

NO DATE FOR ORAL ARGUMENT HAS BEEN SET

No. 09-1094

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

PUBLIC CITIZEN, ADVOCATES FOR HIGHWAY AND AUTO
SAFETY, TRUCK SAFETY COALITION, and the INTERNATIONAL
BROTHERHOOD OF TEAMSTERS,

Petitioners,

v.

FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION and
THE UNITED STATES,

Respondents.

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

**BRIEF OF *AMICI CURIAE* THE INSTITUTE FOR POLICY INTEGRITY
AT NEW YORK UNIVERSITY SCHOOL OF LAW, OMB WATCH,
SOCIETY FOR OCCUPATIONAL AND ENVIRONMENTAL HEALTH,
UNION OF CONCERNED SCIENTISTS, AND CENTER FOR SCIENCE IN
THE PUBLIC INTEREST IN SUPPORT OF PETITIONERS**

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**CERTIFICATE OF COUNSEL AS TO PARTIES, RULINGS, AND
RELATED CASES
(D.C. Cir. R. 28(a)(1))**

Pursuant to D.C. Circuit Rule 28(a)(1) and Federal Rule of Appellate Procedure 26.1, counsel for *Amici Curiae* the Institute for Policy Integrity at New York University School of Law, OMB Watch, Society for Occupational and Environmental Health, Union of Concerned Scientists, and Center for Science in the Public Interest certify as follows:

A. Parties and *Amici*

All parties, intervenors, and *amici* appearing before this court are listed in the Initial Brief for Petitioners. Pursuant to Federal Rule of Appellate Procedure 26.1, the Institute for Policy Integrity at New York University School of Law, OMB Watch, Society for Occupational and Environmental Health, Union of Concerned Scientists, and Center for Science in the Public Interest filed a Corporate Disclosure Statement with their Motion to Participate as *Amici Curiae* on May 6, 2009.

B. Rulings Under Review

References to the agency rulings at issue appear in the Initial Brief for Petitioners.

C. Related Cases

Related cases known to counsel appear in the Initial Brief for Petitioners.

Dated: September 11, 2009 Respectfully submitted,

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**STATEMENT OF COUNSEL AS TO IDENTITY OF *AMICI CURIAE*,
INTEREST IN THE CASE, AND SOURCE OF AUTHORITY TO FILE
(Fed. R. App. P. 29(c)(3))**

Pursuant to Federal Rule of Appellate Procedure 29(c)(3), counsel for *Amici Curiae* the Institute for Policy Integrity at New York University School of Law (IPI), OMB Watch, Society for Occupational and Environmental Health (SOEH), Union of Concerned Scientists (UCS), and Center for Science in the Public Interest (CSPI) certify as follows:

A. Identity of *Amici Curiae* and Interest in the Case

IPI is dedicated to improving the quality of government decisionmaking through advocacy and scholarship in the fields of administrative law, economics, and public policy. IPI takes a special interest in the use of cost-benefit analysis and the promulgation of federal regulations that affect public health and safety.

SOEH is a professional organization dedicated to reducing occupational and environmental health hazards through presenting scientific data and exchanging information across institutions and disciplines.

UCS is the leading science-based not-for-profit working to restore scientific integrity to federal policymaking and ensure that scientific information is adequately integrated into decisionmaking processes. OMB Watch is a not-for-profit organization dedicated to increasing government transparency and

accountability, ensuring sound, equitable regulatory and budgetary processes and policies, and protecting and promoting active citizen participation in our democracy. CSPI is a national, not-for-profit advocacy organization working to conduct innovative research and advocacy programs in health and nutrition and to provide consumers with information about health and well-being. While UCS, OMB Watch, and CSPI wish to address the misapplication of cost-benefit analysis in this case, they do not endorse the unquestioning use of cost-benefit analysis as a standard decisionmaking tool because it is too often subject to misuse and abuse, as well-illustrated in this case.

Amici have a significant interest in the outcome of the legal issues presented by the Initial Brief for Petitioners—particularly in ensuring that federal agencies ground their regulations in scientific, economic, and rational decisionmaking. *Amici* submit this brief to this Court in support of Petitioners’ contention that the Federal Motor Carrier Safety Administration acted arbitrarily and capriciously, and in violation of the Administrative Procedure Act, when relying on an inadequate cost-benefit analysis in support of its final Hours of Service rule. *See* Initial Brief for Petitioners (“Pet’rs.’ Br.”) at 16. *Amici* submit this brief in the hope that their expertise on administrative law and cost-benefit analysis will be of special assistance to this Court when considering the issues raised by Petitioners.

B. Source of Authority to File Separate Brief

The source of authority for filing this brief derives from the timely filing of a Motion to Participate as *Amici Curiae* by IPI, CSPI, OMB Watch, SOEH, and UCS, and this Court's order, dated May 7, 2009, granting that motion.

The Institute for Policy Integrity at New York University School of Law, OMB Watch, the Society for Occupational and Environmental Health, the Union of Concerned Scientists, and the Center for Science in the Public Interest (collectively “*Amici*”), by and through their undersigned counsel, file this *amici curiae* brief in the above-captioned case in support of the Initial Brief for Petitioners filed by Public Citizen, Advocates for Highway and Auto Safety, Truck Safety Coalition, and the International Brotherhood of Teamsters (collectively “Petitioners”). Petitioners seek judicial review of the regulation entitled “Hours of Service of Drivers,” promulgated by the Federal Motor Carrier Safety Administration (“FMCSA” or “the Agency”) on November 18, 2008. 73 Fed. Reg. 69,567 (Nov. 18, 2008) (codified at 47 C.F.R. pt. 76) (“HOS Regulation” or “the Rule”). FMCSA denied Petitioners’ request for reconsideration, and Petitioners now seek review of the rule in this Court.

