CASE NOT YET SCHEDULED FOR ORAL ARGUMENT

CASE NO. 11-1483

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

INDEPENDENT PILOTS ASSOCIATION,
Petitioner,

v.

FEDERAL AVIATION ADMINISTRATION,
Respondent.

BRIEF OF PETITIONER INDEPENDENT PILOTS ASSOCIATION

Review of FAA Rule, Flightcrew Member Duty and Rest Requirements, Docket No. FAA-2009-1093; Amdt. Nos. 117-1, 119-16, 121-357 issued on December 21, 2011.

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CERTIFICATE OF PARTIES, RULINGS UNDER REVIEW, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), Petitioner certifies as follows:

Parties and Amici: The Petitioner is the Independent Pilots Association. The Respondent is the Federal Aviation Administration. The Cargo Airline Association has intervened. A number of entities filed comment letters and otherwise participated in the agency proceedings below, but none have challenged the Final Rule.

Rulings Under Review: The ruling under review is a rule regarding Flightcrew Member Duty and Rest Requirements, amending 14 C.F.R. Parts 117, 119 and 121, issued on December 21, 2011, and published in the Federal Register on January 4, 2012, 77 Fed. Reg.330 (Jan 4, 2012).

Related Cases: This case has not previously been before this Court or any other court.

__________/S__________

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PETITIONER'S RULE 26.1 DISCLOSURE

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, Petitioner INDEPENDENT PILOTS ASSOCIATION ("IPA") declares that it is the collective bargaining unit representing the more than 2600 professional pilots who fly in service of United Parcel Service. IPA is an unincorporated association operating under Section 501(c)(5) of the Internal Revenue Code and has no parent corporations, subsidiaries, or affiliates that have issued shares to the public.

DATED: April 24, 2012

/S/

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STATEMENT REGARDING ADDENDUM OF STATUTES AND REGULATIONS

Pursuant to Circuit Rule 28(a)(5), copies of the following pertinent statutes and regulations, and a copy of FAA's decisions under review, are set forth in the attached Addendum:

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5 U.S.C. § 702	4
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GLOSSARY OF ABBREVIATIONS

APA	Administrative Procedure Act, 5 U.S.C. § 702 *et seq*.
ARC	Flight and Duty Time Limitations and Rest Requirements Aviation Rulemaking Committee
EO12866 Compliance	FAA Compliance with EO12866 for Final Rule, FAA Dckt. No. 2009-1093-2518 (Jan. 23, 2012)
FAA	Federal Aviation Administration
FDP	Flight Duty Period
FedEx	Federal Express
Final RIA	Federal Aviation Administration Regulatory Impact Analysis for Flightcrew Member Duty and Rest Requirements Final Rule, FAA Dckt. No. FAA-2009-1093-2477 (Nov. 18, 2011)
Final Rule	Flightcrew Member Duty and Rest Requirements, Final Rule, 77 Fed. Reg. 330, FAA Dckt. No. FAA-2009-1093-2517 (Jan. 4, 2012)
FMCSA	Federal Motor Carrier Safety Administration
IPA	Independent Pilots Association
NPRM	Flightcrew Member Duty and Rest Requirements, Proposed Rule, 75 Fed. Reg. 55852, FAA Dckt. No. FAA-2009-1093-0001 (Sept. 14, 2010)
NPRM RIA	Federal Aviation Administration Regulatory Impact Analysis for Flightcrew Member Duty and Rest Requirements Notice of Proposed Rulemaking, FAA Dckt. No. FAA-2009-1093-0019 (Sept. 3, 2010)
NTSB	National Transportation Safety Board

OIRA	Office of Information and Regulatory Affairs, Office of Management and Budget
Safety Act	Airline Safety and Federal Aviation Administration Extension Act of 2010, Public Law 11-216, § 212, 124 Stat. 2348, 2362 (2010)
UPS	United Parcel Service
WOCL	Window of Circadian Low

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Review of FAA Rule, Flightcrew Member Duty and Rest Requirements, Docket No. FAA-2009-1093; Amdt. Nos. 117-1, 119-16, 121-357 issued on December 21, 2011.

JURISDICTIONAL STATEMENT

The Independent Pilots Association ("IPA") challenges the Federal Aviation Administration's ("FAA") decision to *exclude* all-cargo operations from its December 21, 2011 rule governing flightcrew member duty and rest requirements for air carrier operations. IPA timely filed its Petition for Review on December 22, 2011, pursuant to 49 U.S.C. § 46110(a) (Addendum of Statutes and Regulations ("Addendum") 1-2). This court has jurisdiction pursuant to 49 U.S.C. § 46110(c)

(Addendum 2), and the Administrative Procedure Act, 5 U.S.C. § 702 *et seq.* ("APA") (Addendum 4-5).

STATEMENT OF ISSUES

1. Did FAA violate the APA or otherwise exceed its authority by leaving all-cargo operations subject to current flightcrew member duty and rest rules deemed inadequate by FAA, based only on a cost-benefit analysis that Congress did not authorize FAA to employ?

2. Did FAA violate the APA or otherwise exceed its authority by relying on a cost-benefit analysis that failed to account for benefits FAA acknowledged would accrue by applying the new rules to all-cargo operations and failing to consider other obvious benefits?

3. Did FAA violate the APA or otherwise exceed its authority by failing to provide notice and opportunity to comment on (1) treating all-cargo operations differently than passenger operations, and (2) the cost-benefit analysis that was the exclusive basis for FAA's decision to exclude all-cargo operations?

STATEMENT OF THE CASE

FAA has long considered changing the flight, duty and rest time rules for flightcrew members operating passenger and cargo aircraft to better reflect modern scientific and medical understanding of how fatigue impairs performance and safety. Flightcrew Member Duty and Rest Requirements, 75 Fed. Reg. 55852,

55853–54 (Sept. 14, 2010) (FAA Dckt. No. FAA-2009-1093-0001) ("NPRM") (Joint Appendix ("J.A.") ___–___). Frustrated by FAA's inability to make such changes, and concerned by aircraft accidents where fatigue was a causal element, Congress adopted legislation in 2010 directing FAA to issue "regulations, based on the best available scientific information, to specify limitations on the hours of flight and duty time allowed for pilots to address problems relating to pilot fatigue." Airline Safety and Federal Aviation Administration Extension Act of 2010, Pub. L. No. 111-216, § 212(a)(1), 124 Stat. 2348, 2362 (2010) ("Safety Act") (Addendum 6).

On September 14, 2010, FAA issued the NPRM for new flightcrew member duty and rest rules. A critical feature of the NPRM was FAA's determination to eliminate distinctions between different kinds of operations and adopt a single set of rules that applied to all operations in recognition of the fact that fatigue affects *all* pilots, regardless of the nature of their aircraft operations. FAA specifically rejected the idea that all-cargo operations should be treated differently than other operations based on their different business models and operational issues because "fatigue factors . . . are universal" regardless of whether the pilot is flying a cargo or passenger plane. NPRM at 55857, 55863 (J.A. ___, ___).

On December 21, 2012, FAA issued a final rule establishing new flightcrew member duty and rest rules for passenger and certain other operations, but keeping

the existing rules in place for all-cargo operations. Flightcrew Member Duty and Rest Requirements, Final Rule, 77 Fed. Reg. 330 (Jan. 4, 2012) (FAA Dckt. No. FAA-2009-1093-2517) ("Final Rule") (J.A. __). The only support FAA provided for its decision was a cost-benefit analysis purportedly showing that the costs to all-cargo operators of complying with the new rules far outweighed the societal benefit. FAA provided no prior notice that it intended to consider different rules for all-cargo operators or that it intended to base its rulemaking on the use of a cost-benefit analysis, nor did FAA make its cost-benefit analysis available for review and comment.

STATEMENT OF THE FACTS AND STATUTORY FRAMEWORK

A. Statutory Framework

Congress has charged FAA with making safety in aviation its highest priority: FAA

> shall consider the following matters, among others, as being in the public interest:
> (1) Assigning, maintaining and enhancing safety and security as the highest priorities in air commerce.
> (2) Regulating air commerce in a way that best promotes safety and fulfills national defense requirements.[1]

[1] The phrase "air commerce" is defined very broadly to include virtually all aviation, including all-cargo operations. 49 U.S.C. § 40102(a)(3) (Addendum 16). The term "air carrier" is defined as a "citizen of the United States undertaking by any means, directly or indirectly, to provide air transportation," which includes cargo operators. 49 U.S.C. § 40102(a)(2) (Addendum 16). The term "air transportation" is defined as "foreign air transportation, interstate air

49 U.S.C. § 40101(d) (Addendum 11). As part of its safety duties, Congress has mandated that FAA regulate maximum hours of duty for aircraft crewmembers:

> (a) Promoting Safety.—The Administrator of the Federal Aviation Administration shall promote safe flight of civil aircraft in air commerce by prescribing—
> . . .
> (4) regulations in the interest of safety for the maximum hours or periods of service of airmen and other employees of air carriers

49 U.S.C. § 44701 (Addendum 10). *See* NPRM at 55881 (J.A. ___) (citing 49 U.S.C. §§ 44701(a)(4) and 40101(d) Addendum 11-12).

Congress specifically directed FAA to address the problem of pilot fatigue in Section 212 of the Safety Act (Addendum 6-7):

> (a) FLIGHT AND DUTY TIME REGULATIONS.—
> (1) IN GENERAL.—In accordance with paragraph (3), the Administrator of the Federal Aviation Administration shall issue regulations, *based on the best available scientific information*, to specify limitations on the hours of flight and duty time allowed for pilots *to address problems relating to pilot fatigue*.

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transportation, or the transportation of mail by aircraft," 49 U.S.C. § 40102(a)(5) (Addendum 16), and includes passenger operations and common carrier all-cargo operations such as operations by United Parcel Service ("UPS") and Federal Express ("FedEx"). *See* 49 U.S.C. § 40102(a)(10) (defining "all-cargo air transportation") (Addendum 16). The phrase "interstate air transportation is defined as "the transportation of passengers or property by aircraft as a common carrier for compensation, or the transportation of mail by aircraft" between, generally, the states, United States territories and/or the District of Columbia. *Id.* at 40102(a)(25) (Addendum 17).

