

**ORAL ARGUMENT HELD APRIL 13, 2004**

**No. 03-1165**

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

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**PUBLIC CITIZEN, CITIZENS FOR RELIABLE AND SAFE HIGHWAYS,  
AND PARENTS AGAINST TIRED TRUCKERS,**

**Petitioners,**

**v.**

**FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION,**

**Respondent,**

**AMERICAN TRUCKING ASSOCIATIONS, INC., DISTRIBUTION AND LTL  
CARRIERS ASSOCIATION, AND TRUCKLOAD CARRIERS ASSOCIATION,**

**Intervenors.**

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**Reply in Support of Motion of Intervenors  
for a Stay of the Mandate**

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September 21, 2004

Intervenors, American Trucking Associations, Inc., Distribution and LTL Carriers Association, and Truckload Carriers Association, hereby submit this Reply in support of their motion for a stay of the mandate in *Public Citizen v. Federal Motor Carrier Safety Administration*, 374 F.3d 1209 (D.C. Cir. 2004). As we show below, petitioners' arguments are unavailing, and the motion should be granted.

**I. THIS COURT HAS THE AUTHORITY TO STAY THE MANDATE UNTIL A NEW RULE IS ISSUED IN THE PROCEEDINGS ON REMAND**

Petitioners argue that this Court does not have the authority to stay the mandate to maintain the status quo ante even when, as here, vacating an existing rule is likely to cause serious disruption and to harm the public interest. Rather, petitioners suggest that the Court may only remand and vacate or remand without vacating.

As a threshold matter, petitioners are wrong in accusing us of seeking a change in the remedy. *See* Petitioners' Opposition to a Stay of the Mandate ("Opp.") at 2. As we indicate below (note 1, *infra*), we were fully aware that the Court made a considered judgment, consistent with precedent, to remand *and* vacate, and we are not seeking reconsideration of that remedy. To the contrary, our motion seeks merely to stay the imposition of the remedy in order to prevent irreparable harm to the trucking industry, decreases in safety (if the old HOS rules are revived), and severe disruption and chaos in the economy and law enforcement. Thus, petitioners' assertion about "what [we] really want" (Opp. at 2) falls flat. We are asking for a stay of the mandate, not reconsideration of the remedy in this case.<sup>1</sup>

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<sup>1</sup> If we *had* moved for rehearing, requesting that the Court alter the remedy and remand the hours-of-service ("HOS") rule without vacating it, petitioners might well be protesting that such a remedy violates the Administrative Procedure Act ("APA"). *See* 5 U.S.C. § 706(2) (stating that a court shall "hold unlawful and set aside" arbitrary and capricious or illegal agency action). Indeed, uncertainty about the Court's authority to remand without vacatur was one factor

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Petitioners have offered no basis for questioning the authority of this Court to stay the mandate to permit the status quo to remain in place while the agency conducts rulemaking proceedings to correct deficiencies in a rule. They argue that such a stay is “contrary to this Court’s local rules” (Opp. at 1), but they do not specify any rules that it would violate. They argue that it has not been done before (*id.* at 2, 6), but, as FMCSA demonstrates in its reply, this contention is wrong. *See* Government’s Reply in Support of Motion to Stay Issuance of the Mandate at 2-4. And petitioners argue that the four-factor stay test was fashioned for the more typical situation in which a stay is sought “to preserve the status quo *pending further review of*

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supporting our decision to move for a stay of the mandate. *See Milk Train, Inc. v. Veneman*, 310 F.3d 747, 757 (Sentelle, J., dissenting) (“I would not simply remand, but would vacate. In my view, [o]nce a reviewing court determines that the agency has not adequately explained its decision, the Administrative Procedure Act requires the court – in the absence of any contrary statute – to vacate the agency’s action.”) (quoting *Checkosky v. SEC*, 23 F.3d 452, 491 (D.C. Cir. 1994) (Randolph, J., concurring)); *see also* Brian S. Prestes, *Remanding Without Vacating Agency Action*, 32 SETON HALL L. REV. 108, 110 (2001) (remand without vacatur violates the APA).