SUMMARY OF ARGUMENT

FMCSA relied on an arbitrary and capricious cost-benefit analysis to promulgate its HOS Regulation. As such, its rulemaking violates the Administrative Procedure Act (APA). The APA’s requirement to engage in reasoned decisionmaking extends to proper performance of any analysis that an agency uses in its decisionmaking process. FMCSA, however, did not properly

perform its cost-benefit analysis, which it relied on when finalizing its HOS Regulation.

FMCSA performed its cost-benefit analysis of this regulation arbitrarily and capriciously in three key respects. First, FMCSA excluded a key variable—driver health—affecting the balance of costs and benefits. This exclusion was a serious departure from basic cost-benefit methodology, was arbitrary and capricious under the APA, and also violated FMCSA’s authorizing statute, which requires the agency perform a cost-benefit analysis. FMCSA should have examined all studies available on the correlations between driving hours and health. Even if all those studies found uncertainty in the correlations, the Agency should have assigned a positive value to the effect on driver health.

Second, FMCSA arrived at an unsupported conclusion, based on faulty analysis, that total driving and working hours would not be affected by the Rule. Consequently, FMCSA determined that the HOS Regulation would have no effect on driver health. The failure to adequately justify its conclusion that the Rule would not affect driving and working hours violated the APA’s basic reasoned decisionmaking requirements.

Finally, when performing its cost-benefit analysis, FMCSA failed to account for the ability of the trucking industry to reduce compliance costs. This error led to

a bias against more stringent alternatives to the Rule, and was arbitrary and capricious.

This Court should vacate FMSCA's HOS Regulation on the grounds that it relied on an arbitrarily and capriciously performed cost-benefit analysis and therefore violated the APA.

ARGUMENT

I. Standard of Review

Under the APA, federal agency action is generally subject to judicial review. A court may hold an agency's formal or informal rulemaking or adjudication unlawful under the APA if that action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A).

While judicial review of agency action is narrow under this "arbitrary and capricious" standard, *Prof'l Drivers Council v. Bureau of Motor Carrier Safety*, 706 F.2d 1216, 1220 (D.C. Cir. 1983), within its prescribed sphere, judicial inquiry must also be "searching and careful," *Ass'n of Oil Pipe Lines v. FERC*, 83 F.3d 1424, 1431 (D.C. Cir. 1996) (citing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971)). A court will find an agency action to be arbitrary and capricious "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence

before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983).

This review applies to both the factual basis of an agency’s action as well as the agency’s reasoning. *Id.* at 30–31. In this context, the function of a court is to take a “hard look” and ensure that an agency has given reasoned consideration to all the material facts and issues. *Panhandle E. Pipe Line Co. v. FERC*, 890 F.2d 435, 439-40 (D.C. Cir. 1989).

“[T]he touchstone of arbitrary and capricious review is reasoned decisionmaking.” Judge Harry T. Edwards & Linda A. Elliot, *Federal Courts Standards of Review* 167 (2007). “Reasoned decisionmaking . . . promotes sound results, and unreasoned decisionmaking the opposite.” *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 375 (1998). Reasoned decisionmaking involves a logical, rational, and analytical process. To satisfy the APA’s “arbitrary and capricious” standard, an “agency must cogently explain why it has exercised its discretion in a given manner,” and that explanation must be “sufficient to enable [a reviewing court] to conclude that the [agency’s action] was the product of reasoned decisionmaking.” *Owner-Operator Indep. Drivers Ass’n v. FMCSA*, 494 F.3d 188, 203 (D.C. Cir. 2007) (quoting *State Farm*, 463 U.S. at 43).

II. An Agency Cannot Rely on an Arbitrarily and Capriciously Performed Cost-Benefit Analysis

The APA's requirement to engage in reasoned decisionmaking extends to proper performance of analyses that the agency relies upon in its decisionmaking. Because FMCSA relied on a cost-benefit analysis when finalizing its HOS Regulation, it was required to undertake a rigorous and thorough analysis of the effects of the proposed action and relevant alternatives.

A. Cost-Benefit Analysis Involves a Specific Methodology

Cost-benefit analysis is a technique widely used by government and private actors when making decisions or choosing between multiple courses of action, legislation, or regulation. *See* Eric A. Posner, *Controlling Agencies with Cost-Benefit Analysis: A Positive Political Theory Perspective*, 68 U. Chi. L. Rev. 1137, 1139 & n.15 (2001) (finding that “[t]he annual number of cost-benefit reports in the Federal Register has increased about sixfold” between 1980 and 1999, to over 2000 reports). For government agencies, cost-benefit analysis is a tool to both maximize the net benefits of regulation and ensure decisions are based on reasoned analysis. *See* Cass R. Sunstein, *Cognition and Cost-Benefit Analysis*, 29 J. Legal Stud. 1059, 1069-70 (2000) (“A virtue of cost-benefit analysis is that it tends to overcome people’s tendency to focus on parts of problems, by requiring them to look globally at the consequences of apparently isolated actions.”).

