ORAL ARGUMENT SCHEDULED FOR APRIL 25, 2022

No. 20-1370

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ADVOCATES FOR HIGHWAY AND AUTO SAFETY, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CITIZENS FOR RELIABLE AND SAFE HIGHWAYS, and PARENTS AGAINST TIRED TRUCKERS,
Petitioners,

v.

FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION, UNITED STATES DEPARTMENT OF TRANSPORTATION, and the UNITED STATES,
Respondents.

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

FINAL BRIEF FOR PETITIONERS

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March 8, 2022

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

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

A. Parties and Amici

Petitioners are Advocates for Highway and Auto Safety, International Brotherhood of Teamsters, Citizens for Reliable and Safe Highways, and Parents Against Tired Truckers. Petitioners Advocates for Highway and Auto Safety, Citizens for Reliable and Safe Highways, and Parents Against Tired Truckers are national nonprofit organizations dedicated to improving truck safety. Petitioner International Brotherhood of Teamsters is a labor union representing more than 1.3 million workers, including commercial truck drivers, in the United States and Canada. None of the Petitioners issues shares or debt securities to the public or has a parent, subsidiary, or affiliate that has issued shares or debt securities to the public.

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

The Owner-Operator Independent Drivers Association, Inc. has intervened in support of Respondents.

B. Ruling Under Review

Petitioners seek review of a final rule titled "Hours of Service of Drivers" (Docket No. FMCSA-2018-0248), published in the Federal Register by Respondent FMCSA on June 1, 2020, at 85 Fed. Reg. 33396, JA 218–74.

C. Related Cases

Petitioners are not aware of any related cases.

/s/ Adina H. Rosenbaum

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GLOSSARY

APA	Administrative Procedure Act
DOT	United States Department of Transportation
FMCSA	Federal Motor Carrier Safety Administration
JA	Joint Appendix in this case
NPRM	Notice of Proposed Rulemaking

INTRODUCTION

In the Final Rule at issue in this case, the Federal Motor Carrier Safety Administration (FMCSA) weakened its regulations governing the hours that drivers of commercial motor vehicles may drive and work, commonly known as the "hours-of-service" regulations. Among other changes, FMCSA extended the workday of short-haul drivers who are exempt from documenting their driving hours and expanded the area in which they may drive. In addition, the agency eliminated the requirement that long-haul drivers of property-carrying commercial motor vehicles receive a 30-minute off-duty break. The Final Rule states that the changes it makes will not compromise safety or negatively impact drivers' health. But the Final Rule does not account for the risks of driving later in the workday, does not adequately respond to a study showing that driving under the short-haul exemption increases crash risk by 383 percent, and does not explain why increasing short-haul drivers' workday will not increase occupational injuries. Moreover, the Final Rule does not contain a rational explanation why increasing the number of drivers who are exempt from documenting their driving hours—and providing those drivers with a longer workday and larger driving radius—will not affect compliance with hours-of-service rules. Likewise, the Final Rule does not account for fatigue from non-driving work or consider the effect of the changes to the 30-minute break requirement on the benefits that FMCSA attributed to that requirement when it adopted the requirement

in 2011. In short, the Final Rule fails to demonstrate that the agency considered all relevant factors and engaged in reasoned decisionmaking. Accordingly, the Final Rule is arbitrary and capricious, and the Court should set aside the provisions on short-haul drivers and the 30-minute break requirement.

JURISDICTION

FMCSA published the challenged Final Rule on June 1, 2020, under the Motor Carrier Act of 1935, 49 U.S.C. § 31502(b), and the Motor Carrier Safety Act of 1984, *id*. § 31136(a). *See* FMCSA, Final Rule, *Hours of Service of Drivers*, 85 Fed. Reg. 33396, 33399 (June 1, 2020), JA 221 (Final Rule). Petitioners filed a timely joint petition for reconsideration of the Final Rule on July 1, 2020. *See* JA 275–85. By letters dated August 25, 2020, FMCSA denied the petition for reconsideration. *See* JA 291–300. Petitioners filed a timely petition for review on September 16, 2020. This Court has jurisdiction under 28 U.S.C. § 2342(3)(A).

STATUTES AND REGULATIONS

The relevant statutes and regulations are included in Addendum A.

STATEMENT OF ISSUES

1. Whether the Final Rule's provisions increasing short-haul drivers' maximum duty hours and driving radius are arbitrary and capricious.

2. Whether the Final Rule's provisions eliminating the requirement that long-haul drivers take an off-duty break of at least 30 minutes if they have not taken an

off-duty or sleeper-berth break of at least that length within the previous eight hours, and replacing it with a requirement that drivers take a break from *driving* of at least 30 minutes—which can be spent on-duty, doing non-driving work—if they have not taken a break from *driving* of at least that length in the previous eight hours are arbitrary and capricious.

STATEMENT OF THE CASE

I. Background

A. Congress's Safety Mandates

In 2018, 4,951 people were killed and an estimated 151,000 people were injured in crashes involving large trucks. National Highway Traffic Safety Administration, *Traffic Safety Facts 2018 Data* 2 (Mar. 2020), *available at* https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/812891. Of the people who died, 18 percent were occupants of large trucks, 71 percent were occupants of other vehicles, and 11 percent were pedestrians, bicyclists, or others not in a vehicle. *Id.* Fatalities in crashes involving large trucks increased 46 percent between 2009 and 2018. *Id.*; *see also* Advocates for Highway and Auto Safety Comments (2019), at 1, JA 195 (Advocates 2019 Comments); National Safety Council Comments (2019), at 1, JA 122.

The United States Department of Transportation (DOT) is charged by Congress with ensuring commercial motor vehicle safety and protecting driver

health. The Motor Carrier Safety Act of 1984, as amended, requires DOT to "prescribe minimum safety standards for commercial motor vehicles." 49 U.S.C. § 31136(a). Those regulations must ensure, at a minimum, that "commercial motor vehicles are … operated safely" and that "the responsibilities imposed on operators of commercial motor vehicles do not impair their ability to operate the vehicles safely." *Id*. The regulations must also ensure that "the physical condition of operators of commercial motor vehicles 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*.

In 1999, Congress established FMCSA as a new administration in DOT, in light of findings that the "rate, number, and severity of crashes involving motor carriers in the United States [were] unacceptable" and that DOT was "failing to meet statutorily mandated deadlines for completing rulemaking proceedings on motor carrier safety." Motor Carrier Safety Improvement Act, Pub. L. No. 106-159, § 3, 113 Stat. 1748 (1999). In establishing FMCSA, Congress set forth in the law the agency's preeminent safety mission: "In carrying out its duties, the Administration shall consider the assignment and maintenance of safety as the highest priority, recognizing the clear intent, encouragement, and dedication of Congress to the furtherance of the highest degree of safety in motor carrier transportation." 49 U.S.C. § 113(b).

B. The Hours-of-Service Regulations

Commercial motor vehicle drivers' working hours affect both the safety of America's roads and the health of the drivers. As FMCSA has explained, long work hours "increase both the risk of fatigue-related crashes and long-term health problems for drivers." FMCSA, Final Rule, *Hours of Service of Drivers*, 76 Fed. Reg. 81134, 81134 (Dec. 27, 2011), JA 37 (2011 Rule). "Fatigued drivers have slowed reaction times and a reduced ability to assess situations quickly." *Id*. "When driving an 80,000-pound [commercial motor vehicle] at highway speeds, any delay in reacting to a potentially dangerous situation can be deadly." *Id*. Moreover, "research has linked long work hours and the resulting curtailment of sleep to a range of serious health effects, particularly when combined with a job that is basically sedentary, like truck driving." *Id*. Commercial motor vehicle drivers suffer from conditions such as "obesity, high blood pressure, other cardiovascular diseases, diabetes, and sleep apnea … at a higher rate than the population as a whole." *Id*.; *see also* Advocates 2019 Comments, at 1, JA 195.

To reduce fatigue-related crashes, the federal government has regulated the hours of service of commercial motor vehicle drivers since the late 1930s. In 1995, Congress ordered the Federal Highway Administration—FMCSA's predecessor agency—to initiate a rulemaking "dealing with a variety of fatigue-related issues pertaining to commercial motor vehicle motor vehicle safety," including the existing

hours-of-service rules. ICC Termination Act of 1995, Pub. L. No. 104-88, § 408, 109 Stat. 803 (1995). After that directive, and after Congress created FMCSA, the hours-of-service regulations went through a series of revisions, in a process prolonged by FMCSA's repeated engagement in arbitrary and capricious rulemaking. *See* FMCSA, Final Rule, *Hours of Service of Drivers; Driver Rest and Sleep for Safe Operations*, 68 Fed. Reg. 22456 (Apr. 28, 2003) (2003 Rule) (adopting new hours-of-service regulations); *Public Citizen v. FMCSA*, 374 F.3d 1209 (D.C. Cir. 2004) (vacating 2003 Rule as arbitrary and capricious because the agency failed to consider the rule's effect on driver health); FMCSA, Final Rule, *Hours of Service of Drivers*, 70 Fed. Reg. 49978 (Aug. 25, 2005) (2005 Rule) (adopting new hours-of-service regulations); *Owner-Operator Indep. Drivers Ass'n* (*Owner-Operator Ass'n*) *v. FMCSA*, 494 F.3d 188 (D.C. Cir. 2007) (vacating portions of 2005 Rule that increased daily and weekly driving limits because the agency did not give interested parties an opportunity to comment on the methodology of the model used to justify those increases and because the agency failed to explain critical elements of that methodology); 2011 Rule, 76 Fed. Reg. 81134 (adopting new hours-of-service regulations); *Am. Trucking Ass'ns v. FMCSA*, 724 F.3d 243 (D.C. Cir. 2013) (rejecting most challenges to the 2011 rule, but vacating one aspect of the rule as arbitrary and capricious in light of agency's failure to justify it); *see generally* FMCSA, Notice of Proposed Rulemaking, *Hours of*

Service of Drivers, 84 Fed. Reg. 44190, 44193–95 (Aug. 22, 2019), JA 92–94 (NPRM) (detailing history of hours-of-service regulations).

In general, under the hours-of-service regulations, drivers of property-carrying commercial motor vehicles must have 10 hours off duty before they can start a driving shift. 49 C.F.R. § 395.3(a)(1). Once they come on duty, they may drive for a total of 11 hours during the 14-hour period following the start of their shift (the 14-hour "driving window"). *Id*. § 395.3(a)(2), (a)(3)(i). Once those 14 hours are up, they must stop driving. *Id*. § 395.3(a)(2). Drivers of passenger-carrying commercial motor vehicles may drive a total of 10 hours, during a 15-hour driving window, after 8 hours off duty. *Id*. § 395.5(a). Drivers of both types of vehicles may not drive after having been on duty either 60 hours in 7 days (if the employing motor carrier does not operate vehicles every day of the week) or 70 hours in 8 days (if the motor carrier does operate vehicles every day of the week), but drivers of property-carrying vehicles can restart the 7- or 8-day period by taking 34 consecutive hours off (the "34-hour restart"). *Id*. §§ 395.5(b), 395.3(b)–(c).