> (2) MATTERS TO BE ADDRESSED.—In conducting the rulemaking proceeding under this subsection, the Administrator shall consider and review the following:
>
> (A) Time of day of flights in a duty period.
> (B) Number of takeoff and landings in a duty period.
> (C) Number of time zones crossed in a duty period.
> (D) The impact of functioning in multiple time zones on different daily schedules.
> (E) Research conducted on fatigue, sleep, and circadian rhythms.
> (F) Sleep and rest requirements recommended by the National Transportation Safety Board and the National Aeronautics and Space Administration.
> (G) International standards regarding flight schedules and duty periods.
> (H) Alternative procedures to facilitate alertness in the cockpit.
> (I) Scheduling and attendance policies and practices, including sick leave.
> (J) The effects of commuting, the means of commuting, and the length of the commute.
> (K) Medical screening and treatment.
> (L) Rest environments.
> (M) Any other matters the Administrator considers appropriate.

(Emphasis added.) In adopting this law, Congress made its intent clear that "[a]n updated rule will more adequately reflect the operating environment of today's pilots and will reflect scientific research on fatigue." Airline Safety and Pilot Training Improvement Act of 2009, H.R. REP. NO. 11-284, at 7 (discussing bill that became Section 212 of the Safety Act) (Addendum 35).

B. Historic Flight Time and Duty Rules

The current flight time and duty rules provide different rules for domestic,

flag and supplemental air carriers. NPRM at 55852 (J.A. __).[2] In general, the rules provide for maximum flight times on an annual, monthly, weekly and daily basis, as well for minimum rest periods between flights. 14 C.F.R. 121.470–.525 (Addendum 21-27). The amount of flight and rest time for flag and supplemental carriers varies depending on the size of the crew and other factors. *Id.* As the FAA has acknowledged, those rules are "overly complicated" and fail to adequately address the risk of fatigue. NPRM at 55855 (J.A. ___); Final Rule at 334 (J.A. ___).

C. Prior Efforts to Amend Flight Time and Duty Rules

FAA and NTSB have long recognized that pilot fatigue is a serious safety problem and that existing regulations do not adequately address the problem. The NTSB has recommended that FAA adopt new rules to address the problem of pilot fatigue since 1972, and addressing pilot fatigue is on NTSB's list of Most Wanted Transportation Safety Improvements. NPRM at 55855 (J.A. ___).

FAA has considered new flight time and duty regulations for at least 20 years, based in part on the recognition that the science on fatigue did not justify different rules for different kinds of operations because fatigue affects all people in

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[2] Domestic operators are scheduled air carriers operating within the lower 48 states or within Alaska or Hawaii. 14 C.F.R. § 110.2 (Addendum 28-30). Flag carriers are scheduled air carriers operating between any state and foreign countries (and U.S. territories) or between any state and Alaska or Hawaii. *Id.* Supplemental carriers are all other commercial air carriers, including charter operations. *Id.* All-cargo operations are included in each category.

the same way. NPRM at 55853 (J.A. ___). The current rulemaking effort began in June 2009, when FAA created the Flight and Duty Time Limitations and Rest Requirements Aviation Rulemaking Committee ("ARC"), comprised of labor, industry and FAA representatives, to recommend modifications to the flight time and duty rules. *Id.* Among other things, ARC was asked to consider and address a single approach for addressing fatigue in light of scientific research. *Id.* ARC was unable to reach consensus on a single approach for new rules, with the Cargo Airline Association and the National Air Carrier Association each presenting alternative proposals. *Id.* FAA did not adopt ARC's recommendations, or the industry alternatives.

D. Congressional Mandate to Amend Flightcrew Member Duty and Rest Rules Based on the Best Available Scientific Information

Motivated by the 2009 Colgan crash that killed 50 people in which fatigue was cited as a contributing factor, and FAA's inability to achieve a consensus, Congress passed the Safety Act to compel FAA to adopt new flight crewmember duty and rest rules based on modern scientific knowledge about fatigue. H.R. REP. NO. 11-284 at 7 (Addendum 35). The Safety Act required FAA to issue an NPRM within 6 months and to issue a rule within one year of enactment. Safety Act at § 212(a)(3) (Addendum 7).

E. The September 14, 2010 Notice of Proposed Rulemaking

The NPRM acknowledges the inadequacies of the existing flight time and

duty rules:

> *The FAA believes its current regulations do not adequately address the risk of fatigue ….* As the NTSB repeatedly notes, the FAA's regulations do not account for the impact of circadian rhythms on alertness, and the entire set of regulations is overly complicated, with a different set of regulations for domestic operations, flag operations, and supplemental operations.

NPRM at 55855 (emphasis added) (J.A. ___). Adhering to the Congressional directives to make safety its highest priority, FAA stated that its proposal:

> takes a new approach whereby the distinctions between domestic, flag, and supplemental operations are eliminated. Rather, all types of operations would take into account the effects of circadian rhythms, inadequate rest opportunities and cumulative fatigue.
>
> *Id.* at 55854 (J.A. ___).

FAA's proposal "addresses the impact of changing time zones and flying through the night by reducing the amount of flight time and FDP [flight duty period] available for these operations." *Id.*

Relying on the best scientific information, as required by the Safety Act, FAA determined that "there is ample science indicating that performance degrades during windows of circadian low [2 A.M.–6 A.M. or "WOCL"] and that regular sleep is necessary to sustain performance," *id.* at 55858 (J.A. ___), and the "reduction in maximum FDP during nighttime hours is broadly supported by existing sleep science." *Id*. at 55860 (J.A. ___). *See also id.* at 55855 ("Several

aviation-specific work schedule factors can affect sleep and subsequent alertness …. includ[ing] early start times, extended work periods, insufficient time off between work periods, . . . night work through one's window of circadian low, daytime sleep periods . . . .") (J.A. ___) (footnote omitted); *id*. at 55867 & n.34 (consecutive nights of work degrades productivity within three days because it is very difficult for most people to sleep effectively during the day) (J.A. ___); *id*. at 55872 & nn.44–49 ("The most effective fatigue mitigation is sleep . . . daytime sleep is less restorative than nighttime sleep . . . . [A]n individual's circadian clock is sensitive to rapid time zone changes.") (J.A. ___).

The NPRM addressed these and other fatigue issues by placing weekly and 28-day limits on flightcrew member duty time, and 28-day and annual limits on flight time, and by requiring that flightcrew members be given 30 consecutive hours each week free of all duty, "a 25 percent increase over the current requirements." *Id*. at 55874 (J.A. ___). The proposal provided credit (through extended FDP) for carriers that augment crews above the required complement and provide them with on-board rest facilities, so they can sleep in shifts.

FAA determined that scientific evidence showed that split sleep during a circadian night can be better than longer sleep periods during the day, with the most productive sleep occurring during the WOCL. *Id*. at 55866, 55885 (J.A. ___, ___). Accordingly, the NPRM endorsed the concept of "split duty rest," by

allowing carriers to extend the FDPs for their flightcrew members by 50 percent of the duration of the rest period, to a maximum FDP of 12 hours, if they provided at least four hours of sleep opportunity to crewmembers. *Id*. at 55866 (J.A. ___).

FAA also proposed to allow a carrier to assign a flightcrew member to more than three consecutive nighttime FDPs if it provided the flightcrew member with an opportunity for rest during each nighttime FDP that complied with the split duty rest provision, *i.e.*, four hours of mid-duty rest. *Id*. at 55867, 55888 (J.A. ___, ___). This was of particular importance for all-cargo operations because major overnight package delivery services provide sleep facilities for their flightcrew members at their primary sortation hubs so crewmembers can rest in between their inbound and outbound flights.

The NPRM also provided for limited exceptions and extensions of FDP for unexpected circumstances, emergencies and operations under government contract. *Id.* Finally, the NPRM allowed carriers to develop "a carrier-specific fatigue risk management system (FRMS)," which would allow a carrier to "customize its operations based on a scientifically validated demonstration of fatigue mitigating approaches and their impact on a flightcrew member's ability to safely fly an airplane" outside of the limitations contained in the rules. *Id.* at 55854, 55874, 55886 (J.A. ___, ___, ___).

F. The December 21, 2011 Final Rule

On December 21, 2011, FAA issued the Final Rule, which reconfirmed that existing rules inadequately address fatigue, do not account for circadian rhythms, are overly complicated, and that "maintaining the status quo . . . subjects society to an 'unacceptably high aviation accident risk.'" Final Rule at 334, 391 (J.A. __, ___) (quoting NPRM at 55882 (J.A. ___)). FAA further reaffirmed "the universality of factors that lead to fatigue in most individuals" and that "[f]atigue threatens aviation safety because it increases the risk of pilot error that could lead to an accident." *Id*. at 395 (J.A. ___).

FAA observed that "fatigue is most likely, and, when present, most severe, between the hours of 2 A.M. and 6 A.M.," also known as the "Window of Circadian Low." *Id.* at 333, 348 (J.A. ___, ___). FAA also listed several "aviation-specific work schedule factors" that "can affect sleep and subsequent alertness," including "night work through one's window of circadian low, daytime sleep periods, and day-to-night or night-to-day transitions." *Id*. at 333–34 (J.A. ___). It noted that "according to the industry commenters . . . these types of nighttime and around-the-world operations are the norm for all-cargo carriers." *Id*. at 336 (J.A. ___).

Despite these considerations, FAA stated that it "has removed all-cargo operations from the applicability section of the new part 117 because their

compliance costs significantly exceed the quantified societal benefits." *Id.* at 332 (J.A. ___). The all-cargo exclusion apparently was recommended by Office of Information and Regulatory Affairs, Office of Management and Budget ("OIRA") based only on a cost-benefit analysis. *See* FAA Compliance with EO12866 for Final Rule at 1 (Jan. 23, 2012) (FAA Dckt. No. 2009-1093-2518) ("EO12866 Compliance") (J.A. ___). *See also Id.* at 1, 12–13, 19, 32–38 (J.A. __, __–__, __, __–__) (examples of OIRA changes regarding all-cargo exclusion).

FAA offered no explanation for the exclusion based on fatigue science or aviation safety. In the Final Rule, FAA included a footnote with a summary of the cost-benefit analysis:

> The projected cost for all-cargo operations is $306 million ($214 million present value at 7% and $252 million at 3%). The projected benefit of avoiding one fatal all-cargo accident ranges between $20.35 million and $32.55 million, depending on the number of crewmembers on board the aircraft.