Cost-benefit methodology involves a rigorous and analytical assessment of the potential effects of a range of alternate actions. *Entergy Corp. v. Riverkeeper, Inc.*, 129 S.Ct. 1498, 1516 (2009) (“Cost-benefit analysis requires the agency to first monetize the costs and benefits of a regulation, balance the results, and then choose the regulation with the greatest net benefits.”). When the process is performed correctly, it values and weighs not only purely financial and economic effects, but the entire range of effects of an agency rulemaking, including effects on health, safety, the environment, and general welfare. *See* Exec. Order No. 12,866 § 6(3)(C)(i), 58 Fed. Reg. 51,735, 51,741 (Oct. 4, 1993) (codified at 45 C.F.R. pt. 88) (hereinafter “the Order”) (stating that benefits of regulatory action can include “the enhancement of health and safety, the protection of the natural environment, and the elimination or reduction of discrimination or bias”).

For nearly thirty years, the Executive Branch has required cost-benefit analysis of important regulations. *See* Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (Feb. 17, 1981). Under the current Executive Order federal agencies are required to perform a cost-benefit analysis for any “significant regulatory action.” Exec. Order No. 12,866 § 6(3)(C), 58 Fed. Reg. at 51,741; *see also id.* § 3(f) (defining “significant regulatory action” as one “likely to result in,” *inter alia*, an annual effect on the economy of \$100 million or more).

The Order is instructive as to the usual requirements and methodology of cost-benefit analysis. It provides that “[c]osts and benefits” must be understood by agencies “to include both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider.” *Id.* § 1(a). The Order broadly defines costs and benefits to encompass direct and indirect impacts on the economy, government, health, safety, and environment. The Order also provides that analyses should evaluate the costs and benefits of not only the preferred regulatory action, but also of any “reasonably feasible alternatives.” *Id.* § 6(3)(C).

B. Courts Review Agency Cost-Benefit Analyses

The Order specifically disclaims judicial reviewability of an agency’s decision to classify a rule as significant or to undertake a cost-benefit analysis. *See id.* § 10. In many cases, it will be within an agency’s purview to choose whether to perform a cost-benefit analysis. *See, e.g., Entergy Corp.*, 129 S.Ct. at 1505-06 (permitting use of cost-benefit analysis for rulemaking under provision of the Clean Water Act); *Natural Res. Def. Council v. EPA*, 937 F.2d 641, 643 (D.C. Cir. 1991) (permitting use of cost-benefit analysis for rulemaking under provision of Clean Air Act); *but see Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 486 (2001) (holding that EPA may not take cost into account when setting national air quality standards under the Clean Air Act).

While it is true that a court will not “substitute its judgment for that of the agency,” *Ctr. for Auto Safety v. Peck*, 751 F.2d 1336, 1342-43 (D.C. Cir. 1985) (quoting *State Farm*, 463 U.S. at 30), once an agency undertakes a cost-benefit analysis and relies on that analysis in its rulemaking, it is cannot perform the cost-benefit analysis in an arbitrary and capricious manner. *See Ctr. for Biological Diversity v. NHTSA*, 538 F.3d 1172, 1198 (9th Cir. 2008) (holding that once an agency voluntarily decides to rely on a cost-benefit analysis, “it cannot put a thumb on the scale by undervaluing the benefits and overvaluing the costs” in an arbitrary and capricious manner); *Pub. Citizen v. FMCSA*, 374 F.3d 1209, 1217-19 (D.C. Cir. 2004) (finding agency’s rulemaking to be “troubling” because it relied on a “questionable” cost-benefit analysis that employed “dubious” assumptions and distorted the costs and benefits). If a cost-benefit analysis “fail[s] to consider an important aspect of the problem” or “runs counter to the evidence before the agency,” *State Farm*, 463 U.S. at 43, the agency action is arbitrary and capricious, and a reviewing court must invalidate the rule under the APA.

Courts will review cost-benefit analyses performed by federal agencies to ensure that they comply with standards of reasoned decisionmaking. *See Advocates for Highway & Auto Safety v. FMCSA*, 429 F.3d 1136, 1146 (D.C. Cir. 2005) (holding a FMCSA training rule arbitrary and capricious in part because the agency said “practically nothing about the projected benefits” and “blithe[ly]”

made assumptions about the rule's effects). In short, agencies cannot pick and choose their data, but rather must include the full range of costs and benefits when conducting an analysis. *See Owner-Operator Indep. Drivers Ass'n*, 494 F.3d at 205-06 (finding FMCSA rule arbitrary and capricious because regulatory impact analysis ignored factors affecting costs); *Pub. Citizen, Inc. v. Mineta*, 340 F.3d 39, 55-62 (2d Cir. 2003) (finding a rule arbitrary and capricious because cost-benefit analysis was incomplete).

Additionally, the cost-benefit analysis must be as accurate as reasonably possible: agencies must do the work of quantifying and estimating costs and benefits in a responsible manner. *Ctr. for Biological Diversity*, 538 F.3d at 1200 (finding that agency refusal to monetize and include important cost and benefits in its analysis was arbitrary and capricious); *Pub. Citizen v. FMCSA*, 374 F.3d at 1219-20 (stating that FMCSA's cost-benefit justifications for its rule would have been unlikely to pass judicial scrutiny because the agency failed to estimate and quantify costs and account fully for benefits).