In addition, our belief that the Court’s decision requires more than just a better explanation of the HOS rule led us to conclude that the Court would be more likely to grant a stay of the mandate in the circumstances of this case than to amend its decision and remand without vacatur. *Cf., e.g., Ill. Pub. Telecomm. Ass’n v. FCC*, 123 F.3d 693, 693 (D.C. Cir. 1997) (“When this court remands a rule to an agency for further consideration with little or no prospect of the rule’s being readopted upon the basis of a more adequate explanation of the agency’s reasoning, the practice of the court is ordinarily to vacate the rule.”). Thus, we concluded that, in light of the decision, remand without vacatur would not be consistent with this Court’s precedent.

This Court, however, may conclude that a remand without vacatur is appropriate in this case, because of “the disruptive consequences of an interim change that may itself be changed.” *Int’l Union, United Mine Workers of Am. v. Fed. Mine Safety & Health Admin.*, 920 F.2d 960, 967 (D.C. Cir. 1990) (stating that appropriateness of remand without vacatur depends on “seriousness of the order’s deficiencies . . . and the disruptive consequences of an interim change that may itself be changed”); *accord, e.g., La. Fed. Land Bank Ass’n, FLCA v. Farm Credit Admin.*, 336 F.3d 1075, 1085 (D.C. Cir. 2003) (same). If so, the Court could, on its motion, amend its decision to allow a mandate to issue on those terms.

the Court’s decision” (Opp. at 2), but, even if true, this would not restrict the Court’s authority to issue a stay in situations in which one of the stay factors may not be readily applicable.<sup>2</sup>

Moreover, petitioners’ criticisms of the concept of staying the mandate in these circumstances ignore the obvious advantages such a procedural device affords. For instance, because, as Judge Randolph has noted, parties do not typically address the issue of remedy during briefing on petitions for review, the stay-of-the-mandate rubric affords the Court an opportunity to receive briefing and make a considered, informed judgment on the appropriate remedy. *See Honeywell Int’l, Inc. v. EPA*, 374 F.3d 1363, 1375 (D.C. Cir. 2004) (Randolph, J., concurring).

In addition, because the Court retains jurisdiction to issue the mandate if the agency fails to act expeditiously or to conform to the decision, the stay-of-the-mandate procedure provides *greater* assurance of agency obedience to the court’s decision than would the issuance of a mandate remanding without vacatur. Thus, there is no basis for concluding that the Court lacks the authority to issue a stay of the mandate in the circumstances of this case.<sup>3</sup>

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<sup>2</sup> Petitioners’ argument in this respect seems to put the cart before the horse. There is no indication in *Virginia Petroleum Jobbers Ass’n v. FPC*, 259 F.2d 921 (D.C. Cir. 1958), that the formulation of the four-factor stay test was designed to *outlaw* stays where further judicial proceedings are not contemplated or when any of the four factors are not readily applicable. To the contrary, this Court has consistently held that the test is to be applied flexibly. *See, e.g., McSurely v. McClellan*, 697 F.2d 309, 317 (D.C. Cir. 1982) (each of the *Virginia Petroleum Jobbers* “requirements may, of course, be applied flexibly according to the unique circumstances of each case”); *Va. Petroleum Jobbers Ass’n*, 259 F.2d at 925 (“[I]njury held insufficient to justify a stay in one case may well be sufficient to justify it in another . . .”).

<sup>3</sup> Petitioners claim (Opp. at 2) that a stay of the mandate “would keep this case in a state of suspended animation” and that the fact that the agency *is* conducting a new rulemaking shows that the agency and intervenors are not really seeking a stay of the mandate. This argument ignores the purpose for which Judge Randolph advocates the stay-of-the-mandate procedure (which is to maintain the status quo *while* the agency proceeds to correct flawed rules and decisions) and overlooks the practical reality of the situation facing the agency. When the

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## II. THE VIRGINIA PETROLEUM JOBBERS FACTORS SUPPORT A STAY

### A. The Likelihood of Success on the Merits

Petitioners argue that the first stay factor relates to the likelihood of success in further judicial proceedings and that, in the case of a stay of the mandate, no such further proceedings are contemplated. Therefore, petitioners conclude, a stay would be improper.

As we noted above, there is no indication that the *Virginia Petroleum Jobbers* factors were intended to foreclose stays unless further judicial proceedings were in the offing. Accordingly, if the Court concludes that a stay of the mandate may be appropriate to preserve the status quo when a rule has been found unlawful, the fact that the first stay factor is not readily applicable here – which we, too, noted in our motion – should not give this Court pause.