Id. at 332 n.1 (J.A. ___). This cost-benefit analysis was disclosed for the first time in the Final Rule, and only broad categories of the analysis were summarized in the Regulatory Impact Analysis placed in the public docket one day *after* the Final Rule was issued. FAA Regulatory Impact Analysis for Flightcrew Member Duty and Rest Requirements Final Rule (Nov. 18, 2011) (FAA Dckt. No. FAA-2009-1093-2477) ("Final RIA") (J.A. ___).[3]

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[3] The limited summary of the purported costs of including all-cargo

Also at OIRA's suggestion, FAA stated that "in the past, it has excluded all-cargo operations from certain mandatory requirements due to the different cost-benefit comparison that applies to all-cargo operations," citing a single example of excluding aircraft with more than two engines from "many of the requirements of the extended range operations (ETOPS) rule . . . ." EO12866 Compliance at 31 (J.A. ___). *See also* Final Rule at 336 (J.A. ___).

FAA made a number of changes from the NPRM, including changes intended to ameliorate the impact of the Final Rule on all-cargo operations. For example, FAA reduced from 4 hours to 2 hours the amount of nightly mid-duty rest required to allow pilots to work more than three consecutive nights. *Id*. at 375 (J.A. ___). FAA sought to reduce the operational consequences for cargo carriers and cited modeling showing that "a 5-night FDP, in which a flightcrew member was provided with a 2-hour mid-duty rest break each night, was actually safer than a 3-night FDP with no rest break." *Id*. FAA cited comments from UPS and FedEx that their flightcrew members typically receive a mid-duty rest break of at least two hours. *Id*.

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operations in the Final Rule is set forth in a series of footnotes in the Final RIA. Final RIA at 54 n.28 (crew scheduling costs) (J.A. ___), 57 n.29 (computer programming costs) (J.A. ___), 59 n.32 (savings due to reduced sick time—note that FAA included this as an offset to costs, rather than a benefit) (J.A. ___), 60 n.33 (aggregate flight operations costs) (J.A. ___), and 69 n.38 (total costs and projected benefit) (J.A. ___).

SUMMARY OF ARGUMENT

IPA challenges FAA's decision to exclude all-cargo operations from the new flightcrew member duty and rest rules; IPA does not challenge the substance of the Final Rule as applied to passenger operations. IPA seeks a remand to FAA to apply the new flightcrew member duty and rest rules to all-cargo operations in accordance with Congress's express direction and the APA. A remand to the agency is justified for three reasons.

1. By excluding all-cargo operations from new flightcrew member duty and rest rules, and leaving them subject to the existing rules that FAA admits do not adequately address the problems of pilot fatigue and leave the public exposed to an unacceptable safety risk, FAA disregarded its congressionally mandated duties to make safety its highest priority and issue new flight and duty rules based on the best available scientific information to address the problems of pilot fatigue. Because Congress did not authorize FAA to dilute its safety obligations with considerations of cost when issuing the new flight time and duty rules, FAA's reliance on a cost-benefit analysis to exclude all-cargo operations from the Final Rule was impermissible.

2. The cost-benefit analysis FAA relied upon does not support the all-cargo exclusion because it (1) was facially insufficient to address the problem of pilot fatigue, (2) failed to account for benefits of applying the new rules to all-

cargo operations that FAA itself recognized, and (3) failed to include other obvious public benefits of applying the new rules to all-cargo operations.

3. FAA violated the APA's notice and comment requirements because (1) the Final Rule is not a logical outgrowth of the NPRM, which indicated that FAA would ***not*** consider treating all-cargo operations differently than passenger operations, (2) FAA did not disclose the cost-benefit analysis upon which it relied until the Final Rule was issued, and (3) FAA never disclosed the underlying data and calculations purportedly supporting the cost-benefit analysis.

STANDING

Pursuant to Circuit Rule 28(a)(7), IPA has standing to bring this action on behalf of itself and its members because flightcrew member duty and rest rules directly affect the health, safety and daily working conditions of IPA's members and affect the collective bargaining IPA undertakes for its members.

IPA participated in the rulemaking proceeding below by submitting comments on the NPRM. Independent Pilots Association Comments on Flightcrew Member Duty and Rest Requirements (Nov. 15, 2010) (FAA Dckt. No. FAA-2009-1093-1893) (J.A. __). IPA was a member of the ARC that FAA convened to develop new flightcrew member duty and rest rules in 2009. NPRM

at 55853 (J.A. ___). IPA and its members are thus persons affected by the Final Rule within the meaning of 49 U.S.C. § 46110 (Addendum 1-2).[4]

In order to establish standing, a petitioner "must show that '(1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.'" *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc*, 528 U.S. 167, 180–181 (2000). An organization "has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Id.* at 181. IPA meets this test.

IPA's members have been injured in fact as a result of the FAA's determinations, which injuries would be redressed by judicial relief in this case. As the collective bargaining unit representing the more than 2,600 professional pilots who fly in service of UPS, IPA has standing to challenge the Final Rule on

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[4] In its comments, IPA addressed issues that were apparent from the face of the NPRM. Because, as detailed below, FAA provided no notice until the Final Rule was issued that the Final Rule might treat all-cargo operations differently than passenger operations, there were reasonable grounds for IPA not to comment on that issue. 49 U.S.C. § 46110(d) (Addendum 2).

behalf of its members. "A Union can assert standing on behalf of itself as an institution or on behalf of its members." *Nat'l Treasury Employees Union v. Chertoff*, 452 F.3d 839, 853 (D.C. Cir. 2006). *See also Cronin v. FAA*, 73 F.3d 1126, 1130 (D.C. Cir. 1996) (union had representational standing to challenge rule when its members were in the regulated class). Addressing working conditions that affect the health and safety of its members is at the very core of IPA's mission.

The Final Rule has imposed a constitutionally cognizable injury on IPA's members in at least two ways. First, as FAA, Congress, and the NTSB recognize, fatigue represents a serious safety problem for aviation pilots and crews. Indeed, while (incompletely) calculating the costs and benefits of the Final Rule, FAA included avoiding the fatality of crewmembers as a benefit. Final Rule at 332 n.1 (J.A. ___). Moreover, FAA acknowledges that fatigue has negative long-term health effects on pilots, *id.* at 392 (J.A. ___), and that "CDC's research shows that chronic fatigue can cause illness and even death." Final RIA at 7 (J.A. __) (footnote omitted). Failing to address those serious health and safety problems, and leaving IPA's members exposed to an existing rule that even FAA admits does "not adequately address the risk of fatigue," NPRM at 55855 (J.A. ___), is a sufficient injury to confer standing.

Because the decision to omit all-cargo operations was contained in the Final Rule, the injury is fairly traceable to the rulemaking IPA challenges here. Finally,

a remand to revise the Final Rule in accordance with the APA and the Safety Act would redress the injuries by requiring FAA to issue a rule that adequately addresses the health and safety risks left unaddressed by the Final Rule. *See, e.g.*, *Advocates for Highway and Auto Safety v. Fed. Motor Carrier Safety Admin.*, 429 F.3d 1136 (D.C. Cir. 2005) (Associations representing interests of commercial motor vehicle drivers successfully challenged Federal Motor Carrier Safety Administration's ("FMCSA") hours of service rules because rules failed to address problems of fatigue; no discussion or challenge regarding standing).

In addition to associational standing, IPA is directly injured by the Final Rule because flightcrew member duty and rest rules relate directly to work rules that are the subject of collective bargaining, as FAA recognizes. Final Rule at 394 n.101 ("flight and duty limitations are unique because they address both safety considerations, which are regulatory in nature, and lifestyle considerations, which are properly addressed in collective bargaining agreements.") (J.A. ___). UPS has confirmed that it does not intend to comply voluntarily with the Final Rule. *See* Letter from Ray LaHood, The Secretary of Transp., to Captain Robert W. Travis, President, IPA (April 10, 2012) (Addendum 43). The Final Rule, accordingly, relates directly to matters of collective bargaining for IPA and its members and materially affects the scope and balance of power in IPA's collective bargaining with UPS. *See, e.g.*, *Nat'l Treasury Employees Union*, 452 F.3d at 853–54 (Union

had standing to challenge rule that materially affected scope of collective bargaining).

ARGUMENT

I. STANDARD OF REVIEW

Pursuant to the APA a "rule must be set aside if it is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law' [], or if it was promulgated 'without observance of procedure required by law.'" *Owner-Operator Indep. Drivers Ass'n v. Fed. Motor Carrier Safety Admin.*, 494 F.3d 188, 198 (D.C. Cir. 2007) (quoting 5 U.S.C. § 706(2)(A) & (D)).

> An agency's rule will be found 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 difference in view or the product of agency expertise."

Advocates for Highway and Auto Safety, 429 F.3d at 1144–45 (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). Moreover, an agency's final rule is arbitrary and capricious when it shows "little apparent connection to the inadequacies it purport[s] to address," or "inexplicably abandon[s]" its own earlier legitimate, reasoned findings, particularly where the earlier determination was "entirely structured around" the abandoned premise. *Id.* Finally, an agency's failure to provide adequate notice and opportunity to comment

on a proposed rule violates the APA. *Owner-Operator*, 494 F.3d at 199.

II. THE RULE VIOLATES CONGRESS' DELEGATION OF AUTHORITY BY FAILING TO DO ANYTHING TO ADDRESS THE PROBLEMS OF PILOT FATIGUE AS MANDATED BY THE SAFETY ACT FOR ALL-CARGO OPERATIONS

A. FAA Failed to Execute Congress' Command to Promulgate Regulations that Address the Acknowledged Problems Relating to Pilot Fatigue in All-Cargo Operations

Congress directed FAA to "issue regulations, *based on the best available scientific information*, to specify limitations on the hours of flight and duty time allowed for pilots *to address problems relating to pilot fatigue*." Safety Act at § 212(a)(1) (emphasis added) (Addendum 6). FAA determined that the scientific research showed that existing flightcrew member duty and rest rules "do not adequately address the risk of fatigue," including problems faced by cargo pilots. NPRM at 55855 (J.A. ___). In the Final Rule, FAA reiterated this finding, Final Rule at 334 (J.A. ___), and made no attempt to distinguish cargo pilots from passenger pilots based on the science or physiology of fatigue. Nonetheless, FAA left all-cargo operations subject to those admittedly inadequate rules.

