CASE NOT YET SCHEDULED FOR ORAL ARGUMENT

CASE NO. 11-1483
Consolidated with Case No. 15-1027

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

INDEPENDENT PILOTS ASSOCIATION,
Petitioner,

v.

FEDERAL AVIATION ADMINISTRATION,
Respondent.

FINAL REPLY BRIEF OF PETITIONER INDEPENDENT PILOTS ASSOCIATION

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

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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 the FAA's decisions under review, are set forth in the attached Addendum:

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TABLE OF AUTHORITIES

*Authorities upon which we chiefly rely are marked with asterisks.

Cases

Statutes

Legislative, Regulatory and Other Materials

GLOSSARY OF ABBREVIATIONS

APA	Administrative Procedure Act, 5 U.S.C. § 702 *et seq.*
ATA	Air Transport Association of America
CAA	Cargo Airline Association
EPA	Environmental Protection Agency
FAA	Federal Aviation Administration
Final Rule	Flightcrew Member Duty and Rest Requirements, Final Rule, 77 Fed. Reg. 330, FAA Dckt. No. the FAA-2009-1093-2517 (Jan. 4, 2012)
FSRIA	Final Supplemental Regulatory Impact Analysis Flightcrew Member Duty and Rest Requirements, Final Rule, Fed. Reg. 236 FAA Dckt. No. FAA–2009–1093 (Dec. 9, 2014)
IPA	Independent Pilots Association
ISRIA	Initial Supplemental Regulatory Impact Analysis Flightcrew Member Duty and Rest Requirements Initial Rule, Fed. Reg. 77 FAA Dckt. No. FAA-2009-1093 (Dec. 12, 2012)
NHTSA	National Highway Traffic Safety Administration
NPRM	Flightcrew Member Duty and Rest Requirements, Proposed Rule, 75 Fed. Reg. 55852, FAA Dckt. No. the FAA-2009-1093-0001 (Sept. 14, 2010)
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

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SUMMARY OF ARGUMENT

The Safety Act provides that the FAA "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." Safety Act § 212(a)(1) (Addendum 19). Congress then identified a number of factors the FAA must consider in issuing the new regulations, all of which relate to the causes of fatigue and ways to address fatigue. *Id.* § 212(a)(2) (Addendum 19-

20).

Turning its back on the scientific information showing that the old rules were inadequate, and apparently responding to political pressure late in the regulatory process, the FAA excluded all-cargo operations from the new flight and duty time rules in 14 C.F.R. Part 117 based solely on a cost-benefit analysis. As explained in detail in IPA's Opening Brief, the FAA's reliance on its cost-benefit analysis is contrary to the plain language of the Safety Act that mandates that new flight and duty time rules be based on the best available scientific information and address problems relating to pilot fatigue.

Faced with the plain language of the Safety Act, the FAA takes a tortured interpretive path to justify its reliance on costs to exclude all-cargo operations from Part 117. Believing that the Supreme Court's recent decision in *Michigan v. EPA*, 135 S. Ct. 2699 (2015), helps its cause, the FAA's Brief is an extended exercise in free-form statutory interpretation that seeks to leverage the words "appropriate" and "any other matters" found in Subsection 212(a)(2)(M) into a basis to ignore the operative language of Section 212(a)(1) directing the FAA to issue regulations "based on the best available scientific information."

The result of that interpretive tour de force, as the FAA itself stated in its Questions Presented, is a statute that "authorizes the FAA to consider 'any other matters' that the FAA considers 'appropriate' in addressing 'problems' of pilot

fatigue . . . ." Brief of Respondent ("FAA Br.") at 2. The FAA claims this construction of the Safety Act is entitled to deference under *Chevron U.S.A., Inc. v. NRDC, Inc.* 467 U.S. 837 (1984).

The FAA's rendition of the statute looks more like a kidnapper's ransom note than a plain reading of the statute. The FAA simply deletes the language that does not help the FAA, selects the words it likes best, and rearranges those words to fit the FAA's desired reading. That approach to statutory construction obviously violates the fundamental rule of applying the plain meaning of the words Congress used and is not entitled to any *Chevron* deference. As the Supreme Court explained in *Michigan*,

> *Chevron* allows agencies to choose among competing reasonable interpretations of a statute; it does not license interpretive gerrymanders under which an agency keeps parts of statutory context it likes while throwing away parts it does not.

135 S. Ct. at 2708.

The FAA's attempts to justify its cut-and-paste rendition of the Safety Act fail at every step. Neither applicable Executive Orders nor the APA require consideration of costs in this case. The plain language of the Safety Act, construed using traditional tools of statutory construction, shows that Congress intended to preclude consideration of costs in the new anti-fatigue regulations it required. The FAA's position fails at *Chevron* step one. Moreover, any attempt to construe the

Safety Act otherwise leads to results so far removed from the language and purpose of the Safety Act that it fails even under *Chevron* step two.

Finally, even if the FAA could consider costs despite the plain language of the Safety Act, the cost-benefit analysis it prepared fails to correctly balance the costs and benefits. Fundamentally, its analysis is a result-driven exercise that makes arbitrary judgments that are not supported by substantial evidence in the record. However considered, the FAA's decision to exclude all-cargo operations from Part 117 must be vacated.