FMCSA generally requires drivers to document their duty status—whether they are driving, on duty but not driving,[1] off duty, or in a "sleeper berth"[2]—in logs known as records of duty status. *Id*. § 395.8(b). These logs "are of crucial importance in the enforcement of the regulations governing maximum driving and on-duty time." *Int'l Bhd. of Teamsters v. United States*, 735 F.2d 1525, 1526–27 (D.C. Cir. 1984). Although drivers used to document duty status through paper logs, drivers are now generally required to use an electronic logging device that automatically records driving time. 49 C.F.R. § 395.8(a)(1)(i). The electronic-logging-device requirement was adopted "to reduce the number of crashes caused by driver fatigue that could have been avoided had the driver complied with the [hours-of-service] rules." FMCSA, Final Rule, *Electronic Logging Devices and Hours of Service Supporting Documents*, 80 Fed. Reg. 78292, 78376 (Dec. 16, 2015), JA 44

[1] On-duty time includes "all time from the time a driver begins to work or is required to be in readiness to work until the time the driver is relieved from work and all responsibility for performing work." 49 C.F.R. § 395.2. On-duty non-driving time includes, among other things, time spent loading or unloading the vehicle, time spent inspecting or servicing the vehicle, and time spent at the motor carrier's facility waiting to be dispatched. *See id*.

[2] Some commercial motor vehicles are equipped with berths that can be used for sleeping. *See* 49 C.F.R. § 393.76 (detailing requirements for a berth to qualify as a sleeper berth). Drivers who use sleeper berths may accumulate the equivalent of 10 hours of consecutive off-duty time by taking two periods of either sleeper-berth time or a combination of sleeper-berth and off-duty time, as long as they meet certain requirements, including that the longer segment is spent in the sleeper berth. *See id*. § 395.1(g).

("Electronic-Device Rule"); *see also* 49 U.S.C. § 31137(a) (requiring promulgation of electronic-logging-device regulations to improve hours-of-service compliance); *Owner-Operator Ass'n v. DOT*, 840 F.3d 879, 885–87 (7th Cir. 2016) (detailing history of electronic-logging-device requirement). Compliance with hours-of-service regulations "has long been an issue … because it is easy to insert an error in paper records, whether intentionally or not." *Owner-Operator Ass'n v. DOT*, 840 F.3d at 883. Electronic logging devices "bring about improvements in safety by making it difficult for drivers and carriers to falsify drivers' duty status which in turn deters violations of the [hours-of-service] rules." Electronic-Device Rule, 80 Fed. Reg. at 78352, JA 43.

C. Background of the Specific Hours-of-Service Provisions at Issue

This case concerns two specific aspects of the hours-of-service regulations: short-haul operations and the 30-minute break requirement.

Short-haul operations: Short-haul drivers, who drive within a local area and tend to make many stops throughout the day, are exempt from the record-of-duty-status/electronic-logging-device requirements. 49 C.F.R. § 395.1(e)(1). Instead, the motor carrier that employs the driver keeps records documenting only the time the driver reported for duty, the total number of hours the driver was on duty, the time the driver was released from duty, and, for drivers used for the first time or intermittently, the total time on duty for the preceding 7 days. *Id*. § 395.1(e)(1)(iv).

Before the rule at issue in this case, to be exempt from the logging requirements as short-haul drivers, drivers operating commercial motor vehicles requiring a commercial driver's license had to stay within 100 air miles of their work reporting location and had to return to the work reporting location and be released from work within 12 hours of coming on duty. 49 C.F.R. § 395.1(e)(1)(i)-(ii) (2019).[3] These limits on qualifying for the short-haul exemption helped "ensure that the hours of service [were] not violated." Federal Highway Administration, *Hours of Service of Drivers; 100-Mile Exemption—Driver's Logs*, 45 Fed. Reg. 22042, 22043 (Apr. 3, 1980), *available at* www.govinfo.gov/content/pkg/FR-1980-04-03/pdf/FR-1980-04-03.pdf (while increasing the distance limit from 50 to 100 air miles, decreasing the on-duty limit from 15 to 12 hours); *see also Int'l Bhd. of Teamsters*, 735 F.2d at 1532–34 (vacating rule extending on-duty limit to 15 hours because agency acted arbitrarily and capriciously); Federal Highway

[3] An exception existed for ready-mixed concrete delivery vehicles, which had to return to their work location within 14 hours, rather than 12 hours, to be exempt from the logging requirements. 49 C.F.R. § 395.1(e)(1)(ii)(B) (2019). This exception was mandated by the Fixing America's Surface Transportation Act, Pub. L. No. 114-94, § 5521, 129 Stat 1312, 1559 (2015). FMCSA had also granted similar exceptions to certain other industry segments. *See* Final Rule, 85 Fed. Reg. at 33401–02, JA 223–24 (noting exceptions). In addition, different rules apply to drivers of property-carrying commercial motor vehicles not requiring a commercial driver's license, *see* 49 C.F.R. § 395.1(e)(2), which include vehicles under 26,001 pounds, *see id*. § 383.5. Unless otherwise noted, when this brief refers to short-haul drivers, it is referring to drivers who use the short-haul exemption in 49 C.F.R. § 395.1(e)(1) and to whom no industry-specific exception applies.

Administration, Final Rule, *Hours of Service of Drivers*, 52 Fed. Reg. 41718, 41719 (Oct. 30, 1987) (in rejecting requests to extend on-duty limit, stating that "an extension beyond 12 consecutive hours would increase the likelihood that drivers would be able to exceed the [then-applicable] 10-hour driving limitation without detection"). If the driver exceeded either the 100-mile radius or 12-hour workday limit on any given day, the driver had to comply with the record-of-duty-status requirements for that day; if the driver was required to comply with the record-of-duty-status requirement on more than 8 days within any 30-day period, the driver had to use an electronic logging device. 49 C.F.R. § 395.8(a)(1)(iii)(A)(1).

30-minute break requirement: Before the rule at issue in this case, drivers of property-carrying commercial motor vehicles were not permitted to drive if more than 8 hours had passed since their last off-duty or sleeper-berth break of at least 30 minutes (the 30-minute break requirement). 49 C.F.R. § 395.3(a)(3)(ii) (2019). FMCSA adopted the 30-minute break requirement in 2011 because research indicated "that such breaks alleviate fatigue and fatigue-related performance degradation." 2011 Rule, 76 Fed. Reg. at 81134, JA 37. In adopting the requirement, FMCSA estimated that it would have safety benefits valued at $72 million, due to "reducing cumulative on-duty hours and limiting the chances for long driving days." FMCSA, *2010-2011 Hours of Service Regulatory Impact Analysis* (Dec. 2011) (2011 Regulatory Impact Analysis), at 6-10, 6-14, JA 33, 35. FMCSA also estimated

that the break requirement would have health benefits valued at $94 million. *Id*. at 6-14, JA 35.[4]

The 30-minute break requirement does not apply to short-haul drivers covered by the exemptions in 49 C.F.R. §§ 395.1(e)(1) and (2). 49 C.F.R. § 395.3(a)(3)(ii); *see Am. Trucking Ass'ns*, 724 F.3d at 253 (upholding the 30-minute break requirement, but vacating application of the break to short-haul drivers in light of agency's failure to justify its "decision to apply the new requirement to the unique context of short-haul operations").

[4] In addition to adopting the 30-minute break requirement, the 2011 Rule made two changes to the 34-hour restart. The benefits the 2011 Rule attributed to adopting all three provisions (the 30-minute break requirement and the two changes to the 34-hour restart) are smaller than the sum of adopting each of the three provisions alone. *See* 2011 Regulatory Impact Analysis, at 6-14, JA 35. However, the benefits FMCSA attributed to adopting all three provisions are greater than the benefits of just adopting the two changes to the restart, demonstrating that FMCSA expected the 30-minute break requirement to have both safety and health benefits even when combined with the restart changes. *See id*. (showing that adopting the three provisions would result in $22 million more in safety benefits and $9 million more in health benefits than just adopting the two changes to the restart). In any event, the two changes to the restart adopted in the 2011 Rule have since been removed, leaving only the 30-minute break requirement. *See* FMCSA, *Hours of Service of Drivers—Restart Provisions*, 84 Fed. Reg. 48077 (Sept. 12, 2019). FMCSA anticipated that adopting the 30-minute break requirement without the now-removed changes to the restart would result in $72 million in safety benefits and $94 million in health benefits. 2011 Regulatory Impact Analysis, at 6-14, JA 35.

II. The Rulemaking at Issue

A. The Advance Notice of Proposed Rulemaking and Notice of Proposed Rulemaking

On August 23, 2018, FMCSA published an advance notice of proposed rulemaking seeking information about short-haul operations and the 30-minute break requirement, along with aspects of the hours-of-service regulations relating to adverse driving conditions and use of sleeper berths. FMCSA, Advance Notice of Proposed Rulemaking, *Hours of Service of Drivers*, 83 Fed. Reg. 42631 (Aug. 23, 2018), JA 47–51. In issuing the advance notice of proposed rulemaking, FMCSA stated that the "introduction of electronic logging devices and their ability to accurately record compliance" with hours-of-service regulations—that is, the introduction of technology that made it significantly more difficult for drivers to violate the rules without detection—had resulted in requests for it to revise the hours-of-service regulations. *Id*. at 42631, JA 47.[5]

[5] The agency also sought comments on rulemaking petitions filed by intervenor Owner-Operator Independent Drivers Association and by TruckerNation.org. The Owner-Operator Association's petition requested that FMCSA allow drivers to take breaks that would extend the 14-hour driving window for up to 3 hours and eliminate the 30-minute break requirement, and TruckerNation.org's petition requested that FMCSA allow drivers to split the 10 hours of required off-duty time into multiple smaller breaks and eliminate the 30-minute break requirement. *See* Advance Notice of Proposed Rulemaking, 83 Fed. Reg. at 42634, JA 50.

FMCSA received comments on the advance notice of proposed rulemaking, including from the petitioners in this case. *See* Advocates for Highway and Auto Safety Comments (2018), JA 78–84 (Advocates 2018 Comments); International Brotherhood of Teamsters Comments (2018), JA 71–77 (Teamsters 2018 Comments); Truck Safety Coalition, Citizens for Reliable and Safe Highways, and Parents Against Tired Truckers Comments (2018), JA 85–88.

On August 22, 2019, FMCSA issued its NPRM proposing five sets of amendments to the hours-of-service regulations, including amendments to the provisions concerning short-haul operations and the 30-minute break requirement. *See* NPRM, 84 Fed. Reg. at 44191, JA 90. With respect to short-haul operations, FMCSA proposed to extend the time within which short-haul drivers must return to their work terminal and go off duty from 12 to 14 hours after coming on duty and proposed to extend the maximum radius in which drivers qualifying for the exemption may operate from 100 to 150 air miles. With respect to the 30-minute break requirement, FMCSA proposed to make the requirement applicable only when a driver has been *driving* for 8 hours without at least a 30-minute interruption (as opposed to when a driver has been *on duty* without an off-duty or sleeper-berth break for 8 hours). In addition, FMCA proposed to allow the requirement to be fulfilled by on-duty non-driving time (as opposed to only off-duty or sleeper-berth time), such as time spent loading and unloading.