By doing ***nothing*** to address the admitted problems of pilot fatigue in all-cargo operations, and leaving cargo pilots subject to the same rules that Congress, NTSB, and FAA have recognized do not adequately address pilot fatigue, FAA has failed to comply with Congress' clear directive to issue regulations that "address problems relating to pilot fatigue." Safety Act at § 212(a)(1) (Addendum 6).

Thus, FAA has failed to carry out the plain terms of the Safety Act. *See Office of Commc'ns of United Church of Christ v. FCC*, 707 F.2d 1413, 1422–23 (D.C. Cir. 1983) ("it is the quintessential function of the reviewing court to interpret legislative delegations of power and to strike down those agency actions that traverse the limits of statutory authority"). This is also a clear violation of the APA because FAA "has adopted a rule with little apparent connection to the inadequacies it purports to address." *Advocates for Highway and Auto Safety*, 429 F.3d at 1145.

B. The Scientific Information on Fatigue Does Not Support FAA's Failure to Adopt New Flightcrew Member Duty and Rest Rules for Cargo Operations

Rather than supporting FAA's decision to exclude all-cargo operations from the Final Rule, FAA's analysis of the "best available scientific information" underscores the *greater need* to adopt new rules for all-cargo operations, because those operations are *particularly* subject to factors that create dangerous levels of fatigue.

FAA summarized the key scientific findings as follows:

> most people need eight hours of sleep to function effectively, most people find it more difficult to sleep during the day than during the night, resulting in greater fatigue if working at night; the longer one has been awake and the longer one spends on task, the greater the likelihood of fatigue; and fatigue leads to an increased risk of making a mistake.

Final Rule at 335 (J.A. ___) (citing NPRM at 55857 (J.A. ___)). FAA found that flying conditions such as *nighttime operations* (during pilots' circadian lows) and *operations that cross multiple time zones* warrant *stricter* measures to guard against fatigue. Final Rule at 330 (J.A. ___). Specifically, "[t]he primary time-of-day safety concern . . . is that flightcrew members who fly during the WOCL *suffer a severe degradation of performance*." *Id.* at 358 (emphasis added) (J.A. ___). *See also id.* at 331, 355 (J.A. ___, ___).[5]

FAA further concluded that "factors that lead to fatigue are universal." *Id.* at 330 (J.A. __). Indeed, FAA's findings show that all-cargo operations are particularly subject to fatigue because cargo carriers "regularly operate long-haul flights and point-to-point operations outside the United States, traveling across multiple time zones and at all hours of the day and night . . . According to the industry commenters, these types of nighttime and around-the-world operations are the norm for all-cargo carriers." *Id.* at 336 (J.A. ___).

Applying the scientific findings to the existing rules, FAA concluded that its "current regulations do not adequately address the risk of fatigue," and specifically

[5] FAA also cited scientific evidence that "long duty periods that take place during the WOCL substantially increase the risk of an accident;" that "each additional hour worked after approximately 8 or 9 hours exponentially increases the risk of an accident;" and that "there is little evidence that a flightcrew member who repeatedly works on nightshifts will experience substantial safety-relevant changes to his or her circadian rhythm through acclimation." Final Rule at 357 (J.A. ___).

"do not account for the impact of circadian rhythms on alertness." *Id.* at 334 (J.A. ___). FAA also concluded that "a fatigued crew is dangerous no matter what 'type' or segment of operation is examined and the requirements in this final rule will eliminate the distinctions between various operations." Final RIA at 30 (J.A. ___). Finally, FAA determined that new duty and rest rules were necessary "because the status quo subjects society to an 'unacceptably high aviation accident risk.'" Final Rule at 391 (J.A. ___) (quoting NPRM at 55882 (J.A. ___)).

FAA stated that "[t]hese uncontroversial scientific findings form the basis for almost all of the major provisions in this rule." Final Rule at 390 (J.A. __). Having reached these uncontroversial conclusions based on the best scientific information and its own expert analysis of the former flight time and duty rules, FAA's decision to exclude all-cargo operations from the new rules and leave all-cargo operations subject to the existing rules, is arbitrary and capricious. In addition to reflecting "little apparent connection to the inadequacies it purport[ed] to address," FAA abandoned the science-based methodology around which the entire rulemaking was structured, contradicted the evidence before the agency, and failed to consider in any way the particular problems of fatigue in all-cargo operations. *Advocates for Highway and Auto Safety*, 429 F.3d at 1145. *See also Owner-Operator*, 494 F.3d at 199. Moreover, FAA made no attempt to provide a substantive explanation for ignoring the "uncontroversial scientific findings"

regarding pilot fatigue, nor did FAA provide any alternative scientific studies or otherwise justify its decision to exclude all-cargo operations, in further violation of the APA. *See Int'l Union, United Mine Workers of Am. v. Mine Safety and Health Admin.*, 626 F.3d 84, 93 (D.C. Cir. 2010) (final rule of the Mine Safety and Health Administration was arbitrary and capricious because it failed to explain why its final rule ignored expert evidence in the record).

Indeed, the suggested changes by OIRA demonstrate that it attempted to resolve the clear contradiction between FAA's science and safety findings and the cargo exclusion by editorial changes and simply *deleting* references to the science. EO12866 Compliance (J.A. ___) is a redlined mark-up of the Final Rule and Preamble that reflects OIRA's changes, including in particular the exclusion of all-cargo operations based on the cost-benefit analysis. *E.g.*, *Id.* at 1, 12–13, 19, 32–38 (J.A. __, __–__, __, __–__). For example, in the section of the Final Rule discussing the possibility of issuing different rules for different types of Part 121 operations, the unedited language, consistent with the NPRM, rejected that approach and presented science-based reasons why it was particularly important to include all-cargo operations in the Final Rule: "Accordingly, this rule uniformly regulates the universal fatigue factors [] regardless of the [] part 121 [] operation that is involved." *Id.* at 259 (J.A. ___). OIRA edited the sentence to read: "Accordingly, this rule uniformly regulates the universal fatigue factors *in*

passenger operations regardless of the *specific* part 121 *passenger* operation that is involved." *Id.* (OIRA inserts in italics). *See also* Final Rule at 391 (J.A. ___). But this editorial change does not change the scientific conclusion that all-cargo operations *are* subject to the same universal fatigue factors as passenger operations.

More significantly, when faced with scientific findings it could not edit, OIRA simply deleted them, including, for example, these findings:

> However, the risk from these types of long FDPs is even higher for nighttime unaugmented operations because studies have shown that working during the WOCL causes a substantial degradation in human performance. Because of the substantial safety risks caused by long FDPs and working during the WOCL, the FAA has concluded certificate holders conducting all-cargo operations can no longer be permitted to schedule 16-hour unaugmented nighttime FDPs and 30-hour augmented FDPs. In addition, as discussed in other parts of this preamble, because nighttime operations raise additional safety concerns, the FAA has decided to subject certificate holders who conduct all-cargo operations to the flight, duty, and rest limits imposed by this rule.

Id. at 37 (J.A. ___).[6]

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[6] It appears that FAA was planning on including all-cargo operations in the Final Rule until very late in the process. For example, the Final Rule includes changes from the NPRM specifically requested by all-cargo carriers. *E.g.*, Final Rule at 375 (reducing from 4 hours to 2 hours the amount of nightly mid-duty rest required to allow pilots to work more than three consecutive nights). FAA would not have needed to address cargo-specific concerns if it intended to *exclude* all-cargo operations from the Final Rule. This further reinforces what the EO12866

In addition to raising troubling questions about whether this rulemaking was executed by FAA, as required by Congress, or OIRA, which has no delegated authority to regulate pilot flight time and duty or aviation safety, these changes highlight that all-cargo operations were excluded from the new rules *despite* the scientific and safety findings showing that cargo pilots are *particularly* affected by fatigue. Neither OIRA nor FAA refute or rebut those scientific findings, and they cannot, with the mere stroke of a bureaucratic pen, pretend those findings no longer exist or are invalid, and ignore Congress' express charge to address pilot fatigue for *all* pilots.

C. FAA Impermissibly Relied on a Cost-Benefit Analysis to Ignore Congress' Directive to Utilize Scientific Information on Pilot Fatigue

FAA's only stated reason for ignoring Congress' clear command to issue science-based regulations to address the problem of pilot fatigue is that the costs of compliance for all-cargo operations far exceed the societal benefits. FAA's reliance on its cost-benefit analysis must be rejected because the Safety Act does not authorize FAA to ignore the best scientific information and decline to address acknowledged problems of pilot fatigue based on a cost-benefit analysis.

The Supreme Court has made clear that the factors an agency may consider

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Compliance suggests: that the decision to exclude all-cargo operations from the Final Rule came from OIRA, based on cost considerations, rather than from the FAA, based on safety and science.

in issuing regulations depend "on what authority the statute confers." *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 465 (2001). Where Congress has specified the factors to be used, an agency may consider costs only if Congress made a "textual commitment of authority to the agency to consider costs . . . ." *Whitman*, 531 U.S. at 468. Absent such a commitment of authority, "'economic considerations play no part in the promulgation of [regulations].'" *Id.* at 464 (quoting *Lead Indus. Ass'n v. EPA*, 647 F.2d 1130, 1148 (D.C. Cir. 1980) (finding that Congress did not authorize EPA to consider costs in promulgating ambient air quality standards under the Clean Air Act)).

Moreover, Congress' commitment of authority to consider costs must be express; Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Id.* In *Whitman*, the Court concluded that the cost "factor is *both* so indirectly related to public health *and* so full of potential for canceling the conclusions drawn from direct health effects that it would surely have been expressly mentioned in §§ 108 and 109 [of the Clean Air Act] had Congress meant it to be considered." *Id.* at 469 (emphasis in original).