ARGUMENT

I. THE FAA FAILS TO EXPLAIN ITS FAILURE TO TAKE *ANY* ACTION TO ADDRESS PILOT FATIGUE FOR ALL-CARGO OPERATIONS

The FAA fails to provide any rational explanation for its exclusion of all-cargo operations from the Final Rule and its decision to leave all-cargo pilots under the former regulation that the FAA and Congress had determined is inadequate in addressing pilot fatigue. In its Opening Brief, IPA demonstrated that the FAA failed to discharge its duty by failing to take *any* action to address the problems relating to cargo pilot fatigue because the FAA left all-cargo operations subject to the pre-Safety Act regulations, codified at 14 C.F.R. Part 121, that the FAA itself had concluded "do not adequately address the risk of fatigue…." NPRM at 55855 (J.A. 560); Final Rule at 334 (J.A. 6). Brief of Petitioner ("IPA Br.") at 23-28.

IPA also showed that the decision to make *no* changes to the flight and duty time rules for all-cargo pilots was contrary to the FAA's own scientific findings, which demonstrated that cargo operations, which occur mostly at night and during pilots' "window of circadian low," pose the *greatest* risk of fatigue. *See* Final Rule at 333-34, 336 (J.A. 5-6, 8); *see* IPA Br. at 12.

The FAA fails to respond to those points directly and offers no justification for its failure to take *any* action other than to rely on its cost-benefit analysis. The result is a rule that, when applied to all-cargo carriers, (1) is not based on the best available scientific information, (2) does not address the acknowledged problem of fatigue for all-cargo pilots and crew, and (3) leaves in place the Part 121 regulations that both the FAA and Congress recognize do not adequately address the serious problem of pilot fatigue. Neither the Safety Act nor the APA permit the FAA to rely on a cost-benefit analysis as the sole basis for not taking *any* action to address the problem of fatigue for all-cargo pilots. *See Advocates for Highway & Auto Safety v. Fed. Motor Carrier Safety Admin.*, 429 F.3d 1136, 1145 (D.C. Cir. 2005) (an agency violates the APA when it adopts "a rule with little apparent connection to the inadequacies it purports to address").

II. THE FAA IMPERMISSIBLY RELIED ON A COST-BENEFIT ANALYSIS TO EXCLUDE ALL-CARGO OPERATIONS

The FAA argues that (1) the APA *required* it to consider costs (FAA Br. at 21-23) and (2) that the Safety Act did not preclude it from considering costs (*id.* at

23-38). The FAA is mistaken on both points, and its arguments rest on a highly selective and misleading reading of the law and statute.

A. Neither The APA Nor *Michigan v. EPA* Mandate The Use Of A Cost-Benefit Analysis

The FAA and the CAA argue that the Supreme Court's recent decision in *Michigan v. EPA*, holds that the APA requires that agencies must consider costs in issuing regulations as a necessary aspect of "reasoned rulemaking" regardless of the language of the statute. FAA Br. at 23; *see also* Brief for Intervenor Cargo Airline Association ("CAA Br.") at 21-23. That argument is wrong, and misreads *Michigan* by taking words and phrases out of context.

The Court itself made clear that the discretion to rely on a cost-benefit analysis depends on the language of the *statute* not on a blanket rule under the APA. As the *Michigan* Court stated, "[t]here are *undoubtedly* settings in which the phrase 'appropriate and necessary' does not encompass cost." 135 S. Ct. at 2707 (emphasis added). The key factor the Court identified in deciding that cost considerations were not precluded in *Michigan* is that 42 U.S.C. § 7412(n)(1)(A) directed the EPA to determine *whether* regulations were "appropriate and necessary." *Id.* (Addendum 1). The Court concluded that cost consideration is a "centrally relevant factor when deciding whether to regulate." *Id.*

The Safety Act is fundamentally different. In the Safety Act, Congress *directed* the FAA to regulate. The FAA has no discretion; it must issue regulations

"based on the best available scientific information" pursuant to Section 212(a) (Addendum 19). The kinds of threshold issues an agency would consider in deciding whether to exercise its discretion to issue regulations, including cost, simply do not apply when Congress has mandated regulation on a specific basis. As the *Michigan* Court explained in distinguishing *Whitman v. American Trucking Ass'n*, 531 U.S. 457 (2001):

> where the Clean Air Act expressly directs EPA to regulate on basis of a factor that on its face does not include cost, the Act normally should not be read as implicitly allowing the Agency to consider costs anyway.