FMCSA received comments, including from the petitioners in this case. *See* Advocates 2019 Comments, JA 195–212; International Brotherhood of Teamsters Comments (2019), JA 180–91 (Teamsters 2019 Comments); Truck Safety Coalition, Citizens for Reliable and Safe Highways, and Parents Against Tired Truckers Comments (2019), JA 192–94 (Truck Safety Coalition Comments). With regard to short-haul operations, commenters explained, among other things, that extending the workday and driving radius would cause short-haul drivers to experience increased fatigue and fatigue-related occupational injuries, and would allow driving later in the duty-period, which has been associated with increases in crash risks. *See*, *e.g.*, Teamsters 2019 Comments, at 5–7, JA 184–86; Advocates 2019 Comments, at 5, JA 199. Commenters also noted that extending the workday and driving radius would give short-haul drivers more opportunities to violate the hours-of-service regulations' driving limits, and that exempting more people from the logging requirements could lead to more instances of undocumented noncompliance with those rules. *See*, *e.g.*, Teamsters 2019 Comments, at 7, JA 186; California Highway Patrol Comments (2019), at 1–2, JA 126–27.

With regard to the 30-minute break requirement, commenters explained, among other things, that non-driving work, such as loading, can be fatiguing, and, therefore, that an on-duty break from driving would not provide the same rest and safety benefits as an off-duty break. *See*, *e.g.*, Teamsters 2019 Comments, at 9, JA

188; Transportation Trades Department, AFL-CIO Comments (2019), at 3, JA 178. Commenters also pointed out that drivers may do strenuous loading and unloading work at the start of their shifts, making it particularly important for them to have a break after 8 hours of work, rather than just 8 hours of driving time, *see* Teamsters 2019 Comments, at 9, JA 188, and that, under the proposed rule, drivers could be assigned work in a way that they would end up without a break from work during the entire 14-hour working window, *see*, *e.g.*, Advocates 2019 Comments, at 10, JA 204; Senator Patty Murray Comments (2019), at 4, JA 173 (Senator Murray Comments).

B. The Final Rule

FMCSA published the Final Rule in the Federal Register on June 1, 2020. *See* Final Rule, 85 Fed. Reg. 33396, JA 218–74. The rule adopted the proposed rule's provisions regarding short-haul operations and the 30-minute break requirement, along with provisions relating to adverse driving conditions and use of sleeper berths.

Despite commenters' explanations of how the proposed changes would detrimentally affect driver health and safety, the Final Rule states that FMCSA concluded that the "changes made by this final rule are safety- and health-neutral." *Id*. at 33403, JA 225. With respect to short-haul operations, the Final Rule states that because the rule does not increase the overall amount of time short-haul drivers may

drive, and because it does not extend the driving window beyond the 14-hour limit allowed for long-haul drivers, "FMCSA does not anticipate adverse impacts on safety." *Id*. at 33405, JA 227. In addition, although the electronic-logging-device requirement makes it harder to falsify records, the Final Rule states that "[n]othing in the changes to the short-haul exception," which expand the number of drivers eligible to be exempt from the electronic-logging-device requirement, "creates additional opportunities for short-haul drivers to falsify time records." *Id*. at 33410, JA 232.

With respect to the 30-minute break requirement, the Final Rule states that FMCSA reconsidered a study that found a reduction in safety-critical events in the hour of driving after a break and concluded that the "study did not clearly demonstrate a significant difference between off-duty and on-duty breaks." *Id*. at 33420, JA 242. The Final Rule also states that the changes to the 30-minute break requirement are not expected to have any "fatigue effect because drivers continue to be constrained by the 11-hour driving limit and would continue to receive on-duty/non-driving breaks from the driving task." *Id*. at 33398, JA 220.

Petitioners filed a timely petition for reconsideration of the Final Rule, *see* JA 275–85, which was denied by FMCSA, *see* JA 291–300.

SUMMARY OF ARGUMENT

The Final Rule does not provide a reasoned explanation for its assertions that its provisions relating to short-haul operations and the 30-minute break requirement will not adversely affect safety and driver health.

I. In the Final Rule, FMCSA states that it has no reason to believe that the short-haul provisions will impact safety because they do not extend the maximum allowable driving time (11 hours for property-carrying commercial motor vehicles) or extend the workday beyond the 14-hour driving window that applies to long-haul drivers. That long-haul drivers have a 14-hour driving window, however, does not show that extending short-haul drivers' workdays will not have a negative safety effect. Moreover, the amount of driving a driver does in the workday is not the only factor relevant to safety: Safety risks also increase when driving occurs later in the workday. FMCSA has not explained why, given the increased risk of driving later in the workday, extending the hours in which short-haul drivers are allowed to drive would not be expected to adversely impact safety. The Final Rule also does not adequately respond to a study showing a 383 percent heightened crash risk among drivers using the short-haul exemption, and does not explain why expanding the work hours of short-haul drivers, who typically make many stops throughout the day, would not be expected to increase the incidence of occupational injuries among such drivers.

Moreover, FMCSA has not supplied a rational explanation why its changes to the short-haul exemption would not be expected to affect compliance with hours-of-service regulations, which, in turn, affect safety. The record-of-duty-status/electronic-logging-device requirements are vital to ensuring compliance with hours-of-service rules. The Final Rule's short-haul provisions increase the number of drivers who will be able to take advantage of the short-haul exemption to those requirements. They also provide drivers who use that exemption with more time in which to drive and the ability to drive greater distances without stopping, thus increasing the possibility of violations of the hours-of-service rules.

II. The Final Rule's explanation of its changes to the 30-minute break requirement is similarly lacking. The Rule's discussion of the safety effects of the changes to that requirement focuses on the benefits of breaks in reducing fatigue caused by prolonged driving. In particular, FMCSA reconsidered a study that found that breaks reduced safety risks in the hour following the break and concluded that the study did not demonstrate a clear difference between on- and off-duty breaks. In focusing on a study that looked at safety immediately after breaks, however, FMCSA ignored the effect on safety of cumulative fatigue due to increased working hours and the fatigue effects of non-driving work, which can include heavy lifting and other strenuous activities. FMCSA also ignored the health benefits that the 2011 Rule attributed to the 30-minute break requirement and made no efforts to analyze

the effects of the changes to the break requirement on those benefits or other health issues.

Overall, although the Final Rule pays lip service to safety and driver health, it ignores factors that affect safety and health, and it fails to demonstrate that the changes were the product of reasoned decisionmaking. The Final Rule's provisions on short-haul operations and the 30-minute break requirement are arbitrary and capricious and should be set aside.

STANDING

As demonstrated in the declaration attached to this brief, Petitioners include the International Brotherhood of Teamsters (Teamsters), a labor union whose members include commercial truck drivers directly regulated by the Final Rule. Byrd Decl. ¶¶ 2–4; *see Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (explaining that "there is ordinarily little question" that an agency action has caused a plaintiff injury where the plaintiff "is himself an object of the action"); *see also Teamsters v. DOT*, 724 F.3d 206, 212 (D.C. Cir. 2013) (recognizing the Teamsters' standing to sue on behalf of their members). Due to the changes in the Final Rule, Teamsters members who are short-haul drivers can be required by their employers to drive farther and work longer hours than before the Final Rule went into effect, and Teamsters members who are long-haul drivers 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. Byrd Decl. ¶¶ 3–4; *see Am. Trucking Ass'ns*, 724 F.3d at 248 (finding it a "a hardly-speculative exercise in naked capitalism to suggest motor carriers would respond to the hours-increasing provisions by requiring their drivers to use them and work longer days" and holding that a truck driver had standing to challenge a final rule setting the number of hours a driver may drive per day at 11 hours rather than 10 (internal quotation marks and citation omitted)).

After the Final Rule, to ensure that their short-haul drivers are limited to a 12-hour workday and 100 air-mile driving radius and that their long-haul drivers receive a 30-minute off-duty break after eight hours of working, the Teamsters will have to negotiate for those provisions in collective bargaining agreements. Byrd Decl. ¶ 5. The Teamsters may not be able to successfully negotiate for such provisions, and having to negotiate for breaks and limits that used to be required by the hours-of-service regulations may require the union to make tradeoffs that it was not required to make when those breaks and limits were required by the regulations. *Id.*; *see Clinton v. City of New York*, 524 U.S. 417, 433 n.22 (1998) (noting that "a denial of a benefit in the bargaining process" can be an Article III injury).

Moreover, to the extent the Teamsters' collective bargaining agreements limit short-haul drivers to a 12-workday and 100 air-mile radius and provide long-haul drivers with a 30-minute break equivalent to the break required prior to the Final Rule, drivers covered by those agreements will be at a competitive disadvantage

compared to independent contractors not covered by such provisions. Byrd Decl. ¶ 6. Similarly, employers of Teamsters drivers who choose to continue to abide by the limitations on the short-haul exemption and the 30-minute break requirement that existed before the Final Rule will be at a competitive disadvantage compared to motor carriers that do not. *Id.*; *see Teamsters v. DOT*, 724 F.3d at 212 (holding that Teamsters had "competitor standing" to challenge a pilot program that allowed Mexican-domiciled trucking companies to operate trucks in the United States).

Finally, as the Teamsters explained in their comments, the Final Rule's changes to the short-haul exemption and 30-minute break requirement will increase fatigue and thereby adversely affect safety on the roads. *See* Teamsters 2019 Comments, at 5, 10, JA 184, 189. Accordingly, the Final Rule threatens the safety of the Teamsters' driver members, who "spend far more time on the road than most other Americans," so that "[r]eductions in highway safety … cause more harm to them than to typical members of the public at large." *Teamsters v. Pena*, 17 F.3d 1478, 1483 (D.C. Cir. 1994); *see* Byrd Decl. ¶ 8.

STANDARD OF REVIEW

The Administrative Procedure Act (APA) requires courts to "hold unlawful and set aside agency action, findings, and conclusions found to be … arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2). "To satisfy the APA's 'arbitrary and capricious' standard, an agency must

'articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.'" *Owner-Operator Ass'n v. FMCSA*, 494 F.3d at 203 (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks omitted)). The explanation must be "sufficient to enable [the Court] to conclude that the [agency's action] was the product of reasoned decisionmaking." *Id.* (quoting *State Farm*, 463 U.S. at 52). In reviewing that explanation, the Court must consider whether the agency's "decision was based on a consideration of the relevant factors," *State Farm*, 463 U.S. at 43 (citation omitted), including any "factor the agency must consider under its organic statute." *Public Citizen*, 374 F.3d at 1216.

When a statute mandates consideration of a factor—as 49 U.S.C. § 31136(a) mandates consideration of safety and driver health, *see Public Citizen*, 374 F.3d at 1216–17—this Court "ask[s] whether the agency has reached an express and considered conclusion pursuant to the statutory mandate." *Cigar Ass'n of Am. v. U.S. Food & Drug Admin.*, 964 F.3d 56, 61 (D.C. Cir. 2020) (internal quotation marks and citation omitted). "Merely referencing a requirement is not the same as complying with that requirement. And stating that a factor was considered—or found—is not a substitute for considering or finding it." *Id.* (citation omitted). Rather than simply "parrot[ing] the governing statutory language," the agency must "set forth evidence or a reasonable explanation" of why it reached its conclusion. *Id.* at

64; *see Public Citizen*, 374 F.3d at 1217 (explaining that, if FMCSA did not think the 2003 Rule's effects on drivers' health were problematic, "it was incumbent on it to say so in the rule and to explain why").