C. FMCSA Relied on Its Cost-Benefit Analysis as Part of Its Rulemaking

As part of the decisionmaking process for the HOS Regulation, FMCSA performed a cost-benefit analysis for its new rule in 2005. FMCSA, Hours of Service of Drivers, 70 Fed. Reg. 49,978, 50,044 (Aug. 5, 2005) (codified at 49 C.F.R. pts. 385, 390, 395) (citing FMCSA, *Regulatory Impact Analysis and Small*

Business Impact Analysis for Hours of Service Options (2005) (hereinafter “FMCSA 2005 RIA”)). It then incorporated a nearly identical version into its interim 2007 rule, FMCSA, Hours of Service of Drivers, 72 Fed. Reg. 71,247, 71,249 (codified at 49 C.F.R. pts. 385, 395) (Dec. 17, 2007) (citing FMCSA, *Regulatory Impact Analysis for Hours of Service Options* (2007) (hereinafter “FMCSA 2007 RIA”)), and incorporated that analysis again into its final 2008 rule now at issue (which adopted the 2007 interim rule), 73 Fed. Reg. at 69,570, 69,583-85 (citing FMCSA, *Regulatory Impact Analysis for Hours of Service Options* ES-3 (2008) (hereinafter “FMCSA 2008 RIA”)).

FMCSA determined the benefits of the HOS Regulation exceeded the costs after performing its cost-benefit analysis. Because the analysis was part of the decisionmaking process and its administrative record, the Agency was obligated under the APA to perform that analysis in a logical, rational, and reasoned manner.

III. FMCSA Performed an Arbitrary and Capricious Cost-Benefit Analysis

As Petitioners’ Initial Brief explains, the HOS Regulation will affect driver health by changing the limits on permissible driving hours. Pet’rs.’ Br. at 9-11. FMCSA’s cost-benefit analysis of the Rule was arbitrarily and capriciously performed in three key respects: (1) FMCSA excluded a key variable—driver health—affecting the balance of costs and benefits; (2) FMCSA reached an unsupported conclusion that the Rule would not affect total driving and working

hours; and (3) FMCSA failed to consider the ability of regulated actors to reduce compliance cost, thereby making more stringent regulatory alternatives seem less attractive.

A. FMCSA Failed to Assign Any Value to the Rule's Effects on Driver Health

In its final rule, FMCSA stated that it was “unable to quantify or monetize the impacts of [the] rule on driver health”; that no credible research existed to establish positive “dose-response curves” (which demonstrate the change in effects caused by differing levels of exposure); and that therefore its cost-benefit analysis could not take into consideration any effects on driver health. 73 Fed. Reg. at 69,573-74; *accord* 70 Fed. Reg. at 49,985-86; Pet’rs.’ Br. at 54-55.

In reaching this conclusion, FMCSA mainly discussed studies cited in its 2005 rule. 73 Fed. Reg. at 69,572-73 (citing 70 Fed. Reg. at 49,982). Those studies reviewed the potential effects of the rule on driver health, including the possibilities of: increased incidents of lung and bladder cancer, correlated to exposure to diesel exhaust; increased incidents of cardiovascular disease and acute myocardial infarction, correlated to sleep disruption from increased driving hours; increased incidents of hearing loss, due to exposure to noise while driving; and low back syndrome and other musculoskeletal disorders, correlated to whole body vibrations while driving. *Id.* at 69,573. Some studies found causations or correlations between driving hours and these negative health outcomes, while

others did not or were inconclusive. *Id.* FMCSA dismissed several studies finding a relationship between these variables because they were “self-evaluations” or the results were not “fine-grained.” *Id.* In its final Rule, FMCSA stated that it found no new studies “since the 2005 rule that would change [its] conclusions.” *Id.*

FMCSA concluded that because the studies could not establish an identifiable, quantitative dose-response curve between driving hours and these negative health outcomes, it had “no basis for estimating health impacts and costs,” and so did not assign any value to these possible effects. *Id.* at 69,574. The cost-benefit analysis therefore only took driver health into consideration as it relates to the effect of fatigue on crash risks. *Id.* at 69,584; *see* FMCSA 2008 RIA at ES-3.

The failure to assign any value to driver health as a separate effect was a serious departure from cost-benefit methodology, was arbitrary and capricious under the APA, and also violated FMCSA’s authorizing statute, which mandates that the Agency “consider, to the extent practicable and consistent with the purposes of this chapter [the] costs and benefits” of any regulation. 49 U.S.C. § 31,136(c)(2)(A). An “agency must examine the relevant data”—it cannot simply dismiss public health studies that discuss possible effects of a rule. *See State Farm*, 463 U.S. at 43; *Advocates for Highway & Auto Safety*, 429 F.3d at 1146 (invalidating rule based on “patently illogical” connections drawn between studies before FMCSA and its regulatory choice, and chastising FMCSA for its “baffling”

“disregard” of government-commissioned reports); *U.S. Air Tour Ass’n v. FAA*, 298 F.3d 997, 1018-19 (D.C. Cir. 2002) (finding that failure to consider impact that could “have a significant impact on the results” was arbitrary and capricious).

As explained by Petitioners, FMCSA ignored and discounted studies reporting significant associations between longer driving hours and driver health. Pet’rs.’ Br. at 18. For example, FMCSA acknowledged that certain public health studies demonstrate the substantially higher risk for lung cancer for truck drivers due to diesel exhaust, yet did not allow this information to inform the cost-benefit analysis. *Id.* at 58-59; 70 Fed. Reg. at 49,986. FMCSA also reviewed several National Institute for Occupational Safety and Health studies that showed ample evidence of a strong association between chronic back injuries and whole body vibration, but dismissed those studies as well, citing confounding factors and a lack of consistency. Pet’rs.’ Br. at 62-63; 70 Fed. Reg. 49,987-88. FMCSA similarly ignored health risks from long daily and weekly working schedules based on inability to isolate all confounding factors. Pet’rs.’ Br. at 55; 73 Fed. Reg. 69,574.