Moreover, petitioners have not rebutted our suggestion that, to the extent the first factor is deemed pertinent, the Court should consider whether the rule emerging from the remand proceedings is more likely to look like the new HOS rule than the old one, and that, under this

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mandate is stayed by the Court, it hangs over the agency's head like Damocles' sword. The Court's ability to immediately issue the mandate if the agency fails to act in accordance with the Court's decision would provide a powerful incentive for the agency to act appropriately – a more powerful incentive than an open-ended remand without vacatur would provide. Thus, a stay until a new rule goes into effect would not induce agency inaction – and would not defeat the purposes for which Judge Randolph advocates stays of the mandate (*see* Opp. at 7) – because the agency would recognize that dilatoriness could result in the immediate issuance of the mandate.

The fact that such stays should not be issued “routinely” (*id.* at 2) does not mean that, in extraordinary cases – such as this one – where the vacatur of a rule would be highly disruptive to large sectors of the economy, the Court should not stay its mandate. Finally, we are not aware of any instances in which members of this Court have challenged the authority of the Court to issue a stay of the mandate where rules have been invalidated. Even in the debate between Judges Silberman and Randolph on the propriety of remand-without-vacatur in *Checkosky*, Judge Silberman did not suggest that the Court lacks the authority to stay the mandate when it has decided that a rule is arbitrary and capricious. *See Checkosky*, 23 F.3d at 465 (opinion of Silberman, J.) (discussing stay of the mandate).

analysis, the agency is likely to prevail on the merits. *See* Motion of Intervenors American Trucking Associations, Inc., Distribution and LTL Carriers Association, and Truckload Carriers Association for a Stay of the Mandate (“Intervenors’ Mot.”) at 4.<sup>4</sup>

**B. Irreparable Harm**

In our motion, we showed that, because any transition from one set of HOS rules to another could not be accomplished without months of preparation, the trucking industry would face severe dislocation and chaos if the mandate were not stayed. We showed that the transition to a different HOS regime would require extensive retraining of personnel in numerous positions; revision of schedules, freight rates, software, and safety management systems, as well as operational policies and procedures; and education of customers. *See* Intervenors’ Mot. at 5-7. We also pointed out that shippers would face similar dislocation as a result of repeated changes to the rules within a short period. *See id.* at 7-8. The scope of the necessary changes is reflected in the economic costs of such a transition, which would be borne by the industry and would not be recoverable. *Id.* at 8-10. Moreover, such iterative rule changes pose a threat to highway safety, because they breed uncertainty. *Id.* at 10.

Focusing on our discussion of the financial costs resulting from a failure to grant a stay – a four-paragraph portion of our six-page discussion of irreparable harm – petitioners claim that we have not carried our burden of establishing irreparable harm. Petitioners’ argument rests largely on the proposition that economic costs do not “rise to the level of irreparable harm.”

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<sup>4</sup> Petitioners sole apparent response to our argument in this regard (Opp. at 6 n.3) attacks a straw man, rather than the argument that we actually made. We did *not* suggest that the Court should consider whether the new rule is more likely than the old one to survive a new rulemaking. *Id.* To the contrary, we expressly acknowledged that a third rule would emerge on remand, and we suggested that the Court consider whether that third rule would look more like the new HOS rule than the old one. *See* Intervenors’ Mot. at 4.

Opp. at 9. Petitioners also express skepticism about our affiants' discussions of the costs of transitioning back to the old rules. *Id.* at 9-10.<sup>5</sup>

Petitioners' arguments are misguided. The chaos that would result from a rapid conversion to the old HOS rules (and the subsequent conversion to a new set of rules) poses a great threat of irreparable harm to the trucking industry and to the interests of highway safety. In addition, although economic loss "does not, *in and of itself* constitute irreparable harm" (*Randolph-Sheppard Vendors of Am. v. Weinberger*, 795 F.2d 90, 108 (D.C. Cir. 1986) (emphasis added)), we did not base our irreparable harm argument solely on the large unrecoverable costs of multiple HOS rule conversions. As noted, we offered abundant evidence of other harms to support our irreparable harm argument.

