerequisites for the short-haul exception, petitioners quibble with individual findings while discounting evidence that supported

the agency's conclusions. These sorts of disagreements with the agency's considered judgment do not demonstrate that the agency offered an inadequate explanation or "entirely failed to consider an important aspect of the problem." *State Farm*, 463 U.S. at 43. FMCSA thoroughly considered and addressed the arguments petitioners raise here, and this Court should reject them.

a. The majority of petitioners' safety concerns misapprehend that the changes to the short-haul exception do not mean that drivers can "operate for longer hours" and "drive longer distances" (Opening Br. 33) than they could before. Rather, the 14-hour and 150-air-mile limitations dictate which drivers are entitled to an exception from keeping logs of their duty status. Drivers could already exceed 12 hours and 100 air miles so long as they prepared and maintained records of duty status, either in paper format (if they exceeded these limits 8 or fewer days in a 30-day period) or by use of an electronic logging device (if they exceeded these limits more frequently). *See* 85 Fed. Reg. at 33,406 (JA 228).

Relatedly, FMCSA did not allow drivers any additional driving time. Most notably, the agency retained "the continued adherence to the 11-hour driving time limit" as well as "the continued prohibition against driving after

the 14th hour of the beginning of the work shift." 85 Fed. Reg. at 33,411 (JA 233). Petitioners dismiss these limits out of hand (Opening Br. 26-27), but they overlook the agency's determination that these limits are "the primary factors influencing safety outcomes," 85 Fed. Reg. at 33,411 (JA 233). FMCSA reasonably concluded that changes to when the short-haul exception applies, viewed in conjunction with these other limits, would not compromise safety, particularly when the agency's actions brought the short-haul exception into alignment with similar or identical restrictions that for many years have governed short-haul drivers not required to hold a commercial driver's license and long-haul drivers.

Petitioners wrongly suggest that FMCSA should have blinded itself to the experience of these other drivers on the ground that "the prior rule" is the only "relevant comparison" (Opening Br. 27, 44). That argument misses the point. In issuing the rule, the agency properly recognized that the modifications only affect drivers "who travel between 100 and 150 air miles" and "return . . . between 12 and 14 hours." 85 Fed. Reg. at 33,409 (JA 231); *see also id.* at 33,405 (JA 227) ("[T]he extension of both the 12-hour limit to 14 hours, and the 100 air-mile radius to 150 air miles will provide the increased flexibility for drivers without compromising overall safety."). As

evidence supporting those changes, FMCSA noted that other drivers have safely operated under a short-haul exception with the same "time and distance limits" since 2005, *id.* at 33,407 (JA 229), and that the 11-hour driving limit and 14-hour driving window applicable to long-haul drivers have long been understood as "consistent with the statutory obligation to protect driver safety and health," *id.* at 33,447 (JA 269). Contrary to petitioners' assertion, the fact that the changes "simply give[] short-haul carriers the same driving limit and driving window that other carriers have utilized for many years," *id.* (JA 269), is relevant and probative.

Petitioners also raise meritless objections (Opening Br. 28-32) to FMCSA's analysis of crash data for concrete mixers in the two years before and after Congress extended their short-haul period from 12 to 14 hours in 2015. For example, petitioners ask this Court (Opening Br. 29-30) to disregard the concrete-mixer data because the drivers' schedules vary. But even assuming petitioners are correct that drivers of concrete mixers sometimes "start [one day] at 7 a.m. and the next at 12 p.m.," Opening Br. 29 (quotation marks omitted), that fact is consistent with FMCSA's assumption that the workday for most of these drivers "begins in the morning hours and ends in the evening hours" such that these drivers "are more likely to be

close" to the end of a 12- or 14-hour shift between 5 p.m. and 11:59 p.m., 85 Fed. Reg. at 33,446 (JA 268). Petitioners' arguments thus do not undermine the significance of the nearly 2% decline in concrete-mixer "crashes at later hours of the day" from 2013 to 2017. *Id.* (JA 268). Petitioners also do not dispute that FMCSA observed no statistically significant jump in concrete mixers' share of total large-truck crashes in the same timeframe. *See id.* (JA 268). All of this supports FMCSA's limited finding that these "analyses suggest that the [congressional change] did not increase the share of concrete mixers involved in crashes when extending the short-haul exception requirement from 12 to 14 hours." *Id.* (JA 268).[3]