But other agencies have relied on similar information available to FMCSA regarding diesel exhaust, yet found the evidence compelling enough to take regulatory action. *See, e.g.*, Control of Air Pollution From New Motor Vehicles; Heavy-Duty Engine and Vehicle Standards and Highway Diesel Fuel Sulfur Control Requirements, 66 Fed. Reg. 5,002 (Jan. 18, 2001) (codified at 40 C.F.R.

pts. 69, 80, 86) (requiring cleaner diesel fuel and reducing diesel exhaust from new engines); Diesel Particulate Matter Exposure of Underground Coal Miners, 66 Fed. Reg. 5,526 (Jan. 19, 2001) (codified at 30 C.F.R. pts. 72) (reducing miners' exposure to diesel particulate matter). FMCSA, on the other hand, disregarded the risk entirely. Pet'rs.' Br. at 55.

FMCSA has dismissed strong evidence of associations between driver exposure and adverse health risks. It may be the case that the complexity of driver exposure will forever preclude establishing a precise dose-response curve. However, under basic administrative law principles, an agency cannot assign a zero value to effects simply because those effects are uncertain. Cost-benefit analyses always involve some level of uncertainty; but reviewing courts do not allow agencies to treat uncertain variables as having zero value.

In Public Citizen's challenge to a precursor of the HOS Regulation at issue, this Court reviewed, among other things, FMCSA's decision to exclude from the rule a requirement that commercial motor vehicles contain electronic onboard recorders ("EOBRs") to monitor driver compliance with the rule. *Pub. Citizen v. FMCSA*, 374 F.3d at 1220. The Agency defended this decision based on a lack of information about the costs and benefits of EOBR systems. This Court stated that this lack of information did not entitle FMCSA to shirk its statutory duty to "consider the costs and benefits" of the rule, and warned that:

The agency's job is to exercise its expertise to make tough choices about which of the competing estimates is most plausible, and to hazard a guess as to which is correct Regulators by nature work under conditions of serious uncertainty, and *regulation would be at an end if uncertainty alone were an excuse to ignore a congressional command*

Id. at 1221 (emphasis added); *see also Chamber of Commerce of U.S. v. SEC*, 412 F.3d 133, 144 (D.C. Cir. 2005) (“Uncertainty may limit what an agency can do, but it does not excuse an agency from its statutory obligation to do what it can to apprise itself—and hence the public and the Congress—of the economic consequences of a proposed regulation before it decides whether to adopt the measure.”).

Another instructive case on agency treatment of uncertainty in the context of a cost-benefit analysis is *Ctr. for Biological Diversity v. NHTSA*, 538 F.3d 1172. There, the National Highway Transportation Safety Administration (NHTSA) performed a cost-benefit analysis of proposed corporate average fuel economy standards for trucks. In that analysis, NHTSA viewed the value of reducing greenhouse gas emissions as too uncertain to support an explicit valuation, and therefore assigned a zero value to that benefit. The Ninth Circuit held NHTSA's reasoning to be arbitrary and capricious because:

[W]hile the record shows that there is a range of values, the value of carbon emissions reduction is certainly not zero The value of carbon emissions reduction is nowhere accounted for in the agency's analysis, whether quantitatively or qualitatively. . . .

Id. at 1200. The court added that NHTSA’s reasoning was also “arbitrary and capricious because it has monetized other uncertain benefits, such as the reduction of criteria pollutants, crash, noise, and congestion costs, and ‘the value of increased energy security.’” *Id.* at 1202. The court chastised NHTSA for impermissibly “put[ting] a thumb on the scale by undervaluing the benefits and overvaluing the costs of more stringent standards.” *Id.* at 1198.

Even if FMCSA can defend its conclusion that the effects on driver health of longer hours are uncertain, it may not simply assign a zero value to those effects unless it has evidence the value actually is zero. FMCSA is required under the APA and the federal Motor Carrier Safety Act, 49 U.S.C. § 31,136(c)(2)(A), to perform a proper cost-benefit analysis—which includes assigning some sort of non-zero value (qualitative or quantitative) to these possible health effects.

FMCSA cannot conclude that there is *no* relationship between the Rule and driver health just because “driver health research is simply not mature enough to allow the conclusion that a number of extra hours of work would result in increased driver health problems,” or because “it remains very difficult to isolate the impact of exposure and longer working hours.” 73 Fed. Reg. at 69,574. By FMCSA’s own admission, longer driving hours have at least *some* effect on driver health. *See* Pet’r.’s Br. at 54-55 (citing FMCSA commissioned literature review,

73 Fed. Reg. at 69,573, finding, *inter alia*, that “[l]ung cancer is *likely* caused by exposure to diesel exhaust”).

The difficulty involved in creating a quantitative dose-response curve does not permit FMCSA to completely disregard effects on driver health. To do so ignores this Court’s warning that “regulation would be at an end if uncertainty alone were an excuse to ignore a congressional command,” and would allow FMCSA to shirk its responsibility “to exercise its expertise to make tough choices about which of the competing estimates is most plausible, and to hazard a guess as to which is correct.” *Pub. Citizen v. FMCSA*, 374 F.3d at 1221.