Moreover, petitioners' selective quotation of *Virginia Petroleum Jobbers* (Opp. at 9) is misleading. *Virginia Petroleum Jobbers* did *not* say that economic injury is utterly irrelevant to the irreparable harm issue. Rather, *Virginia Petroleum Jobbers* stated that economic injury that may ultimately be compensated or remedied in the later course of proceedings would not suffice for a finding of irreparable harm. "The key word in this consideration is irreparable. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the

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<sup>5</sup> Their incredulity about our estimates of the costs of returning to the old rules may be explained by the fact that petitioners focus almost exclusively on retraining costs. *See* Opp. at 10. This blinkered perspective ignores the costs and burdens of operational changes – changes in schedules, software, operating procedures, dispatching practices, and the like – that would be necessary for any HOS rule conversion. Even if retraining costs were not considered, a transition would be extremely costly and would cause severe dislocation, as well as potentially serious compromises in safety, because of the need to institute rapid revisions in software and operations. Moreover, the hundreds of millions of dollars of costs entailed by a temporary transition to the old rules are not insignificant in a highly competitive industry that operates on tight profit margins. Finally, the costs and efforts required for a temporary conversion back to the old rules would be a wasteful diversion of resources – including resources that could be used for more productive safety initiatives.

absence of a stay, are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.” *Va. Petroleum Jobbers Ass’n*, 259 F.2d at 925.<sup>6</sup> This statement clearly does not preclude *irreparable* economic injuries – economic injuries for which “adequate compensatory or other corrective relief” *cannot* “be available at a later date” – from supporting a finding of irreparable harm, especially when, as here, the economic losses are not the only or even the principal injuries likely to result from a denial of the stay. *See Iowa Utils. Bd. v. FCC*, 109 F.3d 418, 426 (8th Cir. 1996) (“We are mindful of the precedents that declare that ‘economic loss does not, in and of itself, constitute irreparable harm’. . . . [This proposition], however, rest[s] on the assumption that the economic losses are recoverable. The threat of unrecoverable economic loss, however, does qualify as irreparable harm.”) (citations omitted).<sup>7</sup>

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<sup>6</sup> *Randolph-Sheppard Vendors*, which petitioners also cite, quotes this same language. *See Randolph-Sheppard Vendors of Am.*, 795 F.2d at 109.

<sup>7</sup> *Virginia Petroleum Jobbers* rejected the use of categorical rules regarding the kind of injuries that could give rise to a finding of irreparable injury: “But injury held insufficient to justify a stay in one case may well be sufficient to justify it in another, where the applicant has demonstrated a higher probability of success on the merits.” 259 F.2d at 925.

Petitioners’ other cited cases (Opp. at 9) also do not support an argument that economic costs are utterly irrelevant to the issue of irreparable harm. *FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 244 (1980), involved a claim that a party would be irreparably harmed if the issuance of an FTC complaint was not judicially reviewed before the conclusion of the administrative adjudication. *Cities of Anaheim & Riverside, Cal. v. FERC*, 692 F.2d 773, 779 (D.C. Cir. 1982), involved an attempt to obtain judicial review of procedural, non-final orders in a FERC licensing proceeding. We, however, have not focused our irreparable harm claim solely on economic losses. And unlike in *Standard Oil* and *Cities of Anaheim & Riverside*, as well as *Randolph-Sheppard* and *Virginia Petroleum Jobbers*, this case does not involve a request that further administrative proceedings be prematurely terminated or interrupted, or that normal exhaustion-of-remedy requirements be excused, on the basis of a claim of irreparable economic harm.

C. Harm to Others

With regard to the third stay factor, we argued that the new HOS rule must be compared to the old HOS rule, which would be revived if a stay were not granted. Petitioners do not so much dispute this analysis as attempt to sidestep it, accusing us of seeking to “relitigate the merits of the case.” Opp. at 16-17. And they assert that their “views on the old rules are beside the point, however, because the new rules are much worse.” Opp. at 18.

Because the old rules will be revived if a stay is not granted, it is perfectly sensible to compare the new rules to the old ones in determining whether a stay would harm other interested parties. Such a comparison is not an attempt to “relitigate the merits of the case.” The issue in this case was *not* whether the new rules are safer than the old rules, but whether, in light of the statutory directive under which the agency acted, the adoption of the new rules was arbitrary and capricious or contrary to law.