135 S. Ct. at 2709.[1]

Although the Court in *Michigan* used broad language to emphasize that consideration of costs was appropriate there, the Court also made clear that consideration of costs is *not* appropriate or even permitted in all cases. Indeed, such a rule would effectively amend the numerous statutes where Congress has precluded consideration of costs. Because the Safety Act directs the FAA to issue regulations based on the best science, a factor that does not include costs, the Act

[1] The FAA also argues that *Whitman* only affirmed EPA's refusal to consider costs because other sections of the Clean Air Act *did* require consideration of costs. FAA Br. at 25. The FAA has it precisely backwards. In *Whitman*, the Court pointed to the fact that Congress referred to costs in other sections of the Act as evidence that Congress deliberately *withheld* consideration of costs in the Act's Section 109. 531 U.S. 457, 468 (2001). In *Michigan*, conversely, the Court held that Section 7412(n)(1)(A) required consideration of cost even though many other provisions of the Act also required consideration of cost. 135 S. Ct. at 2709.

cannot be read to allow consideration of costs anyway.[2]

None of the other cases cited by the FAA establish a different rule. The FAA quotes Justice Powell's concurring opinion in *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 664 (1980), in which he recognizes only that "the statute," not the APA, required consideration of costs. *Id.* at 667. In contrast, the Safety Act limits the factors to be considered to "the best scientific information available." In *Int'l Union, UAW v. OSHA*, 938 F.2d 1310, 1321 (D.C. Cir. 1991), this Court held "only that cost-benefit is a *permissible* interpretation of" the Occupational Safety and Health Act of 1970. That case did not establish a mandatory cost-benefit rule under the APA.. *Competitive Enterprise Inst. v. NHTSA*, 956 F.2d 321, 323-24 (D.C. Cir. 1992), is not a cost-benefit case but simply held that NHTSA had to consider safety *and* energy savings in considering a modification to the CAFE gas mileage standards.

The two Executive Orders the FAA cites also do not support its position. FAA Br. at 20. Executive Order 12866 recognizes that it cannot compel a decision based on a benefit-cost analysis if the legislation directs another approach; its directions apply only "to the extent permitted by law and where applicable."

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[2] *Entergy Corp. v. Riverkeeper, Inc.,* 556 U.S. 208 (2009), also cited by the FAA (FAA Br. at 22, 25) and the CAA (CAA Br. at 25-28) is not to the contrary. That case, like *Michigan*, turned on the specific language of the statute to support the EPA's decision to rely on a cost-benefit analysis. *Riverkeeper* does not establish a broad rule that costs must always be considered. *See* IPA Br. at 40-41.

Executive Order No. 12866 § 1(a) & 1(b), 58 Fed. Reg. 51,735 (Oct. 4, 1993) ("EO 12866") (Addendum 26). Executive Order 13563 is similarly limited "to the extent permitted by law," and further provides that regulatory decisions "must be based on the best available science," belying the cost-only approach taken by the FAA here. Executive Order No. 13563 § 1(a) & 1(b), 76 Fed. Reg. 3,821 (Jan. 21, 2011) ("EO 13563") (Addendum 36).

Rather than the broad proposition that the APA requires the FAA to consider costs in all cases, *Michigan* and the other cases cited by the FAA stand for the more modest proposition that the FAA's authority to consider costs depends on the specific language of the statute. Here, there is no plausible reading of the Safety Act that would allow the FAA to consider costs.

B. The Plain Language Of The Safety Act Precludes Consideration Of Costs And The FAA's Position Is Not Entitled To Deference Under *Chevron* Step One

The FAA contends that its interpretation of the Safety Act "commands *Chevron* deference under step one." FAA Br. at 38. For the FAA "to claim all the authority possible under *Chevron*, deference to its statutory interpretation is called for only when the devices of judicial construction have been tried and found to yield no clear sense of congressional intent." *General Dynamics Land Sys. v. Cline*, 540 U.S. 581, 600 (2004). Here, those devices of statutory construction make clear that Congress spoke precisely to the issue and did not give the FAA the

authority or discretion to rely on a cost-benefit analysis to exclude all-cargo operators from the new science-based flight and duty rules.

Contrary to basic principles of statutory construction, the FAA's argument largely ignores the language of Section 212(a) as written and depends instead on misquoting the statute and misstating its plain language. In its statement of the issues, the FAA describes Section 212(a)(1) as a statute that "authorizes the FAA to consider 'any other matters' that the FAA considers 'appropriate' in addressing 'problems' of pilot fatigue . . . . " FAA Br. at 2. That statement omits the key phrase "best available scientific information" and treats the remaining language like a linguistic buffet in which the FAA can pick and choose what words it likes, ignore what words it does not like, and arrange the words it likes in any order it pleases to derive the meaning the FAA desires. As the Court in *Michigan* made clear, that kind of "interpretive gerrymander[]" is impermissible. 135 S. Ct at 2708.

1. The FAA Cannot Ignore the Phrase "Based on the Best Available Scientific Information"

The only way that the FAA can articulate its argument is to studiously ignore the phrase "based on the best available scientific information." Indeed, in its lengthy argument on the meaning of Section 212, FAA Br. at 19-38, the FAA only acknowledges that phrase once in a vain attempt to interpret it into meaninglessness. *Id*. at 36. That failure to meaningfully address the plain

language of the statute exposes the FAA's position as unsupportable under *Chevron*.

First, the phrase "best available scientific information" establishes a specific and unambiguous basis for the regulation. As the Court made clear in *Whitman,* when a statute specifies the basis of regulation, the agency must issue regulations based on that factor and may not consider costs or other factors. 531 U.S. at 465. *See also Michigan*, 135 S. Ct. at 2709. Scientific information does not include cost, and the FAA offers no authority to the contrary.