Of course, FMCSA may have been able to make a more robust conclusion from this concrete-mixer data if the agency had information about numbers and "trends within trucking operations in general" (Opening Br. 30) or a data set "limited to ready-mix concrete vehicles whose drivers operated under the short-haul exemption" (Opening Br. 29). But FMCSA never

[3] Petitioners' passing suggestion (Opening Br. 31) that Congress's decision to extend the short-haul exception for concrete mixers implicitly precluded a similar extension for other vehicles finds no basis in the statute which discusses the applicability of FMCSA's regulation to concrete mixers, 49 U.S.C. § 31502(f), but does not purport to constrict FMCSA's authority to fine-tune hours-of-service regulations as appropriate.

claimed that this evidence was perfect, 85 Fed. Reg. at 33,446 (JA 268), and "[i]t is not infrequent that the available data does not settle a regulatory issue," *State Farm*, 463 U.S. at 52. As FMCSA explained, the natural experiment of concrete mixers was "the best available data with a before and after comparison of changes," and no commenter produced anything comparable, 85 Fed. Reg. at 33,446 (JA 268), despite the agency's express request for such information, *see* 84 Fed. Reg. at 44,198 (JA 97). FMCSA reached a reasonable "judgment based on the evidence it had." *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1160 (2021).

In a similar vein, petitioners recognize (Opening Br. 33-34) that FMCSA expressly set forth its reasons for rejecting the Teoh study, but they nonetheless insist that the explanation is insufficient. Their criticisms fail to grapple with the fact that the basis for FMCSA's objection was not simply that the study "involved a small sample size" of trucks operating in North Carolina (Opening Br. 34) but that the sample size was so small that the authors were unable to approximate a crash risk limited to short-haul drivers, 85 Fed. Reg. at 33,446 (JA 268). The study itself was explicit in this regard, stating that "[t]he sample was too small to estimate a matched-pair odds ratio restricted to short-haul exemption trucks" and that the lack of

data "limited the statistical power and the ability to disaggregate the data by various factors such as short-haul exemption." Teoh 18, 20. And petitioners offer nothing more than conjecture (Opening Br. 34) to try to overcome the study authors' own acknowledgement that confounding variables—such as truck age or maintenance—may explain the result, *see* Teoh 19. FMCSA was entitled to "exercise its judgment" as to how little weight to afford the Teoh study in light of these deficiencies and in the face of competing evidence. *State Farm*, 463 U.S. at 52.

Petitioners are equally wrong in their broader assertion (Opening Br. 24-28) that FMCSA did not consider the import of the 2011 Blanco study. *See* U.S. Dep't of Transp., *The Impact of Driving, Non-Driving Work, and Rest Breaks on Driving Performance in Commercial Motor Vehicle Operations* (2011). The agency specifically reviewed and discussed that study in the context of the changes to the short-haul exception. As FMCSA explained, the study shows that drivers saw reduced safety critical events by taking an on- or off-duty break from the driving task. *See* 85 Fed. Reg. at 33,412 (JA 234); *see also id.* at 33,445 (JA 267) (describing the "key finding in the Blanco study" that "significant safety benefits can be achieved when drivers take breaks from driving" and that "breaks can ameliorate the

negative impacts associated with fatigue and time on task"). That conclusion also aligns with research demonstrating that "time on task is a leading contributor to driver fatigue." *Id.* at 33,412 (JA 234). Accordingly, FMCSA determined that short-haul drivers would not typically accumulate concerning levels of fatigue because short-haul operations by their nature involve "frequent breaks from driving throughout the day." *Id.* (JA 234).

The agency's analysis also cross-references its discussion of the changes to the 30-minute break requirement. *See* 85 Fed. Reg. at 33,412 (JA 234) (referring to "the Agency's decision concerning changes to the 30-minute break"). In that section, FMCSA reiterates its conclusion that the Blanco study "found that any type of break was beneficial to the driver, whether the break consisted of work activities or rest" and that "breaks were found to be a successful countermeasure to address the negative effects of time-on-task." *Id.* at 33,417 (JA 239) (quotation marks omitted). Petitioners cannot sustain their claim that FMCSA failed to consider "driving later in the workday" (Opening Br. 26) when the agency explicitly noted that short-haul drivers utilize the types of breaks that "counter the effects of driving time that occurred later in the driver's workday," *id.* at 33,417 (JA 239). Moreover, petitioners ignore FMCSA's finding that expanding the workday

under the short-haul exception "will reduce potential pressure" for drivers to speed at the end of the day in order to timely complete their shift. *Id.* at 33,412 (JA 234).