The rationale of *Whitman*, *Lead Industries*, and similar cases applies here to preclude FAA from using cost considerations to exclude all-cargo operations from the Final Rule. Congress directed FAA to "issue regulations, based on the best

available scientific information, to specify limitations on the hours of flight and duty time allowed for pilots to address problems relating to pilot fatigue." Safety Act at § 212(a)(1) (Addendum 6). Congress further directed FAA to "consider and review" twelve specific subjects in developing the new regulations all of which relate to the causes of fatigue and ways to address fatigue. *Id.* at § 212(a)(2) (Addendum 6-7).[7] Nowhere does Congress state or imply that FAA should or could consider the costs and benefits of compliance as a factor in developing new flight duty and rest rules.

As with the provision of the Clean Air Act at issue in *Whitman*, FAA cannot consider cost issues under the Safety Act because cost issues are both "far removed" from addressing the problems of pilot fatigue based on science, and, as FAA's decision demonstrates, cost considerations can "cancel" the science-based conclusions Congress sought. *See Whitman*, 531 U.S. at 469. Simply stated, FAA cannot establish the science-based safety standards Congress demanded if the terms of the Final Rule are determined by cost considerations.

Congress' intent to focus on addressing the problem of fatigue based only on science is made clear in the legislative history as well. An "updated rule will more adequately reflect the operating environment of today's pilots and will reflect

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[7] Congress also directed FAA to consider "any other matters the Administrator considers appropriate," *id.* at § 212(a)(2)(M) (Addendum 7) as discussed *infra* at 32.

scientific research on fatigue." H.R. REP. NO. 11-284, at 7 (Addendum 35).[8] Consideration of operating costs to the carriers does not reflect the pilot's operating environment or scientific research on fatigue. Moreover, Congress enacted the fatigue provisions of the Safety Act, in part, to force FAA to act despite FAA's inability to find a consensus solution. *Id.* As FAA itself has made clear, one of the major stumbling blocks to reaching consensus was the insistence by the cargo carriers that they be subject to separate rules. NPRM at 55853 (J.A. ___). Congress intended to direct FAA to adopt new rules based on modern fatigue science rather than the cost impacts to any sector of the industry.

This focus on safety and science is consistent with Congress' general charge that FAA "assign[], maintain[], and enhanc[e] safety and security as the highest priorities in air commerce." 49 U.S.C. § 40101(d) (Addendum 10). There is simply no express authorization by Congress that FAA should or could dilute its safety responsibilities with cost considerations.

Not surprisingly, given Congress' overriding safety priority, there are relatively few instances where Congress has directed FAA to consider costs as part

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[8] In other statutes, Congress has indicated in the legislative history that it expected the agency to consider costs, even when safety was the "overriding consideration." *See Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Ins. Co.*, 463 U.S. 29, 55 (1983) (discussing agency consideration of costs in challenge to crash protection rulemaking) (citing S. Rep. No. 1301, at 6, U.S. CODE CONG. & ADMIN. NEWS 1966, p. 2714). Congress made no such indication in the Safety Act or its legislative history.

of its rulemaking. Nonetheless, it is clear that Congress has selectively chosen when to allow FAA to consider costs, underscoring that, in the Safety Act, Congress deliberately withheld such authorization. For example, in developing the terms of airport operating certificates for commuter airports, Congress directed FAA to "identify and consider a reasonable number of regulatory alternatives and select from such alternatives the least costly, most cost-effective or least burdensome alternative that will provide comparable safety at [other kinds of airports]." *Id.* at § 44706(d) (Addendum 44). Similarly, FAA may exempt certain airports from certification requirements regarding firefighting and rescue equipment "when the Administrator decides that the requirements are or would be unreasonably costly, burdensome, or impractical." *Id.* at § 44706(c) (Addendum 44). *See also id.* at § 44901(d)(2)(B)(iii) (in considering waivers to placing explosive detection systems in airports for security screening, TSA may consider "the feasibility and cost-effectiveness of deploying explosive detection systems" in other parts of the airport) (Addendum 47).

Moreover, when regulating safety in general, and duty hours in particular, in other segments of the transportation industry, Congress knows how to require that costs and benefits be considered. For example, in 49 U.S.C. § 31136(c)(2) Congress directed the FMCSA "to consider, to the extent practicable and consistent with the purposes of this chapter (A) costs and benefits" before

prescribing new hours of service rules. (Addendum 48). *See Public Citizen v. FMCSA*, 374 F.3d 1209, 1212 (D.C. Cir. 2004) (summarizing statutory framework for FMCSA's hours of service regulations). No similar provision applies to FAA authority to issue flightcrew member duty and rest rules.[9]

The fact that Congress allowed FAA to consider "[a]ny other matters the Administrator considers appropriate," Safety Act at § 212(a)(2)(M) (Addendum 7), does not allow FAA to use cost considerations to ignore all of the fatigue science, and the prior findings of the NTSB and FAA itself. Congress does not "hide elephants in mouseholes" and allow vaguely stated ancillary provisions to create a loophole big enough to allow FAA to ignore the factors Congress *expressly* required FAA to consider. *Whitman*, 531 U.S. at 468. Congress would not have relied on such a "modest" phrase as "other matters [FAA] considers appropriate" to allow cost considerations to cancel out the scientific information and safety issues it specified. *See id.*

Because FAA impermissibly relied on its cost-benefit analysis to ignore its own scientific findings regarding pilot fatigue and leave in place flightcrew member duty and rest rules for all-cargo operations that, by FAA's own admission,

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[9] To the extent FAA relies on Executive Order 12866, such reliance is misplaced. As this Court has recognized, "the President is without authority to set aside congressional legislation by executive order, and the 1993 executive order [12866] does not purport to do so." *In re United Mine Workers of Am. Int'l Union*, 190 F.3d 545, 551 (D.C. Cir. 1999).

fail to address the problem of pilot fatigue, FAA's decision to exclude all-cargo operations from the Final Rule must be remanded for promulgation of rules for all-cargo operations that comply with the Safety Act.

III. FAA'S COST-BENEFIT ANALYSIS FAILS TO JUSTIFY ITS DECISION TO EXCLUDE ALL-CARGO OPERATIONS

"The requirement that agency action not be arbitrary or capricious includes a requirement that the agency adequately explain its result." *Public Citizen, Inc. v. FAA,* 988 F.2d 186, 197 (D.C. Cir. 1993). The explanation must be "sufficient to enable [the court] to conclude that the [agency's action] was the product of reasoned decisionmaking." *Owner-Operator*, 494 F.3d at 203 (quoting *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 52). When an agency's decision rests on the results of a cost-benefit analysis, it must correctly consider both the costs and benefits of the rule. *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 55 (agency decision to rescind seatbelt rule was arbitrary and capricious because agency was too quick to dismiss the safety benefits of seatbelts); *Business Roundtable v. Sec. and Exch. Comm'n,* 647 F.3d 1144, 1152 (D.C. Cir. 2011) (final rule arbitrary and capricious where SEC "duck[ed] serious evaluation of the costs . . . imposed upon companies from use of the rule"); *Advocates for Highway and Auto Safety*, 429 F.3d at 1146 (FMCSA's final rule is arbitrary and capricious in part because its new cost-benefit analysis "says practically nothing about the projected benefits"); *Office of Commc'ns*, 707 F.2d at 1440 (FCC's decision to eliminate a rule requiring radio

stations to keep logs of their programming was arbitrary and capricious because FCC had not fully considered the benefits of the logging requirements in its cost-benefit analysis, which was the exclusive basis for the agency's decision).

A. FAA Failed to Adequately Explain Its Cost-Benefit Analysis

As discussed in greater detail below, FAA never disclosed the cargo cost-benefit analysis and has not explained its calculations, assumptions or underlying data. Instead, the results of FAA's analysis for all-cargo operations are summarized in a series of footnotes scattered throughout the Final RIA. *See supra* at 13–14 n.3. FAA's total estimate of the potential benefits is limited to avoiding the costs of one fatal accident over a ten year period, with the loss of two to four flightcrew members and the aircraft hull (totaling $20.35 million to $32.55 million). *Id.* at 13 n.3 and 35 n.20 (J.A. ___, ___). *See also* Final Rule at 332 n.1 (J.A. ___). FAA's cursory balancing of costs and benefits is facially insufficient to address the serious safety problem Congress directed FAA to solve. *See Motor Vehicles Mfrs. Ass'n*, 463 U.S. at 55 (weighing of costs and benefits must take into account that "Congress intended safety to be the preeminent factor"); *Advocates for Highway and Auto Safety*, 429 F.3d at 1146 (rejecting cursory examination of the benefits of a rule). Moreover, FAA's summary analysis demonstrates a "complete failure to examine [the issue] in an orderly fashion," a "fundamental

problem" that further compels remanding the case. *See Office of Commc'ns*, 707 F.2d at 1440.

B. FAA Failed to Account for Benefits It Identified in the Rulemaking Process

Although the Final RIA's description of FAA's cost-benefit analysis is devoid of detail, it nonetheless provides enough of a glimpse into the undisclosed cost-benefit analysis to reveal that there are unexplained anomalies, inconsistencies, and deficiencies that render the FAA's decision arbitrary and capricious.

First, FAA failed to consider the benefits of avoiding non-fatal accidents and incidents. In the RIA for the NPRM, FAA determined that the present value of the costs of the proposal ($804 million) *exceeded* the benefits ($463.8 million) by $330 million. NPRM at 55853, 55877–55878 (J.A. ___, ___–___). *See also* NPRM RIA at 119–20 (J.A. ___–___). In order to reach a positive cost-benefit ratio, FAA relied on "two additional areas of unquantified benefits: preventing minor aircraft damage on the ground,[10] and the value of well-rested pilots as accident preventors and mitigators." *Id*. at 55878 (J.A. __). With respect to avoiding ground incidents, FAA determined that "if the rule were to reduce damage by about $600 million

[10] These incidents include non-fatal accidents where, for example, two aircraft strike each other's wingtips, or where part of an aircraft strikes a building, ground vehicle, or other equipment.

over 10 years ($340 million present value) it would break even in terms of net benefits . . . ." *Id.*[11] FAA concluded that "[t]hese data suggest that *the scope of accidents/incidents for valuing safety needs to be expanded to account for losses due to ground events where appropriate*." NPRM RIA at 70 (emphasis added) (J.A. ___). Similarly, in assessing the costs and benefits of the Final Rule, FAA adjusted the *negative* cost-benefit analysis to be positive based on the costs of avoiding ground incidents. Final Rule at 392–93 (J.A. ___–___); Final RIA at 13–14 (J.A. ___–___).