Second, the FAA and the CAA argue that "best available scientific information" means only that the FAA must consider science in determining the "scope and nature of the problem," but not issuing regulations to address the problem. FAA Br. at 36-37; CAA Br. at 24. But Section 212(a)(1) could not be clearer that the regulations themselves must be based on the best available science and must specify limitations on duty hours to address problems relating to pilot fatigue. Section 212(a)(1) does not authorize the FAA to consider or define the "scope" of the problem. To the contrary, Congress identified the problem – pilot fatigue – and directed the FAA to address that problem using the best available scientific information. The FAA cannot obey Congress' command unless the regulations themselves are based on the best available science.

The FAA further argues that it acted reasonably by using a cost-benefit

analysis to define the problem differently for cargo pilots than for passenger pilots. FAA Br. at 37-38. In addition to lacking the authority to do that, the FAA never determined that the problem of fatigue in cargo pilots was lesser than the problem of fatigue in passenger pilots. Moreover, the FAA relied on its cost-benefit analysis, not science, to justify the disparate treatment. The FAA's argument is an impermissible *post hoc* attempt to recharacterize its own decision-making process. *See Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962).[3]

Finally, the FAA argues that the cost-benefit analysis itself is science. *See* FAA Br. at 36. That argument has no merit, and the FAA itself cites no authority for the proposition. The entire analysis in *Whitman*, *Michigan*, and the other cases considering when consideration of costs is permitted would be meaningless if the

[3] Both the FAA and the CAA seem to argue that there is no fatigue problem for cargo operations, discussing differences between cargo and passenger operations, the relatively few accidents, and the current Part 121 rules. *See* FAA Br. at 37-38; CAA Br. at 3-10. But the FAA has admitted that Part 121 is inadequate to address the problem of pilot fatigue. Any doubt that pilot fatigue is a problem is put to rest by the grim statistics. The FAA's data shows 4 fatigue-related cargo accidents in the twenty-year study period resulting in 7 deaths. ISRIA at 68 (J.A.2788). Also, the August 14, 2013 crash of UPS Flight 1354 was caused in part by pilot fatigue and resulted in two deaths. http://www.ntsb.gov/news/press-releases/Pages/PR20140909.aspx (accessed Oct. 23, 2015). Moreover, the FAA did not hesitate to impose Part 117 on mainline passenger operations despite no known accidents caused by fatigue, underscoring that the FAA's duty to regulate here is not driven by a consistent definition of the problem.

FAA's position were correct.[4]

2. The FAA Cannot Rewrite the Statute to Confer More Discretion than Congress Provided

The FAA's lack of fidelity to the words Congress actually used is seen further in the fact that it misquotes the statute itself and describes the statute using words that do not appear in the statute. For example, the FAA summarizes Section 212(a) as follows:

> Section 212(a)(1) sets forth the duty to regulate in broad terms, *viz.*, "to address [sic] limitations on the hours of flight and duty time allowed for pilots to address problems relating to fatigue." This language requires regulations to "address" [sic] hours of flight and duty time, *but only where necessary* "to address the problems" with respect to "pilot fatigue."

FAA Br. at 34-35 (emphasis added). This is a blatant rewriting of Section 212 in an effort to conjure a meaning that Congress did not intend.

First, Section 212(a)(1), requires the FAA to "*specify limitations* on the hours of flight and duty time allowed for pilots," (Addendum 19) (emphasis added), not "address" those hours. Congress' command was specific, but the FAA tries to revise it in less mandatory terms. Although perhaps a misquote, it

[4] Similarly, the CAA argues that "[i]nherent in the notion of a 'problem' is the weighing of costs and benefits." CAA Br. at 24. But that reading of "problem" finds no support in the definition of "problem" or any other authority. Plainly there can be a problem even if one chooses not to solve it due to cost or another factor. Here, Congress did not allow consideration of costs to define the problem or devise solutions.

underscores that the FAA seeks to construe the statute in a manner that suits its litigation position rather than applying the language Congress actually used.

Second, the FAA states that the Safety Act authorized the FAA to regulate "only where necessary 'to address problems'" and that the statute does not constrain the FAA's discretion in addressing those problems. FAA Br. at 34-35. But Section 212(a) does not state that the FAA may regulate only "where necessary."[5] The FAA *adds* that phrase to the statute in order to conjure more discretion than Congress actually conferred. As the authority cited by the FAA makes clear, the FAA cannot add language to a statute to suit its preferred interpretation. *See* FAA Br. at 30 (citing *Water Quality Ass'n Employees' Benefit Corp. v. United States*, 795 F.2d 1303, 1308 (7th Cir. 1986); *United States v. Sonmez*, 777 F.3d 684, 688 (4th Cir. 2015)).