b. FMCSA also had an adequate basis to conclude that the changes to the short-haul exception are "health-neutral." 85 Fed. Reg. at 33,447 (JA 269). Petitioners do not address, let alone contest, the benefits stemming from lower stress. *See id.* (JA 269). Instead, petitioners claim that these drivers will perform more non-driving tasks and thereby "experience increased incidence of occupational injuries" (Opening Br. 35). Even for the subset of drivers who will undertake more non-driving tasks in a workday, FMCSA knew of no study "purport[ing] to establish a dose-response curve showing workplace injuries as a function of each hour worked." 85 Fed. Reg. at 33,409 (JA 231). Petitioners cannot fill that gap (Opening Br. 39-40) by reference to a generic remark in a 2004 report that did not examine health effects after 12 hours of work.

On the other hand, FMCSA properly relied on the experience of other drivers operating under similar restrictions. For example, drivers of vehicles not required to hold a commercial driver's license already operate under a short-haul exception with the same (or even more permissive) limits. *See* 49

C.F.R. § 395.1(e)(2). Furthermore, the 2005 rule discussed health effects from substantive driving and workday limitations that apply to the current rule. For example, the combination of the 14-hour shift limit and the 10-hour off-duty requirement between shifts was shown to improve sleep by promoting a normal 24-hour sleep-waking cycle. *See* 70 Fed. Reg. at 49,990-91. Similarly, for those drivers who maximize driving time, the 11-hour driving limit plus the 10-hour off-duty period results in a 21-hour schedule that allows drivers to reap many of the same benefits. *See id.*[4] These positive health effects, which derive from the rule itself and are not limited to long-haul drivers (Opening Br. 36-37), underscore the reasonableness of FMCSA's conclusion that the incremental changes to the short-haul exception will not adversely affect driver health.

c. Petitioners' unsubstantiated assertion that "exempting more drivers from the electronic-logging-device requirement" will invariably result in "increased noncompliance with [hours-of-service] rules" (Opening Br. 43) falters on multiple grounds. Petitioners assume the conclusion by starting and ending with the premise that "electronic logging devices reduce

[4] Petitioners cannot (Opening Br. 37-38) use this opportunity to resurrect a challenge to the prior rule that they could have raised previously.

noncompliance with hours-of-service rules" (Opening Br. 43), and they ignore the countervailing considerations that the changes to the short-haul exception will provide "more flexibility to spend time with customers, respond to changes in market demand such as peak holiday delivery times, and reduce the administrative burden," 85 Fed. Reg. at 33,409 (JA 231). Petitioners' reasoning, taken to its logical end, would cast doubt on the agency's ability to expand or even countenance an exception from the electronic-logging-device requirement. Instead, FMCSA reasonably concluded that, despite the importance of these devices, allowing a slightly broader exception from their use does not "in and of itself" foretell hours-of-service violations. *Id.* at 33,407 (JA 229).

Petitioners largely overlook the "self-limiting" nature of short-haul operations. 85 Fed. Reg. at 33,407 (JA 229). Because short-haul drivers must return to their reporting location at the end of each shift, there is little cause for petitioners' concern (Opening Br. 42) that drivers will be able to cover a significant portion of the expanded operating area. *See* 85 Fed. Reg. at 33,408 (JA 230). And as petitioners acknowledge (Opening Br. 41-42, 45), short-haul operations characteristically involve either "several stops for pick-up and/or delivery" or "few trips with extended periods at the

delivery/service site," including many non-driving tasks like "loading and unloading" and "spend[ing] time with customers," plus bathroom and food breaks, 85 Fed. Reg. at 33,407-09, 33,419 (JA 229-231, 241). When considered with the fact that most short-haul drivers generally fall well below the 11-hour driving limit, FMCSA reasonably rejected the notion that drivers would exceed that limit with a marginally longer workday. *See id.* at 33,408 (JA 230).[5]

Nor do petitioners offer (Opening Br. 43-44) any reason to believe that existing enforcement techniques will be ineffective at preventing violations. *See* 85 Fed. Reg. at 33,410 (JA 232) ("Enforcement personnel will . . . use the same investigative techniques as they currently do to verify radius of travel, driving time, and start time for the work shift."). Although short-haul drivers are not required to log driving time, *see* Opening Br. 44-45, records of "where the driver traveled and the time spent at those locations" are available at the driver's reporting location, 85 Fed. Reg. at 33,407 (JA 229). Drivers of vehicles not required to hold a commercial driver's license qualify

[5] Petitioners are mistaken in urging (Opening Br. 45-46) that FMCSA was obligated to mention decades-old decisions by its predecessor agency about how to calibrate the short-haul exception before the existence of electronic logging devices. Here, FMCSA properly evaluated the current, relevant considerations without contradicting a prior position.

for a nearly identical short-haul exception, *id.* (JA 229), but petitioners have identified no analytical or anecdotal evidence in the record suggesting driving-time violations for this class of drivers.