ARGUMENT

I. The Final Rule's Changes to the Short-Haul Exemption Are Arbitrary and Capricious.

The Final Rule extends the workday for drivers using the short-haul exemption from the record-of-duty-status/electronic-logging-device requirement from 12 to 14 hours and extends their permissible driving radius from 100 to 150 air miles. FMCSA justified these changes by stating that they would increase flexibility without adversely affecting safety or driver health and without increasing the likelihood that drivers would not comply with the underlying hours-of-service regulations. The agency has not provided reasonable explanations for any of these conclusions.

A. FMCSA's conclusion that the changes to the short-haul exemption will not impact safety does not account for relevant factors.

1. FMCSA did not adequately consider the risks of driving later in the workday.

A 2011 study sponsored by FMCSA found that "the risk of being involved in [a safety-critical event] generally increases as the work hour increases." Myra Blanco, *et al.*, *The Impact of Driving, Non-Driving Work, and Rest Breaks on Driving Performance in Commercial Motor Vehicle Operations* xvii, FMCSA

(2011), JA 22 (hereafter, Blanco 2011); *see id*. ("[I]f drivers drove deep into their 14-hour shift, [safety-critical event] risk increased.").[6] "That is, driving time occurring later in the driver's workday due to performing non-driving tasks earlier in the workday[] has a negative safety effect." *Id*.; *see also* 2011 Rule, 76 Fed. Reg. at 81149, JA 40 (noting Blanco 2011's "basic conclusion that driving performance suffers later in the duty day"); Advocates 2019 Comments, at 5, JA 199 (noting that driving later in the duty day "has been associated with increases in crash risk according to previous research"); Advocates 2018 Comments, at 3, JA 80 (citing Blanco 2011); Truck Safety Coalition Comments, at 3, JA 193 (citing a 2019 study that found that working longer than 12 hours a day was associated with risky driving in Korean occupational drivers, and a 1995 study that found that crash risk approximately doubled after 12 hours at work, compared to the first eight hours of work).

By extending to 14 hours the on-duty period in which short-haul drivers may drive, the Final Rule permits such drivers to drive later in the workday than had been previously permitted. Drivers who were already using the maximum permitted driving time under the prior rules will be able to do more non-driving work throughout the workday and push their driving later, and drivers who were not using

[6] The study defined a safety-critical event as a crash, near crash, crash-relevant conflict, or unintentional lane deviation. *See id*. at xiii, JA 18.

the maximum permitted driving time will be able to use more of it, including in hours 12 to 14 of the workday. Because driving later in the workday has a negative safety effect, and the changes to short-haul operations in the Final Rule allow drivers who operate under the short-haul exemption to drive later in the workday, this aspect of the Final Rule can reasonably be expected to have a negative effect on safety.

Nonetheless, the Final Rule states that FMCSA "has no reason to believe that the [short-haul changes in the] revised rule will adversely impact safety." 85 Fed. Reg. at 33406, JA 228. The Rule does not provide a reasoned explanation for this belief in light of the research showing the risks of driving later in the workday.

The Rule's primary explanation for FMCSA's belief that the short-haul changes will not affect safety is that they "allow neither additional drive time during the workday, nor driving after the 14th hour from the beginning of the workday." *Id.* at 33405, JA 227. As the Blanco 2011 study sponsored by FMCSA demonstrates, however, the question for safety is not just the *amount* of driving time allowed, but *when* the driving time occurs during the workday. Thus, that the Rule does not increase the permissible amount of driving time does not demonstrate that the Rule will not have an adverse effect on safety when the Rule *does* allow driving later in the workday.

Likewise, that the changes to the short-haul exemption will not "extend the workday beyond the current long-haul driving window," *id.* at 33442, JA 264, does

not demonstrate that extending the workday for short-haul drivers will not have an adverse effect on safety. The relevant comparison for whether the rule will impact safety is the prior rule—under which drivers using the short-haul exemption were limited to a 12-hour workday—not the rule for long-haul drivers. And driving later in the workday is associated with increased crash risk for drivers who have a 14-hour workday, *see* Blanco 2011, at xvii, JA 22, so the fact that long-haul drivers are allowed to work 14 hours does not demonstrate that increasing the workday for still more drivers to 14 hours will not impact safety.

The Final Rule states that the "extensive discussion in the 2005 final rule (70 [Fed. Reg.] 49978, 49982 et seq.)," which adopted the 14-hour window for long-haul drivers, shows that the 14-hour window is "consistent with the statutory obligation to protect driver safety and health." 85 Fed. Reg. at 33403, JA 225; *id*. at 33447, JA 269. The Final Rule does not identify which specific parts of the discussion in the 2005 Rule it is relying on for its assertion about safety. The pages immediately following 70 Fed. Reg. 49982, which FMCSA cites in support of its reliance on the 2005 rule's discussion, concern driver health, not safety, *see* JA 2–12. In any event, the 14-hour limit adopted for long-haul drivers in the 2005 Rule was *shorter* than the driving window in the pre-2003 Rule that FMCSA was using as a comparison, and the agency recognized that "time spent working (and not simply time spent driving) contributes to a driver's fatigue and thereby impacts

performance in long-haul operations." 2005 Rule, 70 Fed. Reg. at 50013, JA 14. Moreover, the 2005 Rule predates Blanco 2011 and is therefore not responsive to its findings.

Finally, the NPRM cited two analyses FMCSA did of crashes involving concrete mixers in the two years before and after the Fixing America's Surface Transportation Act of 2015, which extended the maximum driving window for drivers of ready-mix concrete vehicles using the short-haul exemption to 14 hours. *See supra* n. 3; Pub. L. No. 114-94, § 5521, 129 Stat at 1559. First, "[a]ssuming the majority of concrete mixer trucks are operated on a schedule with a workday that begins in the morning hours and ends in the evening hours," and thus that "crashes that occur in the later part of the day would occur towards the end of the 12- or 14-hour workday," FMCSA examined crashes between 5:00 pm and 11:59 pm "and found that the percentage of concrete mixers in crashes" at those later hours of the day "has been declining in recent years, falling from 7.6 percent in 2013 to 5.8 percent in 2017." NPRM, 84 Fed. Reg. at 44215, JA 114. Second, FMCSA looked at the total number of concrete mixers involved in crashes in the two years before and after the Fixing America's Surface Transportation Act went into effect, and found that although the number of concrete mixers involved in crashes increased 8.5% in the two years after the law went into effect, that increase was not statistically significant when considered as a percentage of the total number of large trucks

involved in crashes. *Id*. These analyses, the NPRM stated, "suggest that the implementation of the [Fixing America's Surface Transportation] Act on December 4, 2015, did not increase the share of concrete mixers involved in crashes when extending the short-haul exception requirement from 12 to 14 hours." *Id*.

As commenters explained in response to the NPRM, FMCSA's analyses suffer from numerous flaws and limitations. Most notably, the analyses were not limited to ready-mix concrete vehicles whose drivers operated under the short-haul exemption. *See* Advocates 2019 Comments, at 4, JA 198; Insurance Institute for Highway Safety Comments (2019), at 2, JA 163. Accordingly, the analyses do not indicate whether crashes involving such drivers—that is, the drivers whose workday was extended by the Fixing America's Surface Transportation Act—increased following that law's enactment.

In addition, FMCSA did not support its assumption in the first analysis that crashes "that occur in the later part of the day would occur towards the end of the 12- or 14-hour workday." NPRM, 84 Fed. Reg. at 44215, JA 114. To the contrary, in a 2013 petition, the National Ready Mixed Concrete Association stated that drivers of ready-mix concrete vehicles have a "flexible start time where one day they start at 7 a.m. and the next at 12 p.m. Ready mixed concrete deliveries do not happen on a regular 9 a.m. to 5 p.m. schedule[.]" Advocates 2019 Comments, at 3, JA 197 (quoting National Ready Mixed Concrete Ass'n – Application for Exemption from

49 CFR 395.3(a)(3)(ii), FMCSA-2013-0317-0001). Furthermore, FMCSA provided no data on other trucking operations to indicate whether the decline in the percentage of concrete mixers involved in crashes later in the day that FMCSA identified in the first analysis reflected trends within trucking operations in general. *See id*. And although FMCSA's second analysis only considered whether the 8.5 percent increase in crashes involving concrete mixers in the years after the Fixing America's Surface Transportation Act was enacted was statistically significant when considered as a percentage of the total number of crashes involving large trucks, not whether the increase was statistically significant when compared to the total number of concrete mixers, FMCSA provided no information about whether the number of concrete mixers remained steady as a percentage of large trucks during that time. *Cf. Am. Petroleum Inst. v. Envtl. Prot. Agency*, 862 F.3d 50, 70 (D.C. Cir. 2017), decision modified on reh'g, 883 F.3d 918 (D.C. Cir. 2018) (explaining that, if 94 percent of crashes were associated with Airline A, the Court would need "to know something about the distribution of flights among airlines," to know whether Airline A was "less safe than its competitors"). Likewise, FMCSA did not examine whether any other segments of the trucking industry experienced significant increases in crashes during that time, for reasons unrelated to concrete mixers, such that concrete mixers' "share of the total" would not have gone up significantly even if their own crash risk had. NPRM, 84 Fed. Reg. at 44215, JA 114.

Moreover, apart from the analyses' limitations in determining whether crashes among drivers of ready-mix concrete vehicles using the short-haul exemption increased after the Fixing America's Surface Transportation Act, FMCSA failed to "explain[] why the data on concrete mixer[s] is relevant to the experiences" of drivers of other types of commercial motor vehicles. Institute for Policy Integrity Comments (2019), at 3, JA 166.

> [Other commercial motor vehicles] may operate differently from concrete mixers under the same conditions. …. [They] may be more likely than concrete mixers to use the entire daily maximum duty period of 14 hours. [They] may also travel at increased speeds or log more highway miles than concrete trucks. Any of these factors might create a significant enough difference between concrete mixers and [commercial motor vehicles] to warrant a more thorough and detailed explanation[.]

Id.; *see also*, *e.g.*, Teamsters 2019 Comments, at 3, JA 182 (noting that "the scope of work between concrete truck operators and other [commercial motor vehicle] drivers is incomparable"). Indeed, as Senator Murray noted in her comments, that Congress created different standards for ready-mix concrete delivery drivers "strongly suggests Congress did not consider ready-mix concrete delivery vehicles comparable to passenger-carrying and property-carrying short-haul drivers." Senator Murray Comments, at 2, JA 171; *see id*. ("[T]here is no basis for assuming that data collected from ready-mix concrete commercial vehicles would be similar to other short-haul vehicles.").