3. Subsection 212(a)(2)(M) Does Not Open the Door to Base The Regulation On Costs

The only argument by the FAA and the CAA based on words that Congress actually used is that Subsection 212(a)(2)(M), which allows the FAA to "consider and review" . . . [a]ny other matters the Administrator considers appropriate,"

[5] The FAA argues that Section 212(a)(1)'s reference to "pilots" did not necessarily mean "*all* pilots" and that other classes of pilots are also excluded from Part 117, implying that the FAA had discretion to exclude all-cargo pilots from Part 117. FAA Br. at 35-36. But the statute itself does not support the FAA's argument. In any event, it is immaterial that other operations are also not included in Part 117; the issue here is whether all-cargo operations were properly excluded based on a cost-benefit analysis.

allows it to consider costs. FAA Br. at 27-28, 37; CAA Br. at 33 (*See* Addendum 20). The FAA argues that term "'any' should be given its ordinary dictionary meaning . . . and the terms 'other matters' that may be 'appropriate' are likewise extremely broad in their reach," FAA Br. at 37, and should be understood to include costs, particularly given the broad meaning of "appropriate" in the Clean Air Act provision considered in *Michigan*. *Id*. at 27 (citing *Michigan*, 135 S. Ct. at 2707).

That argument ignores the fundamental rule that

> [i]n determining whether Congress has specifically addressed the question at issue, a reviewing court should not confine itself to examining a particular statutory provision in isolation. The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context.

Shays v. FEC, 414 F.3d 76, 105 (D.C. Cir. 2005) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000)). *See also Am. Mining Cong. v. EPA*, 824 F.2d 1177, 1185 (D.C. Cir. 1987) ("everyday meaning" of a word must give way to the purpose and structure of the statute at *Chevron* step one). That rule has particular force here because the "word 'appropriate' is inherently context-dependent." *Sossamon v. Texas*, 131 S. Ct. 1651, 1659 (2011). In considering the meaning of the phrase in the context of the statute, the question becomes "appropriate" to what?

The plain language of Section 212(a) makes clear that the "any matters" in

Subsection 212(a)(2)(M) must be "appropriate" for issuing the science-based regulations called for in Section 212(a)(1) (Addendum 19-20). Subsection 212(a)(2) lists factors the FAA must consider "[i]n conducting this rulemaking." "This rulemaking" was defined in Section 212(a)(1) as being "based on the best available scientific information." (Addendum 19-20). It follows that the catch-all provision in Subsection 212(a)(2)(M) allows the FAA to consider "other matters" "appropriate" to issuing regulations based on the best available science. Any other result would ignore the plain language of the statute and violate the principle that 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." *Whitman*, 531 U.S. at 464.[6] The FAA's reading of Subsection 212(a)(2)(M) renders superfluous Congress' mandate that the regulation sets limits based on "best available scientific information."

4. The FAA Fails To Explain Why The Statutory Canons Do Not Reinforce The Plain Language Of Section 212

The FAA argues that the canons of statutory construction do not apply at *Chevron* step one and, in any event, do not "hold up" in the context of the Safety Act. FAA Br. at 32-35. Those arguments are incorrect and emphasize how

[6] *Michigan* is not to the contrary. The statutory provision there allowed EPA to consider anything appropriate to decide whether to issue regulations, which led the Court to acknowledge costs as one important factor in considering whether to issue regulations.

unmoored the FAA's position is from any principled basis for statutory construction.

First, contrary to the FAA's assertion, IPA does not contend that *ejusdem generis* and *noscitur a sociis* "standing alone" demonstrate Congress' clear intent under *Chevron* step one. *Id*. at 32. Those canons reinforce the plain language of Section 212(a). Although the FAA strains to limit the applicability of statutory canons to particular contexts, the case law simply does not support its position. As this Court has stated "at [*Chevron*] step one, a court must 'exhaust the traditional tools of statutory construction to determine whether Congress has spoken to the precise question at issue. The traditional tools include examination of the statute's text, legislative history, and structure, as well as its purpose.'" *Petit v. U.S. Dep't. of Educ.*, 675 F.3d 769, 781 (D.C. Cir. 2012) (quoting *Bell Atl. Tel. Co. v. FCC*, 131 F.3d 1044, 1047 (D.C. Cir. 1997)). *See, e.g.*, *Public Citizen v. Nuclear Regulatory Comm'n*, 901 F.2d 147, 157 (D.C. Cir. 1990) (applying *ejusdem generis* at *Chevron* step one).

Second, the FAA fails to make any argument against the application of the canon *noscitur a sociis*, which precludes the FAA's reliance on Subsection 212(a)(2)(M) to regulate based on costs rather than the best science. Even if the FAA is right about *ejusdem generis* (which it is not) its argument fails because *noscitur a sociis* independently supports IPA's position.

Third, the FAA's argument that the use of *ejusdem generis* does not "hold up" to the context of Section 212 misses the mark. FAA Br. at 34. The FAA reasons that restricting Section 212(a)(2)(M)'s "any other matters" only to factors similar to the factors in (A) through (L) is inappropriate because it conflicts with the broad discretion afforded the FAA by Section 212. *Id*. But the FAA's claim of broad discretion in Section 212(a)(1) depends on ignoring the phrase "best available scientific information," *id.*, which plainly limits the FAA's authority by requiring that the regulations be based on science. The FAA's argument turns the doctrine of *ejusdem generis* on its head by seeking to use a general phrase in Subsection 212(a)(2)(M) to make meaningless the specific language in Subsections 212(a)(2)(A)-(L) *and* Section 212(a)(1). That topsy-turvy argument is foreclosed by the cases the FAA itself cited, which confirm that the specific controls over the general. FAA Br. at 34 (quoting *CSX Transp., Inc. v. Ala. Dep't. of Revenue*, 562 U.S. 277, 295 (2011)).