Having relied on the costs of avoiding such ground-based incidents to find an acceptable cost-benefit ratio both for the NPRM and the Final Rule, FAA failed to apply such savings when considering the costs and benefits of applying the Final Rule to all-cargo operations. Nor did FAA attempt to account for the safety benefits of well-rested pilots in the cargo context.[12] The result is that the cost-

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[11] FAA's analysis suggests that the benefits of avoiding ground incidents could be even greater. FAA stated that ground incidents in the U.S. cost a total of $3 billion *per year*," and that "the data on when these accidents occur suggest they are more prevalent when the potential for fatigue is greatest." FAA Regulatory Impact Analysis for Flightcrew Member Duty and Rest Requirements Notice of Proposed Rulemaking (Sept. 3, 2010), at 69, 70 ("NPRM RIA") (FAA Dckt. No. FAA-2009-1093-0019) (emphasis added) (J.A. __, __). FAA observed that "[i]f even only a few percent of the losses from ground accidents are caused by pilot fatigue, the annual losses are large. Three percent would be $90 million *per year*." *Id.* at 70 (emphasis added).

[12] FAA did not indicate that it made any effort to quantify the safety benefits of well-rested pilots. Given Congress' express emphasis on safety, it was

benefit analysis fails to account for all of the acknowledged benefits of applying the Final Rule to all-cargo operations. FAA offered no explanation for its apparent decision not to calculate the FAA-acknowledged benefits of avoiding ground incidents or of having rested pilots in the context of all-cargo operations. Given the substantial value of these benefits, which, by FAA's reckoning, are likely to vastly exceed the benefits of avoiding fatal accidents, it was arbitrary and capricious for FAA to fail to consider them.

Second, FAA used inconsistent numbers for the value of an aircraft that might be lost due to an accident compared to the value of an aircraft that might be taken out of service for other reasons. In the Final RIA, FAA described the total benefits of including all-cargo operations in the Final Rule as ranging between $20.35 million (loss of [aircraft] hull and 2 crewmembers) and $32.55 million (loss of hull and 4 crewmembers)." Final Rule at 332 n.1 (J.A. ___); Final RIA at 35 n.20 (J.A. ___). FAA valued an averted fatality at $6.2 million. Final RIA at 3 (J.A. ___). Thus, the lost value of the aircraft hull approximately $8 million ($20.35–$12.4=$7.95 million). *See* Final Rule at 394 ($8.15 Million hull replacement value) (J.A. __). Yet, elsewhere in the Final RIA, FAA "uses $69 million as the estimated market value of an aircraft for downtime analysis." Final

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arbitrary and capricious for FAA to fail to give any weight to these benefits, which FAA itself has identified, in the cargo context.

RIA at 65 (J.A. ___). Because the objective of both analyses is to determine the value of an aircraft that would be taken out of service (whether due to an accident or some other reason), FAA's use of a "hull value" that is *one-eighth* the estimated market value to estimate the cost of *the loss of an aircraft* in the same cost-benefit analysis, without any explanation, is arbitrary and capricious.

Third, the Final RIA lists as benefits only "the value of *an* averted all-cargo fatal accident." Final RIA at 35 n.20 (J.A. ___) (emphasis added). *See also* Final Rule at 332 n.1 (one averted all-cargo accident) (J.A. ___). Even accepting the dubious premise that the only benefit of the Final Rule relates to fatal accidents avoided, a closer review of FAA's analysis of fatal accidents that occurred in prior years reveals that more than one fatal cargo accident would likely be avoided. FAA reviewed accident records where fatigue was a factor over the previous twenty years, Final RIA at 26 (J.A. ___), and apparently categorized a fatal accident involving a ferry flight (the movement of an empty aircraft to the starting point for its next revenue-producing flight) as a passenger operation. But the fatigue that contributed to the accident had been caused by a previous *cargo* flight operated by the same crew. FAA characterized the fatigue-inducing flight operation as a "demanding round trip flight to Europe that crossed multiple time zones . . . [and] involved multiple legs flown at night following daytime rest periods that caused the flightcrew to experience circadian rhythm disruption."

Final Rule at 334 (J.A. __); Final RIA at 11–13, 72–73 (J.A. __–__, __–__). As the NTSB recognized, however, this was "a regular cargo flight from Germany." NTSB Aircraft Accident Report PB95-910406 at 2 (Addendum 57). It was arbitrary and capricious of FAA, without explanation, to characterize as a passenger operation a fatigue-induced fatal crash where the fatigue itself was caused by a routine cargo operation, which had the effect of reducing the expected benefits of the Final Rule even under FAA's calculations.

Fourth, FAA fails to explain why it has applied a generic loss of life value—established by OMB and DOT to calculate the economic loss of life for a broad, general population—to a much smaller, and well-defined segment of the population—cargo pilots. Elsewhere, FAA indicates that it has examined the contracts and wage scales of commercial pilots. NPRM RIA at 81–82 (J.A. ___–___); Final RIA at 4–5 (J.A. ___–___). Thus, FAA could have used a much more refined analysis to more precisely estimate the value of avoiding the deaths of flightcrew members, and its failure to provide an explanation for not doing so renders the lost-lives calculation arbitrary and capricious.

Fifth, FAA failed to treat certain factors equally for purposes of calculating costs versus benefits. For example, FAA included as a cost "loss of service" for aircraft that are taken out of service to comply with the Final Rule. Final RIA at 65 (J.A. ___). FAA does not, however, include as a benefit the cost of *avoiding*

the loss of service for aircraft that would have been destroyed or damaged in fatigue-related accidents or incidents before they are replaced or repaired.

C. FAA Failed to Account for Other Substantial Benefits of Applying the New Flightcrew Member Duty and Rest Rules to All-Cargo Operations

FAA failed to consider *at all* other obvious benefits of the rule. For example, FAA failed to account for avoiding the costs of repairing or replacing aircraft damaged, but not destroyed, in fatigue-related incidents. Similarly, FAA failed to account for the benefits of avoiding the loss, damage or delayed delivery of the cargo being carried by cargo flights involved in fatigue-related incidents. This is a potentially significant number. The comments from UPS explain that cargo loads consists of 12,000 packages in "a typical UPS Airbus A300" and "upwards of 18,000 packages in a Boeing B747-400." UPS Comments on Flightcrew Member Duty and Rest Requirements, at 19 (Nov. 15, 2010) (FAA Dckt. No. FAA-2009-1093-1899) (J.A. __). In addition to routine merchandise, "UPS's typical cargo often includes critically needed medical supplies and pharmaceuticals," and "sophisticated, high-value industrial components used to operate critical infrastructure such as power stations and water treatment plants." *Id.* at 5 (J.A. __).

At some point, FAA recognized that avoiding the loss of cargo is a benefit of applying the Final Rule to all-cargo operations. In a draft of the Final Rule, FAA

stated that "the costs that are imposed by this rule are justified by the associated benefits of reducing the risk that passengers *and/or critical air deliveries* will be involved in an accident." EO12866 Compliance at 262 (J.A. __) (emphasis added). At OIRA's suggestion, however, the italicized language was deleted, apparently to reflect cargo's exclusion from the Final Rule. *Id.*; Final Rule at 392 (J.A. __). That does not explain, however, why FAA did not include those benefits in its cost-benefit analysis for weighing whether to include all-cargo operations in the Final Rule. Moreover, FAA did not consider as a benefit the value of avoiding the destruction of "high-value components," or the economic consequences of such critical cargo not being delivered on time (or having to be replaced or rebuilt), due to a fatigue-caused accident.

FAA did not account for other obvious accident-avoidance benefits, such as avoiding adverse environmental impacts from the release of aircraft fuel and hazardous materials carried on board all-cargo aircraft, or avoiding the costs of crash, fire and rescue services or other services (such as removal of a damaged or destroyed aircraft). Nor did FAA account for the benefits of improved health (and lower health-related costs) of pilots who work less demanding schedules.[13] These

[13] FAA recognizes that there are "substantial, non-quantified health benefits associated with the final rule" as a result of reducing fatigue in pilots. Rule at 392 (J.A. ___). *See also* Final RIA at 7 ("CDC's research shows that chronic fatigue can cause illness and even death.") (J.A. ___). The FAA further notes that "decreasing these costs represents a societal benefit" that "may well exceed the

benefits to the public are more tangible than the lost access to records that the Court held was arbitrary and capricious to omit from the agency cost-benefit analysis in *Office of Commc'ns*, 707 F.2d at 1441–42. Accordingly, the Court should similarly find FAA's cost-benefit analysis to be arbitrary and capricious.

IV. FAA FAILED TO PROVIDE ADEQUATE NOTICE AND OPPORTUNITY TO COMMENT ON ITS COST-BENEFIT ANALYSIS AND THE POSSIBILITY OF EXCLUDING ALL-CARGO OPERATIONS FROM THE NEW FLIGHTCREW MEMBER DUTY AND REST RULES

Section 4(a) of the APA requires that an agency publish in the Federal Register "either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. § 553(b)(3) (Addendum 60). "This court has consistently interpreted that requirement to mean that an agency's notice must "provide sufficient detail and rationale for the rule to permit interested parties to comment meaningfully.'" *Fertilizer Inst. v. EPA*, 935 F.2d 1303, 1310–11 (D.C. Cir. 1991) (quoting *Fla. Power & Light Co. v. United States*, 846 F.2d 765, 771 (D.C. Cir. 1988), *cert. denied*, 490 U.S. 1045 (1989)). The APA's notice requirements

> are designed (1) to ensure that agency regulations are

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projected costs of the rule when added to our base case estimate." Rule at 392 (J.A. ___). FAA attempts to justify excluding those benefits by explaining that they are not related to aviation safety, *id.* at 392 (J.A. ___), but this point is off the mark because FAA's cost-benefit analysis purports to assess the "societal benefits" of the rule. *Id.* at 332 (J.A. ___).

> tested via exposure to diverse public comment, (2) to ensure fairness to affected parties, and (3) to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review.

Envtl. Integrity Project v. EPA, 425 F.3d 992, 996 (D.C. Cir. 2005) (quoting *Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259 (D.C. Cir. 2005)).