In the Final Rule, FMCSA did not provide any further explanation of why the data on concrete mixers could be extrapolated to other short-haul operations, nor did it respond to the other explanations of the shortcomings of its analyses. Instead, after repeating the discussion from the NPRM, the Final Rule states that "FMCSA did not claim that the analysis is definitive, or that the population of concrete mixers is representative of all short-haul operations," but that, "[i]nstead, the analysis was offered as the best available data with a before and after comparison of changes like the changes proposed in the NPRM." 85 Fed. Reg. at 33446, JA 268. However, "limited data do not justify unlimited inferences." *Am. Petroleum Inst.*, 862 F.3d at 70. And an analysis that FMCSA concedes is not representative—and that did not consider whether crashes among the ready-mix concrete vehicles whose drivers' workdays were extended by the Fixing America's Surface Transportation Act increased after their hours were extended—does not respond to Blanco 2011's findings that driving later in the workday has a negative safety effect.

In short, FMCSA has not explained why it does not expect the short-haul changes in the Final Rule to have an adverse impact on safety, when the changes allow drivers using the short-haul exemption to drive later in the workday and driving later in the workday has been associated with a negative effect on safety. By failing to adequately consider this "important aspect of the problem" when

promulgating the Final Rule, FMCSA acted arbitrarily and capriciously. *State Farm*, 463 U.S. at 43.

2. Drivers using the short-haul exemption have been found to have a high crash risk.

In addition to research showing the adverse impact on safety of driving later in the working day, a recent study by the Insurance Institute for Highway Safety "showed that interstate truck drivers operating under the short-haul exemption had a crash risk 383% higher than those not using the exemption." Insurance Institute for Highway Safety Comments (2018), at 1, JA 52 (citing Eric R. Teoh, *et al.*, *Crash risk factors for interstate large trucks in North Carolina*, 62 Journal of Safety Research 13–21 (2017), Supp. Certified Index of Record Item 5 (hereafter, Teoh 2017)). Because operating under the short-haul exemption has been shown to increase crash risk, allowing drivers operating under that exemption to operate for longer hours and to drive longer distances would reasonably be expected to have an adverse effect on safety.

FMCSA responded to Teoh 2017 by stating that although "the finding was statistically significant, it was based on a very small sample size, which prevented the author from estimating a matched-pair odds ratio restricted to drivers operating under a short-haul exception, and was not nationally representative." Final Rule, 85 Fed. Reg. at 33446, JA 268. "Further," FMCSA stated, "the authors [of the study] noted that other related factors unobserved in the study may have led to this result.

For example, it is possible that older or more poorly maintained trucks are used in local operations." *Id*. FMCSA provides no reason, however, why North Carolina short-haul operations would not be representative of short-haul operations nationally. And the possibility that the increased crash risk found in short-haul operations may not be due to the inherent nature of those operations, but to other related factors, does not mean that increasing the workday and driving radius for short-haul drivers would not impact safety. For example, if the reason short-haul drivers were found to have a higher crash risk is because they drive older or more poorly maintained trucks, and such trucks are more likely to get into crashes, then increasing the workday and air-mile radius for short-haul operations would reasonably be expected to have an adverse effect on safety because it would allow drivers to drive longer and farther in those less-safe trucks. Finally, that Teoh 2017 involved a small sample size does not provide a rationale for FMCSA to ignore it, and to announce, despite the study, that it has no reason to think that extending the workday and air-mile radius of short-haul drivers will have a negative safety effect. *Cf. State Farm*, 463 U.S. at 52 (noting that an agency may not "merely recite the terms 'substantial uncertainty' as a justification for its actions").

Apart from these criticisms, FMCSA's only other response to Teoh 2017 is to point to the agency's analyses of ready-mix concrete vehicles. As discussed above, however, FMCSA does not purport to believe that those vehicles are representative

of other short-haul operations, and, in any event, FMCSA's analyses did not focus on ready-mix concrete vehicles using the short-haul exemption. These analyses—which were flawed for the reasons already discussed—do not counter Teoh 2017's findings that drivers using the short-haul exemption have a statistically significant increased crash risk. FMCSA has not provided a reasonable explanation why, despite those findings, it does not expect the changes to the short-haul operations to have a negative effect on safety.

B. FMCSA has not justified its conclusion that the short-haul changes will not adversely affect driver health.

As the Teamsters explained in their comments to FMCSA, the trucking industry has high occupational injury and illness rates. *See* Teamsters 2019 Comments, at 4, JA 183. Many of those injuries occur during non-driving work activities. *See id*. (citing studies); Final Rule, 85 Fed. Reg. at 33408, JA 230 (noting that "several citations provided state that most injuries suffered by short-haul drivers are experienced during non-driving tasks, such as loading and unloading"). Extending the workday for short-haul drivers, who typically make multiple stops throughout the day, will likely cause drivers to handle more freight, spend additional time loading and unloading their trucks, and enter and exit their cabs more times each day. *See* Teamsters 2018 Comments, at 2–3, JA 72–73; Teamsters 2019 Comments, at 6, JA 185. Accordingly, the drivers will likely experience increased incidence of occupational injuries. *See* Teamsters 2018 Comments, at 3, JA 73; *see*

also Teamsters 2019 Comments, at 5, JA 184 (discussing a National Institute for Occupational Safety and Health report that summarized more than 50 studies' findings on the impact of long working hours and found a pattern of increased injuries associated with long work shifts).

Similar to its assertions that the short-haul changes will not negatively impact safety because they do not extend the workday beyond 14 hours, FMCSA's primary response to comments explaining how the changes to short-haul operations will harm drivers' health is to state generally that "the expansion of the short-haul workday from 12 to 14 hours simply gives short-haul carriers the same driving window that other carriers have used for many years." Final Rule, 85 Fed. Reg. at 33403, JA 225. According to FMCSA, that window is "consistent with the statutory obligation to protect driver safety and health … as shown by the extensive discussion in the 2005 final rule [70 Fed. Reg. at 49982, et seq.]." *Id*. That long-haul drivers are permitted to drive within a 14-hour window, however, does not show that increasing the workday from 12 to 14 hours will not have an adverse effect on health in "the unique context of short-haul operations." *Am. Trucking Ass'ns*, 724 F.3d at 253. Short-haul drivers generally spend a larger share of their time than long-haul drivers on the types of non-driving activities that cause the majority of workplace injuries among truck drivers. *See* Final Rule, 85 Fed. Reg. at 33407, JA 229 (describing the "inherent nature" of short-haul operations as involving "several stops for pick-up

and/or delivery during the shift, or a few trips with extended periods at the delivery/service site, etc."); 2011 Rule, 76 Fed. Reg. at 81141, JA 39 (explaining that short-haul drivers "may spend a good part of each day loading and unloading at multiple locations," whereas, "[a]lthough there are exceptions, most long-haul drivers do not load or unload the cargo").

Moreover, the discussion of health in the 2005 Rule, which adopted the 14-hour driving window for long-haul drivers, does not show that increasing short-haul drivers' work hours will not adversely affect their health. As explained above, the 14-hour driving window adopted in the 2005 rule was *shorter* than the driving window under the pre-2003 rule, so the 2005 rule did not discuss the health effects of *increasing* workdays to 14 hours. *See* 2005 Rule, 70 Fed. Reg. at 50014, JA 15 ("The 14-hour provision is a substantial improvement over the pre-2003 rule, with its 15-hour limit extendable by the amount of off-duty time taken during the duty tour, because this provision generally reduces daily work hours and any associated health effects."). Furthermore, the 2005 Rule did not focus on the effect of increasing daily working hours on non-driving occupational injuries, let alone on those suffered by short-haul drivers. *See id*. at 49982–92, 50006, JA 2–13. Finally, the 2005 Rule's discussion of health was, itself, arbitrary and capricious. For example, the 2005 Rule only discussed lower back pain in the context of whole-body vibration and stated that, given "the other confounding factors that have been shown to be associated

with" lower back pain, "it is highly unlikely that vibration is the cause" of such pain. *Id*. at 49988, JA 8. But many of the other risk factors for lower back pain, such as repeated and heavy lifting, are also associated with truck driving. The 2005 Rule did not address whether, for a variety or combination of reasons, drivers experience an elevated incidence of lower back pain that increases with longer working and driving hours.[7] Likewise, here, although the Teamsters' comments explained that many factors that have been found to contribute to lower back pain are present in commercial driving, and particularly in short-haul operations, *see* Teamsters 2019 Comments, at 4, JA 183 (discussing a National Institute for Occupational Safety and Health Report on work-related musculoskeletal disorders), the Final Rule did not address whether increasing short-haul drivers' work hours would exacerbate lower back pain.

Aside from relying on the 2005 Rule and the 14-hour driving window for long-haul drivers, FMCSA provided few responses to explanations of how the rule will adversely affect driver health. FMCSA stated that the "the expanded 150 air-

[7] Public Citizen, et al., explained the problems with the discussion of health in the 2005 Rule in their challenge to that rule *See* Final Brief for Petitioners, *Public Citizen v. FMCSA*, No. 06-1078 (D.C. Cir., filed Sept. 29, 2006). Because the Court vacated the provisions challenged by those petitioners as arbitrary and capricious based on other arguments they made, the Court did not reach those petitioners' arguments that the rule was arbitrary and capricious because it failed to protect driver health. *See Owner-Operator Ass'n v. FMCSA*, 494 F.3d at 199.

mile radius may induce some carriers to make longer runs with fewer deliveries than before, which may minimize, or even eliminate, an increase in the number of stops, where [the Teamsters] claim[] workplace injuries typically occur." Final Rule, 85 Fed. Reg. at 33409, JA 231. Elsewhere in its discussion of the short-haul changes, however, FMCSA stated that it does not expect drivers to "spend significantly more time behind the wheel on a daily basis than they currently do." *Id*. at 33410, JA 232. If drivers have two more hours in which to work, but FMCSA does not expect them to spend significantly more time behind the wheel, then, logically, they would be spending more time on the non-driving activities in which short-haul drivers are often injured. *See* Teamsters 2019 Comments, at 6, JA 185 (listing non-driving duties that surveyed drivers expected to increase if working hours were extended).

FMCSA also stated that "[the Teamsters] ha[ve] not reported, nor is FMCSA aware of, any study that purports to establish a dose-response curve showing workplace injuries as a function of each hour worked." Final Rule, 85 Fed. Reg. at 33409, JA 231. But the Teamsters did cite a report in which a "pattern of deteriorating performance on psychophysiological tests as well as injuries while working long hours was observed across study findings." National Institute for Occupational Safety and Health, *Overtime and Extended Work Shifts: Recent Findings on Illnesses, Injuries, and Health Behaviors* (2004), *available* at https://www.cdc.gov/niosh/docs/2004-143/pdfs/2004-143.pdf (cited in Teamsters

2019 Comments, at 5, JA 184).[8] And it stands to reason that, if drivers spend more time on the tasks that cause them the most injuries, they are more likely to be injured. Moreover, the "mere fact that the magnitude of … effects is *uncertain* is no justification for *disregarding* the effect entirely." *Public Citizen*, 374 F.3d at 1219. FMCSA has not justified its conclusion that extending short-haul drivers' workdays will not adversely affect driver health, and this provision of the Final Rule is therefore arbitrary and capricious.

C. FMCSA has not provided a reasonable explanation for its assertions that the changes to the short-haul exemption will not impact compliance with hours-of-service regulations.