Federal agencies undertaking cost-benefit analyses routinely quantify and attempt to monetize the health and other non-pecuniary impacts of their regulations. Agencies have recognized that it is not “prudent to delay assessing potentially grave risks simply because the available data may be insufficient for an ideal risk assessment.” 66 Fed. Reg. 5,526 (limiting miners’ exposure to diesel exhaust by MSHA).

EPA, for instance, regularly deals with uncertainties in its cost-benefit analyses. Acknowledging that uncertainty does not excuse ignoring possible effects, EPA’s risk assessment guidelines advise “using an assumption of linearity of dose response when (1) there is an absence of sufficient information on modes of action or (2) the mode of action information indicates that the dose-response

curve at low dose is or is expected to be linear.” *See* Control of Hazardous Air Pollutants from Mobile Sources, 72 Fed. Reg. 8,428, 8,436 (Feb. 26, 2007) (codified at 40 C.F.R. pts. 59, 80, 85, and 86).

For example, in a rule limiting benzene emissions from transportation sources, EPA noted that “not enough information is known to determine the slope of the dose-response curve at environmental levels of exposure.” *Id.* at 8,436 n.26. Despite this lack of certainty, EPA applied its default assumption and assigned a linear dose-response curve to the carcinogenic effects of benzene, and included that value in its cost-benefit analysis. *Id.* at 8,435. EPA has repeatedly used this default assumption in many other rules when evaluating uncertain risks. *See, e.g.*, National Primary Drinking Water Regulations; Arsenic and Clarifications to Compliance and New Source Contaminants Monitoring, 66 Fed. Reg. 6,976, 6,994 (Jan. 22, 2001) (codified at 40 C.F.R. pts. 9, 141, 142). Other agencies have also placed a value on uncertain health effects. OSHA, Ergonomics Program, 65 Fed. Reg. 68,262, 68,493, 68,510 (Nov. 14, 2000) (repealed for other reasons, S.J. Res. 6, 107th Cong. (2001) (enacted); 29 C.F.R. § 1910.900 (2001)) (stating the absence of a quantitative dose-response curve “does not at all imply that the evidence for exposure-response relationships is insufficient”).

Nor is assigning values to effects in the face of uncertainty foreign to FMSCA or Department of Transportation agencies. *See, e.g.*, Pub. Citizen, Inc. v.

FMCSA, 874 F.3d at 1222 (noting FMCSA “apparently had no problem making estimates based on imperfect empirical assumptions when it estimated the costs of increasing driving time”); FMCSA, Minimum Training Requirements for Entry-Level Commercial Motor Vehicle Operators, 69 Fed. Reg. 29,384, 29,396 (May 21, 2004) (codified at 49 C.F.R. pt. 380) (estimating crash costs because of “uncertainty with trying to estimate specific, quantitative benefits” in a training rule) (remanded on grounds unrelated to uncertainty analysis, 429 F.3d 1136); NHSTA, Average Fuel Economy Standards Passenger Cars and Light Trucks Model Year 2011, 74 Fed. Reg. 14,196, 14,204-05 (Mar. 30, 2009) (codified at 49 C.F.R. pts. 523, 531, 533-34, 536-37) (valuing the social cost of carbon and other uncertain factors).

Because FMCSA ignored important evidence regarding the health impacts of the rule, and arbitrarily assigned a zero value to those effects, the rule must be invalidated as an arbitrary and capricious agency action.

B. FMCSA Erred When Finding That the Rule Would Not Increase Driving Hours

FMCSA also ignored potential health effects of the Rule by finding that it does not increase hours driven by truck drivers, despite significant concern expressed to the Agency about an increase in driving hours. *See., e.g.*, Comments from Public Citizen, et al., to FMCSA on Hours of Service of Drivers 34-36 (Mar. 17, 2008).

To support this conclusion, FMCSA relied on an empirical observation that the HOS Regulation has not, since its first implementation in 2005, led to an increase in hours driven. 73 Fed. Reg. at 69,573 (“[N]o evidence of significant increases in drivers' working hours has appeared”); 70 Fed. Reg. at 49,984 (“[I]t does not appear that . . . drivers are working on average significantly more hours”).¹

However, the Agency’s analysis does not adequately support its conclusion. While the Rule *in toto* may not have increased hours driven, that does not imply that the challenged portions of the Rule—the 11-hour daily driving limit and the restart provision—have not. Some parts of the Rule may generally exert an upward tendency on driving hours (compared to the pre-rule *status quo*) while other parts of the Rule may exert a downward tendency. While the challenged portions of the Rule will tend to increase working hours, other portions—such as limiting on-duty shifts to 14 hours instead of 15—will exert a downward tendency on working hours. The data gathered by FMCSA on the effects of the Rule do not account for these potentially confounding effects. Because some parts of the Rule may decrease hours driven, it is impossible say that other parts have not increased driving hours. By observing that the Rule *in its entirety* has not increased driving

¹ FMCSA implemented an HOS rule in 2005 (which this Court then vacated in *Owner-Operator Indep. Drivers Ass’n*, 494 F.3d 188); adopted that same rule as an interim rule in 2007, 72 Fed. Reg. at 71,248-51; and then adopted the interim rule as its final rule in 2008, 73 Fed. Reg. at 69,567-68.

hours, FMCSA has not shown that the challenged portions of the Rule have not increased hours worked. *In re United Mine Workers of Am. Int'l Union*, 190 F.3d 545, 555 (D.C. Cir. 1999) (holding that an agency must examine the effects of each part of a rule); *Am. Fed'n of Labor & Cong. of Indus. Orgs. v. OSHA*, 965 F.2d 962, 975 (11th Cir. 1992) (holding that an agency may not combine multiple parts into one rule and then fail to analyze each part completely); *cf. Corrosion Proof Fittings v. EPA*, 947 F.2d 1201, 1227 (5th Cir. 1991) (holding, under a different judicial standard, that EPA cannot assume that overestimates and underestimates in cost-benefit analysis will simply cancel out).

