

[Oral Argument Not Yet Scheduled]

UNITED STATES COURT OF APPEALS  
DISTRICT OF COLUMBIA CIRCUIT

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

Petitioners, )

v. )

FEDERAL MOTOR CARRIER SAFETY )  
ADMINISTRATION, and the UNITED STATES, )

Respondents, )

No. 12-1113  
consolidated with  
No. 12-1092

**RESPONSE OF INTERVENOR IN SUPPORT OF PETITIONERS  
IN SUPPORT OF JOINT MOTION OF PETITIONERS  
FOR PARTIAL RECONSIDERATION OF WORD LIMITS  
SET FORTH IN THE JUNE 13, 2012 ORDER  
AND  
MOTION TO EXCEED WORD LIMITS**

Pursuant to Rule 29(d) of the Federal Rules of Appellate procedure,  
Petitioners’ request that the Court amend its June 13<sup>th</sup>, 2012 Order should be  
granted. Rule 29(d) states, “[e]xcept by the court’s permission, an amicus brief may  
be no more than one-half the maximum length authorized by these rules for a party’s  
principal brief.” The June 13<sup>th</sup>, 2012 Order creates an appearance of bias because  
Amici supporting the petitioner in the consolidated case, American Trucking

Associations, Inc. (ATA), which is also an intervenor in support of Respondents in the above captioned case, are permitted to file a brief equal in length to Petitioners' 7,000 word principal brief while Intervenors are permitted to file a 8,750 word brief in support of Respondents—longer than Petitioners' principal brief and twice as long as the brief of the Intervenor supporting Petitioners. I have consulted with Jonathan Levy, counsel for the respondents, and he has authorized me to inform the Court that “respondents believe that the Court’s order is fair and reasonable and are prepared to proceed according to its terms. However, respondents do not oppose the relief sought in this motion or any other reasonable increase in the word limits for Mr. Trescott’s’ briefs so long as respondents’ word limit is increased by a commensurate amount.”

As Petitioners stated on page 5 of their Joint Motion, ATA’s and Public Citizen et al.’s respective interests are not merely “disparate”; they are directly opposed. Regardless whether Petitioners’ Joint Motion is granted, I, William B. Trescott, hereby beg leave of this Court to file a brief of at least 7,000 words on grounds that Public Citizen et al. should receive the same amount of support from their intervenor as the petitioner opposing them receives from its amici and that the issues I intend to raise are different than the issues Petitioners intend to raise. Petitioners have stated that they expect that the briefs filed by Public Citizen et al.

will not challenge these aspects of the rule. Further, I beg leave to file a 4,375 word reply brief on grounds that Circuit Rule 32(a)(2)(B)(ii) states that “[a] reply brief is acceptable if it contains no more than half of the type volume specified in Circuit Rule 32(a)(2)(B)(i)” and the Court has granted opposing intervenors leave to file a brief of up to 8,750 words.

The preliminary draft of my initial brief contains approximately 5,800 words (other than those permitted to be excluded under the Rules of Appellate Procedure). The minimum number of words necessary for each issue I intend to raise are as follows:

1) Whether the final rule fails to prescribe requirements for qualifications and maximum hours of service as required in 49 U.S.C. § 31502(b)—600 words;

2) Whether the final rule fails to prevent responsibilities from being imposed on entry-level drivers that impair their ability to operate commercial motor vehicles safely as required under 49 U.S.C. § 31136(a)(2)—1400 words;

3) Whether the final rule fails to prevent fatigued drivers required to ride with entry level drivers from being exposed to dangerous working conditions as required in 49 U.S.C. § 31136(a)(4)—800 words;

4) Whether the final rule fails to provide drivers with adequate meal and rest breaks—1000 words;

5) Whether the final rule was promulgated in excess of statutory right or limitation—1500 words.