As FMCSA explained in adopting the Electronic-Device Rule, electronic logging devices "improve compliance with the [hours-of-service] rules." Electronic-Device Rule, 80 Fed. Reg. at 78292, JA 42. Compliance with the hours-of-service rules, in turn, "prevent[s] commercial vehicle operators from driving for long periods without opportunities to obtain adequate rest," which is "necessary to ensure that a driver is alert behind the wheel and able to respond appropriately to changes in the driving environment." *Id*. at 78376, JA 44.

[8] FMCSA did not include the National Institute for Occupational Safety and Health report in the administrative record, indicating that agency did not consider it in issuing the Final Rule. However, the agency cannot create an absence of evidence by omitting cited evidence from the record.

As commenters explained to FMCSA, the Final Rule's expansion of the short-haul exemption to the record-of-duty-status/electronic-logging-device requirements will negatively affect compliance with hours-of-service regulations, primarily in two ways. First, it will allow more drivers to take advantage of the exemption to the logging requirement, thereby making it harder to determine whether those drivers are complying with the hours-of-service rules. *See* Teamsters 2019 Comments, at 7, JA 186; Advocates 2019 Comments, at 5, JA 199. Instead of drivers recording their duty status, the only information that will be recorded for drivers who will now start using the short-haul exemption will be the time the driver reported for duty, the total number of hours the driver was on duty, the time the driver was released from duty, and, for drivers used for the first time or intermittently, the total time for the preceding seven days. 49 C.F.R. § 395.1(e)(1)(iv).

Second, because the workday will be extended by two hours, drivers will have more opportunities to violate the driving limits or be required by their employers to violate the driving limits. *See*, *e.g.*, Advocates 2019 Comments, at 5, JA 199. Before the Final Rule, drivers of property-carrying commercial motor vehicles using the short-haul exemption had a 12-hour workday in which they were allowed to drive 11 hours. Assuming they needed to spend some time on non-driving activities, including work activities such as loading and unloading and non-working activities such as eating and using the restroom, the drivers were relatively unlikely to exceed

the 11-hour driving limit during their 12-hour workday. Under the Final Rule, however, drivers will have 14 hours in which to drive 11 hours. The extra two hours of work time "could allow drivers to substantially exceed driving time limits currently established in regulation, without any deterrent, since discovery of the violation(s) would be impossible by enforcement personnel." California Highway Patrol Comments (2019), at 2, JA 127.

The likelihood that drivers will exceed the driving limits will be exacerbated by the extension of the permissible driving radius from 100 to 150 air miles, a change that increases the area in which a driver can drive from approximately 31,416 square air miles to approximately 70,686 square air miles. *See* Senator Murray Comments, at 2, JA 171 (noting that "the 50 air-mile increase to the current driving area radius would be roughly the equivalent of adding the entire state of Kentucky on to a 'short' haul driver's work area"). Because they will be able to drive farther, drivers will be able to drive for longer periods before they make their stops for deliveries. *See* Advocates 2019 Comments, at 5, JA 199.

Although the changes to the short-haul exemption will allow more drivers to drive without electronic logging devices, and although they will provide drivers with more time and distance in which to exceed the driving limit, the Final Rule asserts that the changes will not "increase the likelihood that motor carriers will not comply with [hours-of-service] rules." 85 Fed. Reg. at 33409, JA 231. As with its assertions

that the short-haul changes will not adversely affect safety and health, FMCSA failed to provide a reasoned explanation for this conclusion. The Final Rule states, for example, that the fact that the changes will enable more drivers to use the short-haul exception, "in and of itself, does not mean that the carriers in questions would experience increased levels of noncompliance with the applicable [hours-of-service] rules." *Id*. at 33407, JA 229. Given that electronic logging devices reduce noncompliance with hours-of-service rules, however, it is only logical to conclude that exempting more drivers from the electronic-logging-device requirement will allow increased noncompliance with those rules.

"With respect to the notion that drivers will drive farther by falsifying time records due to the lack of an [electronic logging device]," FMCSA "notes that the exception allowing short-haul drivers to use time cards as opposed to [records of duty status] has long existed in the [hours-of-service] rules" and insists that "[n]othing in the changes to the short-haul exception creates additional opportunities for short-haul drivers to falsify time records." *Id*. at 33410, JA 232. FMCSA's response ignores that the Final Rule triples the time over the 11-hour driving limit that property-carrying commercial motor vehicle drivers can work, vastly expanding their opportunities to exceed the driving limit. FMCSA's assertion that "the techniques currently used to enforce the [hours-of-service] requirements for short-haul drivers will be the same whether the maximum work shift is 12 or 14 hours,"

id. at 33406, JA 228, likewise ignores that, regardless of whether the enforcement techniques remain the same, extending drivers' workdays expands their opportunities to exceed the driving limit. And FMCSA's assertion that short-haul drivers who require commercial driver's licenses will have no "more opportunities or incentives to exceed 11 hours of driving time within the 14-hour window than non-[commercial driver's license] short-haul drivers who already have these time and distance limits," *id*. at 33407, JA 229, misses the point: The relevant comparison, in discussing whether the Final Rule increases opportunities for short-haul drivers who require commercial driver's licenses to violate hours-of-service regulations are the rules that governed *them* before the Final Rule was enacted, not the rules governing other drivers. And notably, FMCSA provides no information on the extent to which short-haul drivers who do not require a commercial driver's license exceed the driving limit within their driving window—perhaps because those drivers do not document their driving time through records of duty status and electronic logging devices.

The Final Rule emphasizes that employers will still be required to "maintain and retain accurate time records … showing the time the duty period began and ended, and the total hours on-duty each day." *Id*. at 33406, JA 228. Those time records, however, "do not provide a means to detect excessive *driving* time." Motor Carrier Safety Advisory Committee Report, Task 19-1 (Oct. 2019), at 5, JA 133

(emphasis added). FMCSA notes that "[m]otor carriers must still ensure that short-haul drivers using the exception do not drive more than 11 hours for property carriers or 10 hours for passenger carriers." Final Rule, 85 Fed. Reg. at 33409, JA 231. But the agency does not explain how motor carriers will ensure that their drivers comply with the limits when the drivers will not be required to keep a log detailing their driving time. Finally, FMCSA states that "the nature of short-haul operations, with frequent delivery stops, means that an increase in violations of the 11-hour driving limit is highly unlikely." *Id*. at 33408, JA 230. But the Final Rule significantly expands the number of hours drivers can work, and the increase in permissible driving distance will enable drivers to stop less frequently. As FMCSA notes, "carriers that choose to serve new customers near the outer limit of the expanded 150 air-mile radius will draw down more of the 11-hour driving time." *Id*. FMCSA states that such drivers will be "unable to make as many deliveries as they could have made within the previous 100 air-mile radius," *id*., without acknowledging the other possibility—that such drivers will take advantage of the extended workday to make the same number of deliveries by exceeding the 11-hour driving limit.

When FMCSA's predecessor agency, the Federal Highway Administration, extended the driving radius for short-haul drivers from 50 to 100 miles in 1980, it decreased the on-duty limit to 12 hours, explaining that, since the agency was "expanding the area of operation fourfold, a limitation [was] necessary to ensure that

the hours of service are not violated." 45 Fed. Reg. at 22043; *see also* 52 Fed. Reg. at 41719 (in rejecting requests to extend the 12-hour period to 15 hours, stating that "an extension beyond 12 consecutive hours would increase the likelihood that drivers would be able to exceed the … driving limitation without detection"). Although "the requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it *is* changing position," *Federal Communications Commission v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009), FMCSA does not acknowledge that its assertions that extending the workday will not affect compliance represent a change in position. And FMCSA provides no reason why the 12-hour limitation is no longer necessary to ensure that drivers comply with the hours-of-service regulations' driving limits. Just as it did not justify its beliefs that the short-haul changes will not adversely affect safety or driver health, FMCSA has not justified its belief that the changes will not "increase the likelihood that motor carriers will not comply with [hours-of-service] rules." Final Rule, 85 Fed. Reg. at 33409, JA 231. The short-haul changes in the Final Rule should be vacated.

II. The Final Rule's Changes to the 30-Minute Break Requirement Are Arbitrary and Capricious.

The Final Rule makes two related changes to the 30-minute break requirement. First, it allows the break to be fulfilled with on-duty, non-driving time, rather than requiring it to be off-duty or taken in a sleeper berth. Second, it only

requires the break when a driver has been *driving* for eight hours without taking a break from driving of at least 30 minutes, rather than when a driver has been *working* for eight hours without taking a break from working of at least 30 minutes. These changes allow drivers to work through the entire 14-hour driving window (or to be required by their managers to work through the entire 14-hour driving window) without taking a single off-duty break to rest. FMCSA states that it does not expect the changes to the 30-minute break requirement to adversely affect safety, and although it does not directly discuss the health effects of the 30-minute break requirement, it states generally that it has concluded that the Final Rule's changes are health-neutral. FMCSA's determinations on safety and health once again fail to meet the requirements of reasoned decisionmaking.

A. The Final Rule ignores fatigue from non-driving tasks.

The Final Rule's determination with regard to safety is based on its conclusion that "both on-duty breaks and off-duty breaks provide safety benefits essentially equivalent to those produced by an off-duty break." 85 Fed. Reg. at 33417, JA 239. FMCSA reached this conclusion by focusing on the benefits of breaks in reducing the fatigue caused by continuous driving. In particular, FMCSA reviewed data from Blanco 2011 showing "that breaks reduce [safety-critical events] in the hour of driving after a break," *id*. at 33420, JA 242, and concluded that, although the study found that "Off-Duty break[s] provided the most benefit," Blanco 2011, at xx, JA

25, the "study did not clearly demonstrate a significant difference between off-duty and on-duty breaks." 85 Fed. Reg. at 33420, JA 242.

In focusing on its reanalysis of Blanco 2011, however, FMCSA ignored the effect on safety of cumulative fatigue and fatigue from non-driving work. *Cf. Owner-Operator Ass'n v. FMCSA*, 494 F.3d at 206 (holding that a provision of the 2005 hours-of-service rule was arbitrary and capricious where "FMCSA gave no explanation for the failure of its operator-fatigue model to account for cumulative fatigue due to the increased weekly driving and working hours permitted" by the provision). The Regulatory Impact Analysis of the 2011 Rule attributed $72 million in safety benefits to the 30-minute break requirement, which were assessed based on the effects of "reducing cumulative on-duty hours and limiting the chances for long driving days," not on "the refreshing or 'resetting' effect breaks are often thought to have on drivers." 2011 Regulatory Impact Analysis, at 6-10, JA 33. FMCSA's new determination that on- and off-duty breaks provide essentially the same safety benefits was based only on a reanalysis of data involving the refreshing or resetting effect. Although the elimination of the requirement that the 30-minute break be off-duty increases drivers permissible work hours from 13½ to 14 hours per workday, FMCSA did not discuss the effects on safety of increasing "cumulative on-duty hours."