FMCSA also made a mistaken comparison between hours worked under the old rule and hours worked under the new rule. FMCSA compared a pre-rule survey that found an average of 64.3 hours worked per week, to a 2005 evaluation of driver logs that found an average of 61.4 hours per week. 70 Fed. Reg. at 49,984. On the basis of this comparison, FMCSA concluded that even if a dose-response curve could be identified for the health effects of increased driving hours, no impact was expected because “the average exposure [time] of drivers . . . [had] remained essentially unchanged.” *Id.*

However, these studies used different methodologies. The first study purposefully avoided logbooks because the authors feared that drivers would “tend to report only those hours claimed for purposes of pay.” Kenneth L. Campbell &

Michael H. Belzer, *Hours of Service Regulatory Evaluation Analytical Support, Task 1: Baseline Risk Estimates and Carrier Experience, Final Report* 104 (2000), cited in 70 Fed. Reg. at 49,984. In fact, the first study found that drivers exhibited “a broad pattern of violation” of the HOS Regulation, working substantially more hours than permitted. *Id.* at 104-106; see also FMCSA, Hours of Service of Drivers; Driver Rest and Sleep for Safe Operations, 65 Fed. Reg. 25,540, 25,558 (proposed May 2, 2000) (citing two additional studies showing widespread noncompliance).

But to establish the average hours worked under the new rule, FMCSA evaluated driver logs—the very methodology the first study avoided. 70 Fed. Reg. at 49,984; FMCSA 2008 RIA at 17. Unless the broad pattern of violation (which is more easily captured through the survey than through an evaluation of logbooks) vanished with the implementation of the new rule, FMCSA’s comparison is invalid: It compares the total hours (legal and illegal) under the old rule with only legal hours under the new Rule, without demonstrating that compliance rates have substantially improved under the new Rule.

The Agency also contradicts itself on this point. Although FMCSA claims in its cost analysis that driving hours will not increase, it claims in its benefit analysis that the Rule will result in productivity gains due to an increase in driving hours. 73 Fed. Reg. at 69,569 (determining that “[the Rule] could allow additional

operational flexibility by permitting increased driving hours without diminishing the safety benefits of the new provisions”). FMCSA also found that portions of the Rule were in fact increasing driving hours. FMCSA 2008 RIA at 23, 64 (finding “the 11th hour [of driving] is definitely being used,” as high as 55% in certain circumstances, to allow the same number of drivers to drive more hours), cited in 73 Fed. Reg. at 69,569-70 (noting the increase in use of the eleventh hour and restart provision); 70 Fed. Reg. 50,049 (citing similar data from FMCSA 2005 RIA, at 68); Allowing drivers to drive more by using the additional eleventh hour was so integral to business productivity that FMCSA could not conceive of a scenario where trucking companies would not use it. *See* FMCSA 2008 RIA at 70; *accord* FMCSA 2007 RIA at 72; FMCSA 2005 RIA at 76-77.

Because FMCSA’s “failure adequately to consider a relevant and significant aspect of [the] problem”—driver health—resulted from its faulty conclusion (contradicted elsewhere in its analysis) that the Rule would have no effects on working hours, this Court should find FMCSA’s actions arbitrary and capricious. *Am. Farm Bureau Fed’n v. EPA*, 559 F.3d 512, 520 (D.C. Cir. 2009); *Owner-Operator Indep. Drivers Ass’n*, 494 F.3d at 206 (finding that FMCSA’s lack of explanation for its failure to account for the cumulative effects of an increase in working hours “renders the . . . provision arbitrary and capricious”).

C. FMCSA Failed to Incorporate Industry Adaptation into its Cost-Benefit Analysis

FMCSA also failed to consider how regulated actors might adapt to various policy alternatives over time and to identify strategies for reducing compliance costs. To accurately estimate effects of a new rule, an agency must not only look at the options available to industry in the *status quo ante*, but must also anticipate industry adaptation and response to new regulations. *See* Richard L. Revesz & Michael A. Livermore, *Retaking Rationality: How Cost-Benefit Analysis Can Better Protect Our Environment and Our Health* 131 (2008) (“Cost-benefit analysis, by assuming that industry does not respond to regulations by finding the cheapest possible way to comply, has traditionally overestimated the costs of compliance—in some cases quite significantly.”); *see also Pub. Citizen v. Mineta*, 340 F.3d at 59 (“[T]he agency’s innovation argument focuses exclusively” on a less stringent approach, and “ignores the possibility that the costs of [a more protective system] could be reduced.”).