FAA violated that fundamental obligation in two respects. First, it failed to provide any notice that it was considering treating all-cargo operations differently than other operations, and thus the Final Rule was not a logical outgrowth of the NPRM. Second, FAA failed to provide the opportunity for meaningful comment by failing to disclose, prior to issuance of the Final Rule, the cost-benefit analysis that formed the sole basis for FAA's decision to exclude all-cargo operations.

A. The Final Rule's Exclusion of All-Cargo Operations from the New Flight Crewmember Duty and Rest Rules Was Not a Logical Outgrowth of the Proposed Rule

1. The Logical Outgrowth Rule

A final rule may differ from the proposed rule only if the final rule is "a 'logical outgrowth' of its notice." *CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1079 (D.C. Cir. 2009) (quoting *Covad Commc'ns Co. v. FCC*, 450 F.3d 528, 548 (D.C. Cir. 2006)). "A final rule qualifies as a logical outgrowth 'if interested parties should have anticipated that the change was possible, and thus

reasonably should have filed their comments on the subject during the notice-and-comment period.'" *Id.* at 1079–80 (quoting *Ne. Md. Waste Disposal Auth. v. EPA*, 358 F.3d 936, 952 (D.C. Cir. 2004)) (quotation marks omitted).

Conversely, "a final rule fails the logical outgrowth test and thus violates the APA's notice requirement where 'interested parties would have had to divine [the agency's] unspoken thoughts, because the final rule was surprisingly distant from the proposed rule.'" *CSX Transp.*, 584 F.3d at 1080 (quoting *Int'l Union*, 407 F.3d at 1259–60) (quotation marks omitted). Moreover, a rule fails the "logical outgrowth" test if the final rule is an "Agency's decision to repudiate its proposed interpretation and adopt its inverse." *Envtl. Integrity Project*, 425 F.3d at 998.

2. The Final Rule Is Not a Logical Outgrowth of the NPRM

The very first sentence of the Executive Summary in the NPRM makes clear that "this rulemaking proposes to establish ***one set*** of flight time limitations, duty period limits, and rest requirements for pilots in part 121 operations." NPRM at 55852 (emphasis added) (J.A. ___). Throughout the NPRM, FAA repeatedly rejected different flightcrew member duty and rest rules for different types of Part 121 operations. *E.g.*, NPRM at 55854, 55857, 55863, 55867 (J.A. ___, ___, ___, ___).

FAA noted that "different business models and needs [] are partly responsible for the differences in current regulations," and that it is "sympathetic to

concerns raised within the ARC by cargo carriers . . . that new regulations will disproportionately impact their business models." NPRM at 55857 (J.A. ___). FAA, however, rejected these concerns as irrelevant, stating that "the historical distinction between the types of operators has become blurred," with both cargo and passenger operations regularly occurring at night. *Id.* Thus the proposed rule "is designed to recognize the growing similarities between the kinds of operations and the universality of factors that lead to fatigue in most individuals." *Id.* FAA flatly declared that:

> The FAA has decided against proposing special rules for all-cargo operations because there are no physiological differences between pilots who fly cargo planes and pilots who fly passenger planes.

Id. at 55863 (J.A. ___).

Based on this clear statement, particularly in the overall context of FAA's declared goal of establishing one set of rules for all Part 121 operations and Congress' directive that FAA address pilot fatigue based on the best available scientific information, the NPRM provided no hint that FAA would "consider abandoning [its] proposed regulatory approach," *Int'l Union*, 407 F.3d at 1260, and decide to exclude all-cargo operations from the Final Rule based solely on costs.

FAA's scheme in the Final Rule is "far distant" from both the substance and underlying rationale of the NPRM and is the kind of agency "flip-flop" that the APA does not permit. *Envtl. Integrity*, 425 F.3d at 997 (EPA could not announce

in the NPRM that it would adopt one position and then adopt the opposite position without providing notice and opportunity for comment). Having said that the particular cost impacts to cargo operators were not relevant because there are no physiological differences between cargo and passenger pilots, FAA could not legally "flip-flop" and exclude all-cargo operations from the Final Rule without providing an opportunity to comment. *Id.*

The lack of opportunity to comment on the cargo exclusion is further reflected in FAA's requests for comments. FAA broke the proposed rule into several components and specifically requested comments on each topic. NPRM at 55858 (flight duty period) (J.A. ___), 55861 (time zones) (J.A. ___), 55863 (augmentation as mitigation) (J.A. ___), 55866 (split duty as mitigation) (J.A. ___). But in none of those 35 specific requests does FAA solicit comments on whether different kinds of operations should be treated differently. Most notably, in addressing daily flight time limits, FAA first stated that it had "decided against proposing special rules for all-cargo operations" and then sought comment on three specific issues, none of which involved consideration of special or different rules for all-cargo operations. NPRM at 55863 (J.A. ___). Similarly, although FAA considered several alternatives to the proposed rule, it did not consider different flightcrew member duty and rest rules for all-cargo operations. NPRM at 55878 (J.A. ___).

Having defined the issues open for comment, FAA could not put new issues on the table without prior notice. Fundamentally, the public "must be able to trust an agency's representations about *which particular* aspects of its proposal are open for consideration." *Envtl. Integrity*, 425 F.3d at 998 (emphasis in original). To uphold FAA's rulemaking would be contrary to the APA because it would allow an agency to justify virtually any final rule that might have been suggested *only* by positive or negative inference in the notice. *Id. See also CSX Transp.*, 584 F.3d at 1078–82 (failure to provide notice because NPRM "nowhere even hinted that the Board might consider expanding the number of years from which comparison groups could be derived"); *Int'l Union*, 407 F.3d at 1260 (rule setting a *maximum* mine belt air velocity speed was not a logical outgrowth of a proposal to set a *minimum* air velocity speed because parties could not have anticipated that the Secretary would "consider abandoning her proposed regulatory approach" of setting a minimum speed).

FAA's flawed notice is very different from the notice in cases such as *Owner-Operator* or *City of Portland v. EPA*, 507 F.3d 706 (D.C. Cir. 2007), where the agency clearly signaled a more open-ended approach to possible regulation and specifically asked for comments on the issue in question. *See CSX Transp.*, 584 F.3d at 1081 (distinguishing cases).[14] In contrast to those cases, FAA signaled here

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[14] *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2007), is

that it would *not* pursue the course it ultimately took, and did *not* seek comments on issues relating only to all-cargo operations.

Finally, nothing in the NPRM suggested that FAA's decision would be based, in whole or in part, on the results of a cost-benefit analysis. Although FAA presented a summary of a cost-benefit analysis of the proposed rule, FAA never suggested that the terms or scope of the Final Rule would depend on application of a cost-benefit analysis. In fact, the calculated costs of the proposed rule exceeded the calculated benefits by $340 million. NPRM RIA at 119–120 (J.A. ___–___). FAA did not request comments or input regarding the costs and benefits of the rule to any segment of the industry. Indeed, FAA specifically *rejected* the notion that disparate costs to all-cargo operations were relevant. NPRM at 55857, 55863 (J.A. ___, ___).

Moreover, when FAA did seek comments regarding costs, it was *only* to request "recommendations that would *provide the same or better protection* against the problems of fatigue at a lower cost. We may incorporate any such recommendation in a Rule in this proceeding." NPRM at 55861 (emphasis added)

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also not to the contrary. The Court did not announce a new rule regarding logical outgrowth, but adopted the rule applied by this and other Courts of Appeals. In *Long Island Care*, moreover, the Department of Labor's proposed rulemaking contemplated the possibility that the Department would not adopt the provision at issue. *Id.* Here, in contrast, the NPRM expressly foreclosed the possibility that FAA would choose to treat all-cargo operations differently than other Part 121 operations. *Supra* at 44–45.

(J.A. ___). Thus, the NPRM indicated that costs were relevant *only if they could be reduced without reducing the level of protection against fatigue provided by the proposed rule*. FAA took the opposite approach in the Final Rule, however, by leaving all-cargo operations subject to an admittedly inadequate level of protection against the problems of fatigue, based on purported costs. This is precisely the kind of agency "flip-flop" that the APA bars without adequate notice and opportunity for comment. *See Envtl. Integrity*, 425 F.3d at 997.

B. FAA Violated the APA by Failing to Disclose the Cost-Benefit Analysis that Was the Sole Basis for Excluding All-Cargo Operations

1. The APA Requires FAA to Disclose and Make Available for Comment the Technical Studies and Data that It Used in Reaching Its Decision

FAA's exclusion of all-cargo operations from the new flight crewmember duty and rest rules must be remanded because FAA failed to disclose the technical studies and data that purported to support its decision. The APA requires that an agency give notice of "the terms of the substance of the proposed rule or a description of the subjects and issues involved," 5 U.S.C. § 553(b)(3) (Addendum 60), and "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments," 5 U.S.C. § 553(c) (Addendum 60). This Court has explained that:

> "[i]ntegral" to these requirements "is the agency's duty 'to identify and make available technical studies and data

> that it has employed in reaching the decisions to propose particular rules . . . *An agency commits serious procedural error when it fails to reveal portions of the technical basis for a proposed rule in time to allow for meaningful commentary*.'"

Owner-Operator, 494 F.3d at 199 (quoting *Solite Corp. v. EPA*, 952 F.2d 473, 484 (D.C. Cir. 1991)) (internal citations omitted) (emphasis added). *See also Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 236 (D.C. Cir. 2008) (quoting *Chamber of Commerce v. SEC*, 443 F.3d 890, 899 (D.C. Cir. 2006)) ("[a]mong the information that must be revealed for public evaluation are the 'technical studies and data' upon which the agency relies.") (citation and quotation marks omitted).

Making technical studies available for comment is a critical aspect of notice and comment rulemaking:

> By requiring the "most critical factual material" used by the agency to be subjected to informed comment, the APA provides a procedural device to ensure that agency regulations are tested through exposure to public comment, to afford affected parties an opportunity to present comment and evidence to support their positions, and thereby to enhance the quality of judicial review.