Moreover, FMCSA assumed that the only cause of fatigue among drivers is prolonged driving. The Final Rule states, for example, that the changes to the 30-minute break requirement are not expected to affect fatigue "because drivers continue to be constrained by the 11-hour driving limit and would continue to receive on-duty/non-driving breaks from the driving task." 85 Fed. Reg. at 33398, JA 220; *see also id*. at 33418, JA 240 (stating that drivers who drive less than 8 hours in a day are "unlikely to accumulate the levels of fatigue necessitating a mandatory 30-minute break"). Drivers, however, can be "required to perform heavy work that demands high metabolic energy output, such as loading, unloading, and delivering freight." Teamsters 2019 Comments, at 9, JA 188. The Final Rule does not discuss fatigue and safety effects of allowing a driver to conduct potentially heavy "on-duty non-driving work for 10 hours straight, without any break[,] and then get behind the wheel of an 80,000-pound [commercial motor vehicle] and drive for four hours." Advocates 2019 Comments, at 10, JA 204. It does not acknowledge that a driver might be fatigued after eight hours of work even if those hours do not consist of continuous driving, or that a driver may be fatigued after 14 hours of continuous work, even if the driver received breaks from the driving task. By failing to address these important aspects of the problem, the Final Rule is arbitrary and capricious.

B. The Final Rule does not address the health effects of the changes to the 30-minute break requirement.

In the Regulatory Impact Analysis accompanying the 2011 Rule, which adopted the 30-minute break requirement, FMCSA estimated that the 30-minute break requirement would have health benefits, over and above its safety benefits, estimated at $94 million. *See* 2011 Regulatory Impact Analysis, at 6-14, JA 35; 2011 Rule, 76 Fed. Reg. at 81138, JA 38. These health benefits were based on "reductions in mortality risk due to the decreases in total duty time in a day and in a week, and thus possible increases in sleep." 2011 Regulatory Impact Analysis, at 5-1, JA 32.

The Final Rule does not discuss the effect of the changes in the 30-minute break requirement on the health benefits discussed in the 2011 Regulatory Impact Analysis. Instead, it states that the health benefits in the 2011 Regulatory Impact Analysis "were largely based on limiting the use of the 34-hour restart provision," 85 Fed. Reg. at 33447, JA 269, and that because the Final Rule does not affect the "34-hour restart provision, … the health benefits estimated in the 2011 [Regulatory Impact Analysis] will not be affected by this final rule," *id*. But although the health benefits in the 2011 Regulatory Impact Analysis were "largely" based on the limits on the restart provision, they were not *entirely* based on those limits: The Regulatory Impact Analysis estimated that the 30-minute break requirement alone would result in $94 million in health benefits. 2011 Regulatory Impact Analysis, at 6-14, JA 35. The Final Rule is arbitrary and capricious in ignoring the health benefits the 2011

Regulatory Impact Analysis attributed to the 30-minute break requirement and in failing to analyze how the elimination of the off-duty break requirement, which allows increased daily and weekly duty time, would affect those health benefits.

Indeed, the Final Rule contains no analysis of the effects on driver health of the changes to the 30-minute break requirement. To the extent it addresses the driver health effect of these change at all, it is only in talking about the health effects of the Final Rule as a whole. In discussing the health effects of the Final Rule as a whole, FMCSA stated that "the effect of specific regulatory changes on driver health is difficult to evaluate," that the discussion of health in the 2005 Rule (which adopted the 14-hour workday) "remains applicable today with only a few changes," and that "based on the current scientific information and its own experience with Hours of Service regulation, FMCSA concludes that the changes made by this final rule are safety- and health-neutral." 85 Fed. Reg. at 33403, JA 225; *see also id*. at 33447, JA 269 ("Total hours driven or worked could increase or decrease on a given day, but FMCSA does not anticipate that these time shifts will negatively impact drivers' health. Instead, this final rule will empower drivers to make informed decisions based on the current situation, and thus the rule could lead to a decrease in stress and subsequent health benefits.").[9]

[9] The only specific potential adverse health issue addressed by the Final Rule in its paragraphs on health is the effect of exposure to diesel exhaust. The Final Rule

The difficulty in measuring health effects, however, does not free the agency from its duty to ensure that its regulations "do[] not have a deleterious effect on the physical condition of the operators." 49 U.S.C. § 31136(a)(4); *cf. State Farm*, 463 U.S. at 52 (explaining that, even where there is substantial uncertainty, the agency must "explain the evidence which is available, and must offer a rational connection between the facts found and the choice made" (internal quotation marks and citation omitted)); 2011 Regulatory Impact Analysis, at 5-1, JA 32 ("The difficulty of doing quantitative analyses … does not mean that potential health benefits must be left aside."). And FMCSA's conclusory assertion that it has determined that the changes in the Rule will not negatively impact health does not "articulate a satisfactory explanation" for that determination. *State Farm*, 463 U.S. at 43.

Finally, FMCSA's citation to the 2005 Rule does not explain its determination that the changes to the 30-minute break requirement will not have a negative effect on health. The 2005 Rule did not address the 30-minute break requirement, which was not adopted until 2011. Moreover, the Court vacated the portions of the Rule that increased daily driving time and weekly on-duty time without reaching

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notes that the 2005 Rule stated that attempts to create a dose-response curve for the effects of diesel exhaust led to unclear results, and it asserts that attempts to create such a curve "would be even less useful today" because diesel exhaust has declined significantly and because the changes in the Final Rule are only "incremental." 85 Fed. Reg. at 33403, JA 225.

arguments that the rule failed to protect driver health, *see Owner-Operator Ass'n v. FMCSA*, 494 F.3d at 199, and in the years between the 2005 and 2011 Rules, "the body of research that finds a connection between long hours of work and worker health [grew] substantially." 2011 Rule, 76 Fed. Reg. at 81174, JA 41.

If FMCSA believed that the changes to the 30-minute break requirement will not be detrimental to driver health, "it was incumbent on it to say so in the rule and to explain why." *Public Citizen*, 374 F.3d at 1217. "Its failure to do so, … requires [this Court] to vacate" the provisions in the rule relating to the 30-minute break requirement. *Id*.

CONCLUSION

For the foregoing reasons, this Court should vacate the provisions of the Final Rule concerning short-haul operations and the 30-minute break requirement.

Respectfully submitted,

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March 8, 2022

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitations of FRAP 32(a)(7)(B). The brief is composed in a 14-point proportional typeface, Times New Roman. As calculated by my word processing software (Microsoft Word 2016), the brief (excluding those parts permitted to be excluded under the Federal Rules of Appellate Procedure and this Court's rules) contains 12,955 words.

/s/ Adina H. Rosenbaum
Adina H. Rosenbaum

CERTIFICATE OF SERVICE

I hereby certify that, on March 8, 2022, this brief was served through the Court's ECF system on counsel for all parties.

/s/ Adina H. Rosenbaum
Adina H. Rosenbaum

ADDENDUM A

STATUTES AND REGULATIONS

STATUTORY AND REGULATORY ADDENDUM

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49 U.S.C. § 31136. United States Government regulations

(a) Minimum safety standards.—Subject to section 30103(a) of this title, the Secretary of Transportation shall prescribe regulations on commercial motor vehicle safety. The regulations shall prescribe minimum safety standards for commercial motor vehicles. At a minimum, the regulations shall ensure that—

> **(1)** commercial motor vehicles are maintained, equipped, loaded, and operated safely;
>
> **(2)** the responsibilities imposed on operators of commercial motor vehicles do not impair their ability to operate the vehicles safely;
>
> **(3)** the physical condition of operators of commercial motor vehicles is adequate to enable them to operate the vehicles safely and the periodic physical examinations required of such operators are performed by medical examiners who have received training in physical and medical examination standards and, after the national registry maintained by the Department of Transportation under section 31149(d) is established, are listed on such registry;
>
> **(4)** the operation of commercial motor vehicles does not have a deleterious effect on the physical condition of the operators; and
>
> **(5)** an operator of a commercial motor vehicle is not coerced by a motor carrier, shipper, receiver, or transportation intermediary to operate a commercial motor vehicle in violation of a regulation promulgated under this section, or chapter 51 or chapter 313 of this title.

…

49 C.F.R. § 395.1 Scope of rules in this part.

…

(e) Short-haul operations—

(1) 150 air-mile radius driver. A driver is exempt from the requirements of §§ 395.8 and 395.11 if:

(i) The driver operates within a 150 air-mile radius (172.6 statute miles) of the normal work reporting location;

(ii) The driver, except a driver-salesperson, returns to the work reporting location and is released from work within 14 consecutive hours;

(iii)

(A) A property-carrying commercial motor vehicle driver has at least 10 consecutive hours off-duty separating each 14 hours on-duty;

(B) A passenger-carrying commercial motor vehicle driver has at least 8 consecutive hours off-duty separating each 14 hours on-duty; and

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

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

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

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

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

(2) Operators of property-carrying commercial motor vehicles not requiring a commercial driver's license. Except as provided in this paragraph, a driver

is exempt from the requirements of §§ 395.3(a)(2), 395.8, and 395.11 and ineligible to use the provisions of § 395.1(e)(1), (g), and (o) if:

> (i) The driver operates a property-carrying commercial motor vehicle for which a commercial driver's license is not required under part 383 of this subchapter;
>
> (ii) The driver operates within a 150 air-mile radius of the location where the driver reports to and is released from work, i.e., the normal work reporting location;
>
> (iii) The driver returns to the normal work reporting location at the end of each duty tour;
>
> (iv) The driver does not drive:
>
> > (A) After the 14th hour after coming on duty on 5 days of any period of 7 consecutive days; and
> >
> > (B) After the 16th hour after coming on duty on 2 days of any period of 7 consecutive days;
>
> (v) The motor carrier that employs the driver maintains and retains for a period of 6 months accurate and true time records showing:
>
> > (A) The time the driver reports for duty each day;
> >
> > (B) The total number of hours the driver is on duty each day;
> >
> > (C) The time the driver is released from duty each day;
> >
> > (D) The total time for the preceding 7 days in accordance with § 395.8(j)(2) for drivers used for the first time or intermittently.

…

49 C.F.R. § 395.3 Maximum driving time for property-carrying vehicles.

(a) Except as otherwise provided in § 395.1, no motor carrier shall permit or require any driver used by it to drive a property-carrying commercial motor vehicle, nor shall any such driver drive a property-carrying commercial motor vehicle, regardless of the number of motor carriers using the driver's services, unless the driver complies with the following requirements:

> (1) Start of work shift. A driver may not drive without first taking 10 consecutive hours off duty;
>
> (2) 14-hour period. A driver may not drive after a period of 14 consecutive hours after coming on-duty following 10 consecutive hours off-duty.
>
> (3) Driving time and interruptions of driving periods—
>
> > (i) Driving time. A driver may drive a total of 11 hours during the period specified in paragraph (a)(2) of this section.
> >
> > (ii) Interruption of driving time. Except for drivers who qualify for either of the short-haul exceptions in § 395.1(e)(1) or (2), driving is not permitted if more than 8 hours of driving time have passed without at least a consecutive 30-minute interruption in driving status. A consecutive 30-minute interruption of driving status may be satisfied either by off-duty, sleeper berth or on-duty not driving time or by a combination of off-duty, sleeper berth and on-duty not driving time.

(b) No motor carrier shall permit or require a driver of a property-carrying commercial motor vehicle to drive, nor shall any driver drive a property-carrying commercial motor vehicle, regardless of the number of motor carriers using the driver's services, for any period after—

> (1) Having been on duty 60 hours in any period of 7 consecutive days if the employing motor carrier does not operate commercial motor vehicles every day of the week; or

(2) Having been on duty 70 hours in any period of 8 consecutive days if the employing motor carrier operates commercial motor vehicles every day of the week.