Accounting for industry adaptation is now standard practice in both government and academic analysis of the costs and benefits of policy choices. *See* NHTSA, Average Fuel Economy Standards Passenger Cars and Light Trucks Model Year 2011, 74 Fed. Reg. 14,196, 14,205 (Mar. 30, 2009); Reyer Gerlagh & Bob van der Zwaan, *Options and Instruments for a Deep Cut in CO2 Emissions: Carbon Capture or Renewables, Taxes or Subsidies?*, 27 Energy J. 25, 42 (2006)

(comparing policy instruments in terms of costs, efficiency, and effectiveness and accounting for industry adaptation). The effect of industry adaptation on compliance costs has been documented in settings as diverse as air quality regulation, A. Denny Ellerman et al., *Markets for Clean Air: The U.S. Acid Rain Program* chs. 221-313 (2000) (discussing compliance costs of the Acid Deposit Control Program), and light bulb energy efficiency rules, Leora Broydo Vestel, *Incandescent Bulbs Return to the Cutting Edge*, N.Y. Times, July 5, 2009 (discussing technological innovation in incandescent light bulbs). The Office of Management and Budget's guidance to federal agencies acknowledges that "learning' will likely reduce the cost of regulation in future years" in some cases, and recommends that agencies "take into account cost-saving innovations" when regulations promote adaptation. *See, e.g.*, Office of Management and Budget, Circular A-4 37 (Sept. 17, 2003).

FMCSA, however, made a determination not to consider how the industry could adapt to reduce its compliance cost with alternative versions of the HOS Regulation. In 2000, in a previous version of the HOS Regulation, the Agency disregarded the possibility that the industry could increase efficiency (and reduce the cost of the rule) by decreasing "non-driving work, much of which generates little value to carriers (or the economy)." 65 Fed. Reg. at 25,573. FMCSA determined that "[d]rivers schedules are dependant upon the conditions and

demands of shippers and receivers, so any concerted effort to reduce non-driving time would need their cooperation. It is not clear what incentive shippers, receivers, and others would have to cooperate, as wasted drivers time is generally no cost to them.” *Id.* The Agency therefore did not include cost-reducing adaptation in its estimates, thereby erroneously reducing the potential net benefits of alternative, more stringent, regulation. FMSCA then retained this determination throughout its rulemaking process in 2003, 2005, 2007, and 2008, never incorporating adaption by trucking companies into its cost-benefit analysis when evaluating possible alternatives to the rule. *See Hours of Service of Drivers; Driver Rest and Sleep for Safe Operations.* 68 Fed. Reg. 22,456 (Apr. 28, 2003) (codified at 49 C.F.R. pts. 385, 390, 395); 70 Fed. Reg. 49,978; 72 Fed. Reg. 71,247; 73 Fed. Reg. 69,567.

In doing so, FMCSA’s cost-benefit analysis was flawed because it inflated compliance costs when evaluating policy alternatives. For example, if permissible working hours are decreased, trucking companies will have an incentive to reduce non-driving work, such as wait times, by *inter alia*, charging penalties if their drivers have to wait excessively for merchandise to be loaded. If FMCSA had considered how the trucking industry would adapt to proposed rules, a more stringent rule (for example, one that did not include a 34-hour restart or did not have the added 11th hour of driving) may have looked more attractive.

However, in stark contrast to this failure to include industry adaption to reduce compliance costs, FMCSA did consider that industry adaptation would reduce any negative impacts on driver health when discussing less stringent versions of the rule. 70 Fed. Reg. at 49,986 (noting that “[t]he non-extendable 14-hour provision of the 2003 rule has given motor carriers greater leverage to insist that shippers and receivers reduce waiting time” and therefore reduce driver exposure to diesel exhaust). This conclusion was used in part to help justify FMCSA’s failure to account for effects on driver health—if the industry adapts by reducing waiting time, then (the Agency figured) there would be less increase in exposure to diesel exhaust. *Id.* at 49,986-87.

In addition to contradicting other portions of its analysis, FMCSA’s reasoning, that trucking companies’ customers would prevent them from taking efficient steps to reduce compliance costs, violates basic economic principles: If it is an efficient response for carriers to decrease non-driving hours, customers will accept fewer non-driving hours in exchange for a price adjustment that is less than or equal to savings to carriers. *See* Ronald H. Coase, *The Problem of Social Cost*, 3 J. Law & Econ. 1, 6-8 (1960). Even in markets dominated by monopolies, this general principle holds. *See* N. Gregory Mankiw & Mark P. Taylor, *Microeconomics* 291-96 (2006) (discussing monopolies); John Vickers, *Market Power and Inefficiency: A Contracts Perspective*, 12 Oxford R. of Econ. Policy 11,

13 (1996) (showing that even bilateral monopoly bargaining will generate efficient contract terms). FMCSA provided no market models, no empirical data, nor any legitimate principle for why it could reasonably ignore industry adaptation when considering the compliance costs of the rule. FMSCA therefore acted arbitrarily and capriciously.

CONCLUSION

By conducting and relying on a cost-benefit analysis that fails to provide an accurate or realistic assessment of the potential benefits and costs of the HOS Regulation, FMCSA has failed to engage in reasoned decisionmaking and acted arbitrarily and capriciously in violation of the Administrative Procedure Act. For the foregoing reasons, the Institute for Policy Integrity at New York University School of Law, OMB Watch, Society for Occupational and Environmental Health, Union of Concerned Scientists, and Center for Science in the Public Interest respectfully support Petitioners' request that this Court vacate the Hours of Service regulation.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE (Fed. R. App. P. 32(a)(7)(C))

I hereby certify that the foregoing Brief for *Amici Curiae* complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B). The brief is composed in a 14-point proportional typeface, Times New Roman. As calculated by my word processing software (Microsoft Word 2003), the brief (excluding those parts permitted to be excluded under the Federal Rules of Appellate Procedure and the D.C. Circuit Rules) contains 6,981 words.

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CERTIFICATE OF SERVICE

I certify that on September 11, 2009, I electronically filed the foregoing brief with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to the following:

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