B. FMCSA Properly Applied Its Expertise and Experience in Light of the Evidentiary Record to Support the Modifications to the 30-Minute Break Rule

1. FMCSA Reasonably Determined that the Changes to the Break Rule Promote Flexibility Without Adversely Affecting Driver Safety or Health

As FMCSA detailed, the prior hours-of-service rule required that truck drivers take a 30-minute off-duty break after 8 hours of on-duty time, regardless of the work performed up to that point or a driver's level of fatigue. 85 Fed. Reg. at 33,416 (JA 238). In some instances, drivers would drive "more aggressively" at the end of their shift to stay "on schedule." *Id.* (JA 238). The agency thus opted for a rule providing flexibility for drivers to plan their schedules and "take breaks without penalty when they need rest." *Id.* at 33,397 (JA 219).

The final rule keeps the substantive driving and workday limits in place and provides that "a driver may not drive more than 8 hours without an interruption of at least 30 consecutive minutes," which may be satisfied "by spending the time off-duty [or] on-duty (not driving)." 85 Fed. Reg. at 33,438

(JA 260). Thus, drivers must still cease driving but may count tasks like refueling and completing paperwork toward the required 30 minutes, *id.* at 33,436 (JA 258), thereby allowing drivers "to reach their destination earlier" in many cases, *id.* at 33,398 (JA 220). Even commenters who opposed the changes to the 30-minute break requirement admitted these "real-world advantages." *Id.* at 33,420 (JA 242).

FMCSA documented why the changes "will not adversely affect safety relative to the previous requirements." 85 Fed. Reg. at 33,445 (JA 267). Based on extensive input from commenters such as drivers, the agency explained that, whether or not drivers are subject to a mandatory break, they have taken breaks as needed and will continue to do so, including to use the restroom and eat food. *See id.* at 33,418-19 (JA 240-241). Even those "who drive for fewer than 8 hours would take some sort of break during the work shift due to the naturally occurring breaks (such as when cargo is loaded or unloaded)." *Id.* at 33,419 (JA 241). Thus, the changes were not expected to "significantly decrease the number of breaks being taken by drivers," but they still cover those likely "to accumulate the levels of fatigue necessitating a mandatory 30-minute break in addition to breaks that naturally occur during their workday." *Id.* at 33,418 (JA 240).

Crash data for vehicles that hold FMCSA-granted exemptions similar to the revised rule further support the agency's determination. Drivers have operated under those exemptions with few reported crashes and none directly attributable to the exemption. *Regulatory Evaluation* 48 (JA 216). After granting such an exemption to drivers transporting certain hazardous materials, FMCSA found a decrease from 2.616% to 2.419% in these vehicles' share of the total crashes involving large trucks. *Id.* (JA 216). This data "may suggest that the [granted] exemption did not increase crash risk for operators of [these] vehicles." *Id.* at 48-49 (JA 216-217).

These conclusions are also consistent with scientific research in the administrative record. Reevaluating the 2011 Blanco study on which the off-duty requirement was premised, the agency determined that "both on-duty breaks and off-duty breaks provide safety benefits essentially equivalent to those produced by an off-duty break (as well as productivity benefits)." 85 Fed. Reg. at 33,416-17 (JA 238-239); *id.* at 33,417 (JA 239) ("[A]ny type of break was beneficial to the driver, whether the break consisted of work activities or rest."). And because "multiple research efforts [demonstrate] that time on task is a leading contributor to driver fatigue," *id.* at 33,412 (JA 234), and that breaks effectively combat these "negative effects," *id.* at 33,417

(JA 239) (quotation marks omitted), a break after 8 hours of driving time is well suited to address that concern. *See id.* at 33,412 (JA 234).