In addition, I have included approximately 500 words in footnotes. Because my claims are arithmetical in nature including numerous statistical tables and graphs, to make the brief easier to comprehend, the Court should allow me to add at least 1000 words of explanatory material for the following reasons:

### **ARGUMENT**

I. The court's records will show it was I who demanded the settlement of *Public Citizen, et. al. v. FMCSA*, 09-1094 (D.C. Cir.). The calculations I presented in my 7,000 word initial brief have since been independently confirmed by researchers from Virginia Tech<sup>1</sup> and Penn State University.<sup>2</sup> My assumption that a death spike from 2-3PM was caused by drivers talking on cell phones and operating dispatch devices has since lead to a nationwide ban on texting while driving. The ATA and Supporting Intervenors have indicated they will brief issues relating to the rest break provision of the final rule granted in response to my arguments. Allowing additional words to argue the opposite view in my principal and reply briefs would be a more

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<sup>1</sup> Blanco, Hanowski, Olson, Morgan, Soccolich, Wu, Guo, *The Impact of Driving, Non-Driving Work, and Rest Breaks on Driving Performance in Commercial Motor Vehicle Operations*, p.78, [www.fmcsa.dot.gov/facts-research/research-technology/report/Work-Hours-HOS.pdf](http://www.fmcsa.dot.gov/facts-research/research-technology/report/Work-Hours-HOS.pdf)

<sup>2</sup> Jovanis, Wu, Chen, *Hours of Service and Driver Fatigue*, page 59, [www.fmcsa.dot.gov/facts-research/research-technology/report/HOS-Driver-Fatigue.pdf](http://www.fmcsa.dot.gov/facts-research/research-technology/report/HOS-Driver-Fatigue.pdf)

efficient use of scarce judicial resources than filing a separate brief defending the agency because they would more likely result in a settlement. The proposed briefing plan should have made clear that the unusually long reply brief agreed to by the parties was intended to accommodate this.

**II.** I was the only party to have attempted to prevent this litigation by filing a petition for reconsideration—which not denied until March 8<sup>th</sup>, 2012, three weeks after the ATA filed its petition for review. My petition might have been granted if the Agency had not been slapped with a new lawsuit. Had I not waited for the Agency to respond to my petition and filed suit at the same time Public Citizen, I would have been entitled to file a 7,000 word brief like other petitioners. Instead, the Court has limited my issues to 4,375 words. A party should not be penalized for attempting to avoid litigation. The Court should look with extreme disfavor on any party that fails to undertake every possible means of avoiding litigation.

**III.** It was my understanding that if we settled 09-1094, President Obama would appoint an Administrator with professional experience in motor carrier safety to promulgate the new rule as required under 49 U.S.C. § 113(c). Violating this statute made litigation inevitable and delayed development of more efficient intermodal technology that should have made the challenged rule unnecessary. To cover up additional deaths that resulted from the Agency's failure to comply with the Court's

previous orders,<sup>3</sup> the Administrator published false information on page 4 of her 2012-2016 Strategic Plan<sup>4</sup> claiming truck mileage grew 43.7 percent from 1999 to 2009. The previously published figure was 12 percent.<sup>5</sup> See 76 F.R. 81142.

Dramatic changes in accounting methods sometimes called cooking the books create additional burdens for litigants because citations that in previous cases needed only a footnote will now require a lengthy discussion and fact checking of multiple sources. For this reason alone, the additional word limits requested are justified.

### CONCLUSION

For the foregoing reasons, the Joint Motion should be granted.

Regardless whether the Joint motion is granted, the above request to exceed word limits should be granted on grounds that briefs of intervenors on opposite sides of a case should be similar in length.

Respectfully Submitted,



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<sup>3</sup> *Public Citizen v. FMCSA*, 374 F.3d 1209, 1218, D.C. Cir. 2004; *Advocates for Highway and Auto Safety v. FMCSA*, 429 F.3d 1136 (D.C. Cir. 2005); *Owner-Operator Indep. Drivers' Ass'n v. FMCSA*, 494 F.3d 188, (D.C. Cir. 2007)

<sup>4</sup> [www.fmcsa.dot.gov/documents/STRATEGIC-PLAN/FMCSA\\_StrategicPlan\\_2012-2016.pdf](http://www.fmcsa.dot.gov/documents/STRATEGIC-PLAN/FMCSA_StrategicPlan_2012-2016.pdf)

<sup>5</sup> NHTSA, Traffic Safety Facts, Large Trucks, 2008-2009, DOT HS 811 158, DOT HS 811 388

**CERTIFICATE OF SERVICE**

I hereby certify that I caused the foregoing Response of Intervenor In Support of Petitioners In Support of Joint Motion of Petitioners for Partial Reconsideration of Word Limits Set Forth in the June 13, 2012 Order and Motion to Exceed Word Limits to be served by the court's ECF filing system on the following:

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