Moreover, as the Court repeatedly stated, it did *not* make a final decision about any aspects of the rule other than the failure to address driver health as a distinct consideration. *See Public Citizen*, 374 F.3d at 1216, 1217. Thus, the Court did not find that any other aspects of the new rule were arbitrary and capricious, and certainly did not find that, because of them, the new rule is less safe than the old one.<sup>8</sup>

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<sup>8</sup> Accordingly, the Court did *not* conclude that any aspects of the rule that it found troubling – such as the eleven-hour driving provision or the 34-hour restart – outweigh the safety benefits afforded by the reduction in on-duty time from fifteen to fourteen hours, the increase in off-duty time from eight to ten hours, the imposition of a framework closer to a 24-hour work/rest cycle than the old rule’s framework, and the closing of the “loophole” (374 F.3d at 1214) that allowed drivers to extend their workday by taking breaks throughout the day.

Nor did the Court find that the new rule would degrade driver health or pose a “serious threat to truck drivers.” Opp. at 18. The Court merely held that the agency failed to consider driver health, as required by the governing statute. *See* 374 F.3d at 1217.<sup>9</sup>

With regard to the evidence of the industry’s experience under the new rules, we were candid about the preliminary nature of the data and the difficulty of drawing firm conclusions from it. *See, e.g.*, Intervenor’s Mot. at 12. Nevertheless, the absence of reports of increased accident rates under the new rules supports the conclusion that the retention of the new rules during a stay would not harm others, as compared with a revival of the old rules.

Finally, petitioners do not offer any response to our arguments that a return to the old rules would have a negative impact on safety, because it would encourage a return to practices, such as the tolling of off-duty time, that contribute to driver fatigue. *See id.* at 13-16; *see also Public Citizen*, 374 F.3d at 1214 (new rule eliminated “loophole” that “allowed drivers to extend the fifteen-hour duty period by taking breaks throughout the day”). Nor do they address our argument that the 34-hour restart provision is proving to have a beneficial safety impact. *See* Intervenor’s Mot. at 13 n.7.

In the end, the assertion that the new rule is “worse” than the old rule rests solely on petitioners’ *ipse dixit*. Certainly, the Court found no such thing. Thus, to the extent that

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<sup>9</sup> Petitioners’ discussion of the third stay factor *assumes* that the new rule will have an overall negative effect on driver health. *See* Opp. 16-17, 18. Petitioners’ assertions are purely speculative. Moreover, petitioners consistently conflate driver health and driver fatigue issues (*see* Opp. at 17, 18), despite the fact that the Court’s decision rested largely on the conclusion that the agency erred in failing to treat driver health as a distinct issue. *See* 374 F.3d at 1217 (“Under the statute, vehicle safety is a distinct factor the agency must consider, so considering the effect of driver health on safety cannot be equal to considering the impact on the physical condition of the operators.”). Petitioners also ignore the fact that the Court stated that the agency could permissibly conclude that any of the new rule’s detrimental effects on driver health are not material or are outweighed by other considerations. *See id.*

petitioners are suggesting that the Court has already found the old rules to be safer than the new rules, *they* are seeking to rewrite the decision.

**D. The Public Interest**

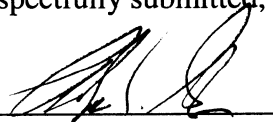
Petitioners' argument on this stay factor appears to be that the retention of the new rules during a stay would harm the public interest because they are less safe than the old rules and because it is never in the public interest to retain rules that have been held to be arbitrary and capricious. *See Opp.* at 18.

We have addressed the first proposition in the previous section. With regard to the claim that “[i]t is not in the public interest to perpetuate a regulation that this Court has determined violates federal law and is so fundamentally flawed as to be arbitrary and capricious” (*id.*), this assertion would preclude staying the mandate (or remanding without vacating) in any case in which the Court has concluded that a rule is arbitrary and capricious or contrary to law. This is not a principle that this Court has embraced, and it should not do so here.

**CONCLUSION**

Intervenors' motion for a stay should be granted.

Respectfully submitted,



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## CERTIFICATE OF SERVICE

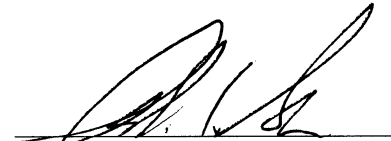
I hereby certify that on this 21st day of September, 2004, I served copies of the foregoing Reply in Support of Intervenors' Motion for a Stay of the Mandate by e-mail and overnight delivery on Petitioners, Respondents, and the *amici* at the following addresses:

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