Chamber of Commerce, 443 F.3d at 900 (quoting *Ass'n of Data Processing Serv. Orgs., Inc. v. Bd. of Governors of the Fed. Reserve Sys.*, 745 F.2d 677, 684 (D.C. Cir. 1984)). Without proper disclosure of technical studies and data, notice and comment rule-making can become "an empty charade" wherein an agency "operate[s] with a one-sided or mistaken picture of the issues at stake in a rule-

making." *Conn. Light & Power Co. v. Nuclear Regulatory Comm'n*, 673 F.2d 525, 528, 530 (D.C. Cir. 1982). This Court has repeatedly said that "'[t]o allow an agency to play hunt the peanut with technical information, hiding or disguising the information that it employs, is to condone a practice in which the agency treats what should be a genuine interchange as mere bureaucratic sport.'" *Solite Corp.*, 952 F.2d at 484 (quoting *Conn. Light & Power*, 673 F.2d at 531).

This Court has not hesitated to strike down rules when agencies have failed to disclose the technical bases of their decisions. For example, in *Owner-Operator*, FMCSA had relied on a cost-benefit analysis to draft a rule for hours-of-service for long-haul truck drivers. FMCSA's first version of the rule was vacated by this Court on a variety of grounds, including FMCSA's inappropriate reliance on a cost-benefit analysis to justify increasing the daily driving limit to 11 hours. 494 F.3d at 196. After remand, FMCSA amended the rule and also prepared a revised cost-benefit model that included several significant changes from the prior model. *Id.* at 198. The new model was not made public until release of the Regulatory Impact Analysis when the new final rule was issued. *Id.*

This Court held that FMCSA had violated the APA. The Court found that "the model and its methodology were unquestionably among 'the most critical factual material that [was] used to support the agency's position.'" *Id.* at 201 (quoting *Air Transp. Ass'n v. FAA*, 169 F.3d 1, 7 (D.C. Cir. 2006)). Accordingly,

"[t]he failure to provide an opportunity for comment on the model's methodology therefore constitutes a violation of the APA's notice-and-comment requirements." *Id.* *See also Solite Corp.*, 952 F.2d at 499 (EPA violated the APA by deciding to keep a certain kind of sludge waste within the scope of an exemption from RCRA regulation, based on calculations that were released one day before the final rule was announced); *Chamber of Commerce*, 443 F.3d at 908 (failure to disclose agency's reliance on publicly available documents to inform its decision violated the APA).

2. FAA's Last Minute Disclosure of the Cost-Benefit Analysis, and Its Failure to Disclose the Underlying Data, Violates the APA's Notice Requirements

FAA violated APA's notice requirements as set forth in *Owner-Operator*. The Final Rule makes clear that the sole basis for FAA's decision to exclude all-cargo operations from the new flightcrew member duty and rest rules was a cost-benefit analysis: "FAA . . . has removed all-cargo operations from the applicability section of new part 117 because their compliance costs significantly exceed the quantified societal benefits." Final Rule at 332 (J.A. ___). An accompanying footnote summarizes the total calculated costs and benefits in fewer than six lines of text in one Federal Register column. *Id.* at 332 n.1 (J.A. ___). But FAA did not release the underlying cost-benefit analysis itself. At most, FAA summarized parts of the analysis in a series of footnotes in the Regulatory Impact Analysis. *Supra* at

13–14 n.3. FAA never disclosed the underlying data or calculations of costs that might be imposed on all-cargo operations.[15] This presentation of the decisive analysis in the rulemaking in a series of summary footnotes is precisely the kind of "hunt the peanut" game this Court found in impermissible in *Owner-Operator* and *Solite*, and should be rejected here as well.

Even if the Final RIA is understood as disclosing the analysis, it was released too late to save the Final Rule. The Final RIA was not placed into the public docket until December 22, 2011, the day *after* the Final Rule was announced, even though the Final RIA is dated November 18, 2011.[16] Accordingly, IPA and its members were denied the opportunity to comment on the information and analysis that was critical to the issue of primary concern to them. As in *Owner-Operator* and *Solite*, FAA's failure to disclose even the results of its cost-benefit analysis concerning all-cargo operations prior to issuance of the Final Rule violates the APA's notice requirements.

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[15] The calculation of benefits, although seriously flawed, is revealed in a footnote. Essentially it is the "value of an averted all-cargo fatal accident [, which] would range between $20.35 million (loss of [the aircraft] hull) and 2 crewmembers and $32.55 million (loss of hull and 4 crewmembers)." Final RIA at 35 n.20 (J.A. ___). *See also id.*, at 13 n.3 (J.A. ___), and Final Rule at 332 n.1 (J.A. ___).

[16] Docket Folder Summary, Flight Crewmember Duty and Rest Requirements, http://www.regulations.gov/#!docketDetail;dct=SR;rpp=25;po=0;D=FAA-2009-1093 (Addendum 62).

Moreover, as discussed above, FAA never disclosed that the cost-benefit analysis would be used to determine the scope and nature of the Final Rule. *Supra* at 48–49. Accordingly, IPA reasonably believed that it did not need to address cost and benefit issues in order to assure that all-cargo operations were treated the same as other operations. FAA's last minute decision to exclude all-cargo operations from the Final Rule based solely on a cost-benefit analysis was a classic "flip-flop" that deprived IPA of a meaningful opportunity to address what ended up being the decisive factor in FAA's decision in violation of the APA. *See Envtl. Integrity Project*, 425 F.3d at 997.

C. IPA and Its Members Were Prejudiced by FAA's Failure to Provide Notice and Opportunity to Comment

In considering whether a rulemaking violates Section 553, the Court must take "due account" of whether the violation was prejudicial to the parties. *CSX Transp.*, 584 F.3d at 1082 (quoting 5 U.S.C. § 706). "The court has not required a particularly robust showing of prejudice in notice-and-comment cases" under Section 553. *Chamber of Commerce*, 443 F.3d at 904. "To show prejudice, those protesting the use of supplementary information might 'point to inaccuracies in the [supplemental] data, [] show that the agency 'hid or disguised the information it used, or otherwise conducted the rulemaking in bad faith,' [] or 'indicate with reasonable specificity what portions of the [data] it objects to and how it might

have responded if given the opportunity.'" *Id.* (quoting *Solite*, 952 F.2d at 484 and *Air Transp. Ass'n*, 169 F.3d at 8).

As in *CSX Transportation*, the prejudice here is readily apparent. As a general matter, IPA's entire approach to its comments would have been different if FAA had indicated that it might treat all-cargo operations differently than other operations. Instead, FAA stated emphatically that all operations would be treated the same and marshaled the scientific evidence to support that position, as required by the Safety Act. *E.g.*, NPRM at 55863 (J.A. ___). Thus, FAA's approach to the rulemaking deprived IPA the ability to comment on the issues FAA ultimately deemed decisive.

Similarly, FAA failed to make the public aware that it might use a cost-benefit analysis to determine the scope of the rule, and that the costs and benefits to all-cargo operations could be the decisive factor. Had IPA had such notice, it would have commented on such purported costs (had they been disclosed) and provided information regarding the benefits of the rule. *See supra* at 35–41. FAA's failure to disclose the basis of its cargo cost-benefit analysis until the end of the rulemaking process deprived IPA of the ability to submit comments and data on those and other issues that might have changed FAA's analysis.[17] Because the

[17] On the cost side, it is difficult to detail what IPA might have said because FAA did not provide any support for the source of its cost figures; it only provided a gross breakdown of such figures, with no underlying support for how the figures

cost-benefit analysis proved to be the determining factor in the treatment of all-cargo operations in the Final Rule, and left IPA's members subject to the admittedly inadequate existing rules, IPA was clearly prejudiced by FAA's inadequate notice. *See Chamber of Commerce*, 443 F.3d at 904.

V. REMEDY

IPA does not seek vacatur of the Final Rule because it does not want to delay implementation of safety improvements to passenger operations. IPA challenges *only* FAA's decision to exclude all-cargo operations from the Final Rule. Final Rule at 330 (J.A. ___). IPA asks the Court to remand the Final Rule and direct FAA to reconsider the cargo exclusion by (1) following the standards and factors mandated by Congress, and (2) providing IPA and the public sufficient notice of the substance of the proposed rule, as well as its underlying data and analysis, to provide a meaningful opportunity to comment.

This Court has granted a remand but not vacatur in similar circumstances. In *Advocates for Highway Safety*, the Court noted that "[w]hile unsupported agency action normally warrants vacatur, [] this court is not without discretion." 429 F.3d at 1151 (citation omitted). "'The decision whether to vacate depends on

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were calculated. *See supra* at *13*–14 n.3. IPA would have commented on FAA's assumptions and calculations related to alleged costs that would be imposed on all-cargo operations (if disclosed) based on its experience and knowledge of all-cargo operations, including issues related to flightcrew scheduling.

the seriousness of the order's deficiency . . . and the disruptive consequences of an interim change that itself may be changed.'" *Id.* (quoting *Allied-Signal, Inc. v. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150–51 (D.C. Cir. 1993)). Because petitioners did not argue that the rule as adopted was itself harmful, "only that it [did] not go far enough," and because the Court found no harm in leaving the rule as adopted in place while the agency reconsidered its approach, the Court was "convinced that the final rule should be remanded, but that it should remain in effect while the agency crafts an adequate regulation." *Id.*

That principle applies here because IPA does not challenge the substance of the Final Rule as applied to passenger operations; it only seeks to extend the Final Rule to all-cargo operations. Because the Court can provide IPA with all of the relief it seeks without voiding the Final Rule, vacatur is not necessary and would only serve to disrupt the orderly implementation of the Final Rule with regard to passenger operations. Accordingly, IPA respectfully requests that the Court remand the matter to FAA and direct the agency to reconsider application of the new flightcrew member duty and rest rules to all-cargo operations in accordance with the law.

CONCLUSION, RELIEF SOUGHT, AND REQUEST FOR ORAL ARGUMENT

For the foregoing reasons, the Petitioner respectfully requests the Court to grant the Petition for Review, remand the Final Rule to FAA to consider new

flightcrew member duty and rest rules for all-cargo operations that comply with Section 212 of the Safety Act and the APA, and schedule the case for oral argument.

Respectfully submitted this 24th day of April, 2012.

___________/S/_____________

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 28(a)(11) and 32(a)(7)(C), I hereby certify on this 24th day of April, 2012, that:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of April, 2012, I caused to be served by ECF a true copy of the BRIEF OF PETITIONER INDEPENDENT PILOTS ASSOCIATION on the following persons:

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