C. The FAA's Interpretation of Section 212 Fails to Satisfy *Chevron* Step Two

Contrary to the FAA's and CAA's arguments, IPA argued in succinct terms that the FAA's interpretation of Section 212 is unreasonable under *Chevron* step two. *See* IPA Br. at 42-43. The FAA's interpretation of Section 212 to authorize a cost-benefit analysis directly conflicts with the plain language of the Safety Act, ignores the purpose of the Act, and conflicts with well-established rules of

statutory construction. *Id*. It was unnecessary to provide a complete recitation of the reasons why the FAA's interpretation is unreasonable under *Chevron* step two. *See Kutler v. Carlin*, 139 F.3d 237, 246 (D.C. Cir. 1998) ("We need not focus unnecessarily on the question of whether the Archivist's interpretation falls afoul of congressional intent under *Chevron* step one or is simply unreasonable under *Chevron* step two. In either case we are satisfied that it is not a permissible interpretation of the Act."). The FAA's interpretation can be rendered unreasonable under *Chevron* step two for the same reasons its interpretation fails under step one. *See Fedway Assocs., Inc. v. U.S. Treasury,* 976 F.2d 1416, 1424 (D.C. Cir. 1992) (The Court stated that it would deem an interpretation "'unreasonable' under the second part of the *Chevron* analysis even had [it] not come earlier to a confident conclusion regarding Congress' intent under the first part of the *Chevron* analysis.").

Even if the Court deems the statute ambiguous on whether the FAA's cost-benefit analysis is authorized, the FAA's interpretation remains unreasonable under *Chevron* step two. Under *Chevron* step two, the FAA cannot "exploit some minor unclarity to put forth a reading that diverges from any realistic meaning of the statute lest the agency's action be held unreasonable." *Massachusetts v. United States Dep't of Transp.*, 93 F.3d 890, 893 (D.C. Cir. 1996). The FAA's interpretation is unreasonable because, among other things, it excludes cargo

operations based on costs despite recognizing that "fatigue factors . . . are universal" regardless of whether one is a cargo or passenger plane pilot (NPRM at 55857, 55863 (J.A. 562, 568)), and is contrary to Congress' mandate that the rule reflect the "best available scientific information available." Courts have found an agency's interpretation unreasonable under *Chevron* step two based on similar factors. *See e.g.* 93 F.3d at 894 (stating that DOT's interpretation of the statute "could not be deemed reasonable in light of the text and structure [of the statute]"); *see also Associated Gas Distribs. v. FERC*, 899 F.2d 1250, 1261-63 (D.C. Cir. 1990) (finding the FERC's interpretation of the Natural Gas Policy Act unreasonable under *Chevron* step two because it was contrary to the statute's language and legislative history, did not further the statute's policies, and could "undermine" the statutory regime); *see also Afge v. Fed. Labor Rels. Auth.*, 798 F.2d 1525, 1528 (D.C. Cir. 1986) ("[E]ven under the deferential standard of *Chevron*, [the agency's] interpretation of the Statute is an impermissible one. It ignores the familiar canon that statutes should be construed 'to give effect, if possible, to every word Congress used.'") (citation omitted).

III. THE FAA'S COST-BENEFIT ANALYSIS IS ARBITRARY AND CAPRICIOUS

Even if the FAA could rely on a cost-benefit analysis in issuing the regulations, it acted arbitrarily in excluding all-cargo operations from Part 117 because the cost-benefit analysis itself is fundamentally flawed and fails to provide

a reasoned basis for the FAA's decision.

A. The Cost-Benefit Analysis Does Not Demonstrate A Reasonable Decision-making Process

The FAA argues that its decision to exclude all-cargo operations from Part 117 is reasonable because leaving all-cargo operations in Part 117 would have resulted in a negative cost-benefit ratio for all operations. FAA Br. at 40-42.

But the law does not require that a cost-benefit ratio be positive, and none of the authority cited by the FAA establishes such a rule. In *Am. Trucking Ass'ns, Inc. v. Fed. Motor Carrier Safety Admin*, this Court recognized that a "'serious flaw'" or otherwise arbitrary and capricious reasoning can crash an agency's cost/benefit analysis" 724 F.3d 243, 254 (D.C. Cir. 2013). Nothing in *Am. Trucking Ass'ns* imposes a requirement of a positive cost-benefit ratio. *Helicopter Ass'n Int'l, Inc. v. FAA*, 722 F.3d 430, 439 (D.C. Cir. 2013), also did not establish such a rule and further did not involve a challenge to a rulemaking decision based only on a cost-benefit analysis. The cost issue was a cost assessment under the Regulatory Flexibility Act. Indeed, the Executive Orders regarding cost-benefit analyses broadly require that costs and benefits be taken into account when adopting regulations, but do not require that benefits always exceed costs. *See* EO 12,866 § 1(b) (Addendum 26); EO 13,563 § 1(b) & (c) (Addendum 36).