(c)

(1) Any period of 7 consecutive days may end with the beginning of an off-duty period of 34 or more consecutive hours.

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

49 C.F.R. § 395.5 Maximum driving time for passenger-carrying vehicles.

Subject to the exceptions and exemptions in § 395.1:

(a) No motor carrier shall permit or require any driver used by it to drive a passenger-carrying commercial motor vehicle, nor shall any such driver drive a passenger-carrying commercial motor vehicle:

(1) More than 10 hours following 8 consecutive hours off duty; or

(2) For any period after having been on duty 15 hours following 8 consecutive hours off duty.

(b) No motor carrier shall permit or require a driver of a passenger-carrying commercial motor vehicle to drive, nor shall any driver drive a passenger-carrying commercial motor vehicle, regardless of the number of motor carriers using the driver's services, for any period after—

(1) Having been on duty 60 hours in any 7 consecutive days if the employing motor carrier does not operate commercial motor vehicles every day of the week; or

(2) Having been on duty 70 hours in any period of 8 consecutive days if the employing motor carrier operates commercial motor vehicles every day of the week.

49 C.F.R. § 395.8 Driver's record of duty status.

(a)

(1) Except for a private motor carrier of passengers (nonbusiness), as defined in § 390.5 of this subchapter, a motor carrier subject to the requirements of this part must require each driver used by the motor carrier to record the driver's duty status for each 24-hour period using the method prescribed in paragraphs (a)(1)(i) through (iv) of this section, as applicable.

(i) Subject to paragraphs (a)(1)(ii) and (iii) of this section, a motor carrier operating commercial motor vehicles must install and require each of its drivers to use an ELD to record the driver's duty status in accordance with subpart B of this part no later than December 18, 2017.

(ii) A motor carrier that installs and requires a driver to use an automatic on-board recording device in accordance with § 395.15 before December 18, 2017 may continue to use the compliant automatic on-board recording device no later than December 16, 2019.

(iii)

(A) A motor carrier may require a driver to record the driver's duty status manually in accordance with this section, rather than require the use of an ELD, if the driver is operating a commercial motor vehicle:

(1) In a manner requiring completion of a record of duty status on not more than 8 days within any 30-day period;

(2) In a driveaway-towaway operation in which the vehicle being driven is part of the shipment being delivered;

(3) In a driveaway-towaway operation in which the vehicle being transported is a motor home or a recreation vehicle trailer; or

(4) That was manufactured before model year 2000, as reflected in the vehicle identification number as shown on the vehicle's registration.

(B) The record of duty status must be recorded in duplicate for each 24-hour period for which recording is required. The duty status shall be recorded on a specified grid, as shown in paragraph (g) of this section. The grid and the requirements of paragraph (d) of this section may be combined with any company form.

(iv) Subject to paragraphs (a)(1)(i) through (iii) of this section, until December 18, 2017, a motor carrier operating commercial motor vehicles shall require each of its drivers to record the driver's record of duty status:

(A) Using an ELD that meets the requirements of subpart B of this part;

(B) Using an automatic on-board recording device that meets the requirements of § 395.15; or

(C) Manually, recorded on a specified grid as shown in paragraph (g) of this section. The grid and the requirements of paragraph (d) of this section may be combined with any company form. The record of duty status must be recorded in duplicate for each 24-hour period for which recording is required.

(2) A driver operating a commercial motor vehicle must:

(i) Record the driver's duty status using one of the methods under paragraph (a)(1) of this section; and

(ii) Submit the driver's record of duty status to the motor carrier within 13 days of the 24-hour period to which the record pertains.

(b) The duty status shall be recorded as follows:

(1) "Off duty" or "OFF."

(2) "Sleeper berth" or "SB" (only if a sleeper berth used).

(3) “Driving” or “D.”

(4) “On-duty not driving” or “ON.”

…

49 C.F.R. § 395.1 (2019) Scope of rules in this part.

…

(e) Short-haul operations—

(1) 100 air-mile radius driver. A driver is exempt from the requirements of §§ 395.8 and 395.11 if:

(i) The driver operates within a 100 air-mile radius of the normal work reporting location;

(ii)

(A) The driver, except a driver-salesperson or a driver of a ready-mixed concrete delivery vehicle, returns to the work reporting location and is released from work within 12 consecutive hours;

(B) The driver of a ready-mixed concrete delivery vehicle returns to the work reporting location and is released from work within 14 consecutive hours;

(iii)

(A) A property-carrying commercial motor vehicle driver, except the driver of a ready-mixed concrete delivery vehicle, has at least 10 consecutive hours off duty separating each 12 hours on duty;

(B) A driver of a ready-mixed concrete delivery vehicle has at least 10 consecutive hours off duty separating each 14 hours on duty;

(C) A passenger-carrying commercial motor vehicle driver has at least 8 consecutive hours off duty separating each 12 hours on duty;

(iv)

(A) A property-carrying commercial motor vehicle driver, except the driver of a ready-mixed concrete delivery vehicle, does not exceed the maximum driving time specified in § 395.3(a)(3) following 10 consecutive hours off duty; or

(B) A driver of a ready-mixed concrete delivery vehicle does not exceed 11 hours maximum driving time following 10 consecutive hours off duty; or

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

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

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

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

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

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

…

49 C.F.R. § 395.3 (2019) Maximum driving time for property-carrying vehicles.

(a) Except as otherwise provided in § 395.1, no motor carrier shall permit or require any driver used by it to drive a property-carrying commercial motor vehicle, nor shall any such driver drive a property-carrying commercial motor vehicle, regardless of the number of motor carriers using the driver's services, unless the driver complies with the following requirements:

> (1) Start of work shift. A driver may not drive without first taking 10 consecutive hours off duty;
>
> (2) 14-hour period. A driver may drive only during a period of 14 consecutive hours after coming on duty following 10 consecutive hours off duty. The driver may not drive after the end of the 14–consecutive-hour period without first taking 10 consecutive hours off duty.
>
> (3) Driving time and rest breaks.
>
>> (i) Driving time. A driver may drive a total of 11 hours during the 14-hour period specified in paragraph (a)(2) of this section.
>>
>> (ii) Rest breaks. Except for drivers who qualify for either of the short-haul exceptions in § 395.1(e)(1) or (2), driving is not permitted if more than 8 hours have passed since the end of the driver's last off-duty or sleeper-berth period of at least 30 minutes.

…

ADDENDUM B

DECLARATION OF LAMONT BYRD

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ADVOCATES FOR HIGHWAY AND AUTO SAFETY, et al.,	)	
Petitioners,	)	
v.	)	No. 20-1370
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION, et al.,	)	
Respondents.	)	

DECLARATION OF LAMONT BYRD

1. My name is Lamont Byrd, and I am Director of the Safety and Health Department at the International Brotherhood of Teamsters (IBT). I have been employed at the IBT for thirty-one years.

2. The IBT is a labor organization with more than 1.3 million members, who are employed in virtually every job classification of work in the United States and Canada. The IBT has hundreds of thousands of members who are commercial motor vehicle operators in the United States and who are required to hold a Commercial Driver's License. These drivers are directly regulated by the Federal Motor Carrier Safety Administration's hours-of-service regulations. In providing

representation to their members, the IBT and its affiliates seek to provide the members good wages, benefits, and safe and healthy working conditions.

3. The IBT's members include drivers engaged in short-haul operations who operate under the short-haul exemption to the record-of-duty-status and electronic-logging-device requirements. Prior to the Final Rule at issue in this case, the hours-of-service regulations provided that drivers operating under that short-haul exemption were limited to a 100 air-mile radius and had to return to their work reporting location and be released from work within 12 hours. The Final Rule expands those limits to 150 air miles and 14 hours. Because of these changes, IBT members who are short-haul drivers subject to the limitations in the regulations can be required by their employers to drive farther and work longer hours than before the Final Rule went into effect.

4. The IBT's members also include long-haul drivers who are subject to the 30-minute break requirement in the hours-of-service regulations. Prior to the Final Rule at issue in this case, such drivers were required to take an off-duty break of at least thirty minutes if it had been more than eight hours since their last off-duty (or sleeper berth) break of at least thirty minutes. The Final Rule changes the 30-minute break requirement in two ways: it allows the break to be fulfilled by on-duty, non-driving work, and it only requires a break to be taken if a driver has been driving for eight hours without taking a break of at least thirty-minutes, rather than if the driver

has been working (doing either driving or non-driving work) for eight hours without taking a break. Because of this change, IBT members who are long-haul drivers are no longer entitled by law to a 30-minute off-duty break after 8 hours of work before they can do any more driving.

5. After the Final Rule, to ensure that its short-haul drivers are limited to a 12-hour workday and 100 mile driving radius and that its long-haul drivers receive a 30-minute off-duty break after eight hours of working, IBT will have to negotiate for those provisions in collective bargaining agreements. IBT may not be able to successfully negotiate for such provisions and having to negotiate for breaks and limits that used to be required by the hours-of-service regulations may require it to make tradeoffs that it was not required to make when those breaks and limits were required by the regulations.

6. In addition, to the extent IBT's collective bargaining agreements limit short-haul drivers to a 12-hour workday and 100 air-mile radius and provide long-haul drivers with a break equivalent to the break required prior to the Final Rule, drivers covered by those agreements will be at a competitive disadvantage compared to independent contractors not covered by such provisions. Similarly, employers of IBT drivers who choose to continue to abide by the limitations on the short-haul exemption and the 30-minute break requirement that existed before the Final Rule

will be at a competitive disadvantage compared to motor carriers that do not. This disadvantage undermines those members' wages and job security.

7. The IBT filed comments in response to both the Advance Notice of Proposed Rulemaking, 83 Fed. Reg. 42631 (Aug. 23, 2018), which sought input on short-haul operations and the 30-minute break requirement, and the Notice of Proposed Rulemaking, 84 Fed. Reg. 44190 (Aug. 22, 2019), which proposed changes to short-haul operations and the 30-minute break requirement. *See* IBT Comments (2018), FMCSA-2018-0248-4783; IBT Comments (2019), FMCSA-2018-0248-8128. In their comments, IBT made clear that it opposed the proposed changes to short-haul operations and the 30-minute break requirement. The IBT explained that the changes to the short-haul exemption would cause drivers to experience more fatigue-related occupational injuries and crashes and could lead to greater undocumented non-compliance with the hours-of-service regulations, since drivers operating under the short-haul exception do not need to document their time with electronic logging devices. The IBT also explained that an on-duty/non-driving work can cause fatigue, and thus that an on-duty break does not provide the same benefits as off-duty breaks.

8. In addition to being directly regulated by the hours-of-service regulations, the IBT's member-drivers drive spend more time on the road than most Americans and share the roads with other drivers, including short-haul drivers who

may drive farther and work longer hours under the expanded short-haul exemption in the Final Rule, and long-haul drivers who may now perform on-duty work during their 30-minute break from driving. Thus, to the extent these changes in the hours-of-service regulations decrease safety, the changes both directly and indirectly threaten the safety of the IBT's member drivers.

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

Executed on December 3, 2021

Lamont Byrd