2. Petitioners' Counterarguments Lack Merit and Ignore Aspects of FMCSA's Reasoned Decision

In their attack on the rule, petitioners omit key facets of FMCSA's explanation and the underlying evidentiary support. They take no serious issue (Opening Br. 47-48) with FMCSA's understanding of the 2011 Blanco study, which FMCSA called the "best evidence on the effect of breaks." 85 Fed. Reg. at 33,416 (JA 238). As a threshold matter, FMCSA indicated respects in which the Blanco study "deviate[d]" from the strict 30-minute off-duty requirement in the prior rule—in the study, the break time was longer (up to 59 minutes), and off-duty breaks were voluntary. *Regulatory Evaluation* 46 (JA 214). FMCSA also reclassified data from the study in accordance with the hours-of-service rules and concluded that there was not a significant disparity between the safety effects afforded by on-duty vs. off-duty breaks. *Id.* at 47 (JA 215). Because FMCSA previously "placed too great a value on off-duty breaks," it revised the rule to accord with the supported conclusion that "breaks of any type reduced" safety critical events. *Id.* (JA 215).

Petitioners' bare assertions that FMCSA's analysis does not account for "the effect on safety of cumulative fatigue and fatigue from non-driving work" (Opening Br. 48) and that only off-duty breaks can be restful (Opening Br. 49) are incorrect. Although the prior rule required off-duty breaks, it did not dictate that off-duty breaks had to be restful or not involve strenuous activities. And FMCSA explained that the Blanco study "did not clearly demonstrate a significant difference between off-duty and on-duty breaks." 85 Fed. Reg. at 33,420 (JA 242). FMCSA cited multiple studies, including the Blanco study, demonstrating that breaks from the driving task reduce fatigue and safety critical events. *See id.* at 33,417 (JA 239); *see also id.* at 33,445 (JA 267) ("The results from the break analyses indicated that significant safety benefits can be achieved when drivers take breaks from driving. This was a key finding in the Blanco study and clearly shows that breaks can ameliorate the negative impacts associated with fatigue and time on task."). Even for the less than 4% of shifts that extend beyond 13.5 hours, *id.* at 33,419 (JA 241), FMCSA's finding of "[n]o anticipated fatigue effect" is fully applicable because drivers must abide by driving limits and take breaks from driving, *see id.* at 33,398 (JA 220).

Petitioners cannot make much headway in urging (Opening Br. 49) that drivers will exert themselves by performing tasks like loading and unloading, when they simultaneously recognize (Opening Br. 37) that "most long-haul drivers do not load or unload the cargo," 76 Fed. Reg. at 81,141. FMCSA listed multiple other less-onerous on-duty tasks that drivers may count toward their break, such as completing paperwork and stopping for fuel. 85 Fed. Reg. at 33,416 (JA 238). In all events, nothing in the prior or current rule prevents drivers from taking needed bathroom, food, and other breaks. *See id.* at 33,419 (JA 241).

Nor did FMCSA disregard health benefits, as petitioners claim (Opening Br. 50-52). FMCSA recognized that drivers' ability to control their schedules may decrease stress, and workday variability is not expected to "negatively impact drivers' health." 85 Fed. Reg. at 33,447 (JA 269). As described in more detail above, the rule cited the 2005 rule's extensive discussion of the health benefits attendant to the 11-hour driving limit and 14-hour driving window, which remain in effect. *See id.* (JA 269). And petitioners identify no error (Opening Br. 51-52) in FMCSA's statement about the difficulties in evaluating what effect "specific regulatory changes" have on "driver health," 85 Fed. Reg. at 33,447 (JA 269).

Petitioners do not dispute (Opening Br. 50) that the 2011 rule's health benefits were largely attributable to the 34-hour restart provision and therefore carry over to the current rule. *See* 85 Fed. Reg. at 33,447 (JA 269). But they insist that any separate benefits derived from the 30-minute break requirement have diminished in light of the changes to the rule (Opening Br. 50-51). However, petitioners have not identified evidence undercutting FMCSA's reasonable conclusions that drivers will continue to take routine breaks during their shifts, as they did prior to the changes, 85 Fed. Reg. at 33,418 (JA 240), and that "any type of break (both off-duty, and on-duty not driving) [is] beneficial to the driver," *id.* at 33,412 (JA 234). FMCSA reasonably justified the incremental changes to the hours-of-service rules.

CONCLUSION

For the foregoing reasons, the petition for review should be dismissed or denied.

Respectfully submitted,

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This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 11,579 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in CenturyExpd BT 14-point font, a proportionally spaced typeface.

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