The FAA's argument is further undermined by its own rulemaking process. Even with respect to passenger operations, benefits exceed costs only in the high

case – the least likely case. *See* FSRIA at 6 (J.A.3322). The FAA exercised its judgment that the benefits were worth the costs to regulate passenger operations, even if there was uncertainty that the benefits would in fact exceed the costs. A different tally of costs and benefits for all-cargo operations may cause the FAA to exercise its judgment in a different manner, even if benefits do not exceed costs in all or any cases. Under the APA, the question here is whether the FAA exercised its judgment reasonably, based on a sound cost-benefit analysis, and provided a reasonable explanation for its differential treatment of all-cargo operations.

The failure of the FAA to engage in a truly reasoned decision-making process is underscored by the fact that the FAA did not use its analysis to explore whether Part 117 could be modified to be both more cost effective and based on the best scientific information. Rather, the FAA used its cost-benefit analysis in a result-oriented manner to justify the exclusion of all-cargo operations despite its admission that Part 121 does "not adequately address risk of fatigue…." *See* NPRM at 55855 (J.A. 560). The result is a rule that does not address the problem the FAA and Congress identified, in violation of fundamental principles of reasoned decision-making under the APA.

B. The FAA Fails To Provide An Adequate Explanation For Its Ten-Year Study Period

In its Brief, IPA showed that the FAA arbitrarily chose to exclude a ten-year period from the twenty-year data it gathered on all-cargo accidents by concluding

that "other safety initiatives have likely partially mitigated the impacts of fatigue issues" even though regulations on flight duty and rest had not changed over the twenty-year period. IPA Br. at 47 (quoting FSRIA at 24 (J.A. 3340)). Selecting only half of data to be used in the cost-benefit analysis excluded three cargo crashes occurring during the first ten-year period from the FAA's consideration of benefits in regulating all-cargo operations. *Id*. at 46.[7] In its response, the FAA again fails to provide a statistically acceptable reason for excluding the first ten-year period from its analysis. It only repeats that it relied on comments from Air Transport Association of America (ATA) observing the difference in the number of accidents in the two ten-year periods and that it tested that assertion. *See* FAA Br. at 44-45. But that merely verifies that ATA correctly counted the number of accidents in each ten-year period; it does not provide any support for the conclusion that changes in safety rules *caused* the decline in accidents. Indeed, the FAA's highly qualified conclusion that unidentified "safety initiatives have likely partially mitigated the impacts of fatigue issues" lays bare the lack of evidence in the record to support the FAA's decision. FSRIA at 24 (J.A.3340). The FAA's exclusion of the first ten-year period precluded the FAA from accurately

[7] The FAA also understated the benefits of applying the Final Rule to cargo operations by misclassifying an all-cargo flight that crashed as a passenger flight. *See* IPA Br. at 46 n.6. In its response, the FAA does not refute this misclassification.

determining the benefits of regulating all-cargo operations in violation of the APA. *See Bensenville v. FAA*, 376 F.3d 1114, 1122 (D.C. Cir. 2004) (The "FAA cannot simply declare its 'expertise'; it must exercise that expertise and demonstrate sufficiently that it has done so else we have nothing to review much less defer to.").

C. The FAA Arbitrarily Dismissed The Benefits Of Preventing Ground Fatalities And Damages Caused By All-Cargo Crashes

The FAA arbitrarily dismisses the benefits of avoiding ground fatalities and damages because the evidence substantiating those benefits came from Europe, and not the United States. *See* FAA Br. at 54. As a result, the FAA fails to meaningfully consider the benefits of preventing ground fatalities and damages from all-cargo crashes in its cost-benefit analysis. In response, the FAA makes an artificial distinction by focusing on the difference in arbitration regulations in the United States and Europe. *Id*. at 54-55. But the FAA does not explain how those differences lead to a greater likelihood of ground fatalities and damages abroad than in the United States. The FAA also fails to provide any factual basis for the assertion that because of different land-use patterns in the United States, it does not need to consider ground fatalities and damages occurring outside of the country. *Id*. at 55. The FAA responds without providing any factual basis that "the only true relevant fact is that the on-the-ground deaths in the United States are significantly lower than they are outside the United States . . . ." *Id*. This "is not a

statement of reasoning, but of conclusion. It does not 'articulate a satisfactory explanation' for the agency's action." *Tourus Records, Inc. v. DEA*, 259 F.3d 731, 737 (D.C. Cir. 2001) (citation omitted).

The FAA's dismissal of the benefits in avoiding fatalities on the ground from all-cargo operations is particularly arbitrary because it attributed substantial benefits to regulating mainline passenger operations that had zero fatigue-related crashes in the United States. *See* IPA Br. at 56. The FAA does not and cannot explain why it assigns substantial benefits to avoiding passenger accidents when there is no historic evidence of any risk but fails to consider the possibility of fatalities or damages on the ground despite evidence of such a risk. *See County of Los Angeles v. Shalala,* 192 F.3d 1005, 1022 (D.C. Cir. 1999) (agency acts arbitrarily when it "offers 'insufficient reasons for treating similar situations differently'" where the "Secretary ha[d] inadequately explained why the 1984 data were suitable for one significant calculation but unreliable for another") (citation omitted).

D. The FAA's Presumption That All-Cargo Operators Will Be Already Complying With The Part 117 Rules Is Not Supported By The Record

As IPA has explained, the FAA's 15% effectiveness rating presumes that all cargo carriers will comply with Part 117 because the 15% rating was based on a crash where the FAA claims the crew met the Part 117 rules. *See* IPA Br. at 49.

The presumption is invalid because all-cargo carriers have made it clear that they do not intend to comply with the new rules. *See id.* at 49-50. Despite several pages discussing the topic of effectiveness, the FAA fails to refute that the 15% effectiveness rating presumes all-cargo carriers will comply with the rules. The FAA summarily claims the "process is eminently reasonable." FAA Br. at 49. Under the APA, "conclusory statements will not do; an 'agency's statement must be one of *reasoning.*'" *Amerijet Int'l, Inc. v. Pistole*, 753 F.3d 1343, 1350 (D.C. Cir. 2014) (citation omitted).

The FAA attempts to downplay its error by arguing that it "address[ed] uncertainty concerns" by using a 75% effectiveness rating to determine the benefits of the rule in the high case. FAA Br. at 49-50. But additional analyses do not address the significant flaw raised by IPA, nor do they make the 15% effectiveness rating presumption less wrong because the FAA's decision rests on a materially incorrect assumption. A different spread of costs and benefits in the low case could lead to a different decision on the scope of the regulations, and the FAA cannot foreclose that possibility without first considering the correct information.

Further, if the FAA's assumption that all-cargo operations are capable of complying with Part 117 is valid, or even partially valid, then compliance costs of all-cargo carriers are significantly overstated.[8] IPA Br. at 50. However, the FAA

[8] Contrary to the FAA's assertions, FAA Br. 40 n.14, IPA *has* challenged

did not factor its assumption of existing compliance when determining the compliance costs of all-cargo operations. The FAA cannot use its assumption in two directly conflicting ways. Using the FAA's own 15% effective rate, either compliance is easier and therefore cheaper for all-cargo operations, or more all-cargo operations are not currently complying and therefore the benefits of regulating all-cargo operations are more significant than the FAA determined.

E. The FAA's Differential Treatment Of Mainline Passenger Operations And All-Cargo Operations Has No Rational Basis

As IPA detailed, the FAA arbitrarily attributed millions of dollars of benefits to regulating mainline passenger operations despite the fact that the FAA's data show no risk of fatigue-related accidents in mainline passenger operations. *See* IPA Br. at 56. Because there is no risk of fatigue-related accidents in mainline passenger operations, the substantial benefits attributed to regulating mainline passengers stem merely from an arbitrary assumption.

In response, the FAA argues that separating passenger operations from all-cargo operations is justified because "passenger operations involve potentially hundreds of passengers . . . ." FAA Br. at 57. This flimsy reasoning falls far short of what the FAA has touted as "a careful, scientific analysis of the problem of pilot fatigue" in assessing the cost and benefits of the Final Rule. FAA Br. at 36. Although it is true that the *consequences* of an accident involving a mainline

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the FAA's calculation of costs. IPA Br. at 50.

passenger operation could involve hundreds of passengers, there is no evidence to suggest that there is any possibility of that occurring. In contrast, even though the consequences of an accident involving a cargo flight are less horrific in terms of the number of potential fatalities, the FAA's data demonstrates that there is a very real risk of such accidents. The FAA never explains why it is justified in taking no action to protect the lives of cargo pilots and crew, despite a known risk, while it takes the maximum action to protect the lives of mainline passenger pilots, crew, and passengers despite *zero* risk. The FAA's treatment of mainline passenger operations not only skews the cost-benefit analysis, but it has the effect of devaluing the lives of cargo pilots in comparison to passengers on planes that, based on the FAA's data, have never crashed due fatigue-related problems.

Congress did not task FAA with determining whether cargo pilots' lives are worth saving. Nor did Congress authorize FAA to determine whether the costs to all-cargo carriers is too much to provide their pilots with the same limitations on flight and duty time as those afforded to passenger plane pilots. Congress and the FAA recognized, without qualification, that the FAA's "current regulations do not adequately address risk of fatigue." *See* NPRM at 55855 (J.A. 560). In enacting Section 212, Congress directed the FAA to solve the problem of pilot fatigue by issuing "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…." (Addendum 19). The FAA's failure to protect the lives of all pilots, crew, and passengers, regardless of type of operation, violates the purpose and language of the Safety Act.

CONCLUSION, RELIEF SOUGHT, AND REQUEST FOR ORAL ARGUMENT

For the foregoing reasons, the Petitioner respectfully requests the Court to grant the Petition for Review, and schedule the case for oral argument.

Respectfully submitted this 20th day of November, 2015.

_____/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 20th day of November, 2015, that:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of November, 2015, I caused to be served by ECF and U.S. Mail, First-Class Postage pre-paid, a true copy of the FINAL REPLY BRIEF OF PETITIONER INDEPENDENT PILOTS ASSOCIATION on the following persons:

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