

ORAL ARGUMENT NOT YET SCHEDULED

No. 16-1430

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**TRUCK TRAILER MANUFACTURERS
ASSOCIATION, INC.,**

Petitioner,

v.

**UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, et al.,**

Respondents.

On Petition for Review of Decision of the U.S. Environmental Protection
Agency and the U.S. Department of Transportation**STATE INTERVENORS' FINAL OPENING BRIEF**

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

A. Parties and Amici.

Petitioner is the Truck Trailer Manufacturers Association, Inc.

Respondents are the United States Environmental Protection Agency; Andrew R. Wheeler in his official capacity as Administrator of the United States Environmental Protection Agency; National Highway Traffic Safety Administration; and James C. Owens, in his official capacity as Deputy Administrator of the National Highway Traffic Safety Administration.

Respondent-Intervenors are the California Air Resources Board; the Center for Biological Diversity; the Environmental Defense Fund; the Natural Resources Defense Council; the Sierra Club; the Union of Concerned Scientists; and the States of Connecticut, Iowa, Massachusetts, Oregon, Rhode Island, Vermont and Washington.

B. Rulings Under Review.

The agency actions under review are “Greenhouse Gas Emissions and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles—Phase 2,” 81 Fed.Reg. 73,478 (Oct. 25, 2016).

C. Related Cases.

This case was not previously before this Court or any other court. This case was formerly consolidated with *Racing Enthusiasts & Suppliers Coalition v. EPA*, No. 16-1447, a case involving a challenge to different provisions of the final rule challenged here. On December 26, 2019, this Court severed this case from *Racing Enthusiasts* and continued to hold that case in abeyance.

TABLE OF CONTENTS

	Page
GLOSSARY	
STATEMENT OF THE ISSUES	1
PERTINENT STATUTES AND REGULATIONS.....	1
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	4
STANDARD OF REVIEW	7
ARGUMENT	7
I. EISA Unambiguously Requires NHTSA to Regulate the Fuel Economy of Trailers.....	7
A. The Plain Meaning of the Term “Vehicle” Includes Trailers	7
B. Congress’ Intent that the Term “Vehicle” Include Tractor-Trailers is Consistent with its Colloquial Use of the Term “Truck”	14
C. TTMA’s Arguments that Trailers Are Not “Vehicles” Lack Merit.....	15
II. NHTSA’s Standards Remain Effective Even If EPA Does Not Have Independent Authority To Regulate Trailers	17
A. NHTSA’s Fuel Economy Standards are Independent from EPA’s Greenhouse Gas Standards.....	18
B. The Joint Compliance Process Regulations Can Continue to Function Even if EPA’s Substantive Standards Are Invalidated.....	20
1. Congress Established a Role for EPA in the Regulatory Framework for Fuel Economy Standards.....	21

TABLE OF CONTENTS
(continued)

	Page
2. EPA’s Compliance Process Regulations are Severable from EPA’s Substantive Standards.....	23
3. Even if EPA’s Standards and Compliance Process Regulations were Entirely Invalidated, Both Agencies’ Regulations Pertaining to NHTSA’s Standards Should be Remanded Without Vacatur	27
CONCLUSION.....	30

TABLE OF AUTHORITIES

	Page
CASES	
<i>*Allied–Signal, Inc. v. Nuclear Regulatory Comm’n</i> 988 F.2d 146 (D.C. Cir. 1993).....	27, 28
<i>*Bragdon v. Abbott</i> 524 U.S. 624 (1998).....	8
<i>Clean Air Project v. EPA</i> 891 F.3d 1041 (D.C. Cir. 2018).....	7
<i>Cnty. for Creative Non-Violence v. Turner</i> 893 F.2d 1387 (D.C. Cir. 1990).....	27
<i>*Davis County Solid Waste Mgmt. v. U.S. EPA</i> 108 F.3d 1454 (D.C. Cir. 1997).....	18, 20
<i>*Delta Const. Co. v. EPA</i> 783 F.3d 1291 (D.C. Cir. 2015).....	19, 20, 25
<i>Fertilizer Inst. v. EPA</i> 935 F.2d 1303 (D.C. Cir. 1991).....	28
<i>Fin. Planning Ass’n v. SEC</i> 482 F.3d 481 (D.C. Cir. 2007).....	18
<i>Fox Television Stations, Inc. v. F.C.C.</i> 280 F.3d 1027 (D.C. Cir. 2002).....	27, 28
<i>Heartland Regional Med. Ctr. v. Sebelius</i> 566 F.3d 193 (D.C. Cir. 2009).....	28
<i>Keene Corp. v. United States</i> 508 U.S. 200 (1993).....	15

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

TABLE OF AUTHORITIES
(continued)

	Page
* <i>Massachusetts v. EPA</i> 549 U.S. 497 (2007).....	18, 19
<i>NRDC v. EPA</i> 489 F.3d 1250 (D.C. Cir. 2007).....	29
* <i>NRDC v. Wheeler</i> 955 F.3d 68 (D.C. Cir. 2020).....	26
* <i>PDK Labs. Inc. v. DEA</i> 362 F.3d 786 (D.C. Cir. 2004).....	11
* <i>Sierra Club v. FERC</i> 867 F.3d 1357 (D.C. Cir. 2017).....	20, 23
* <i>U.S. Sugar Corp. v. EPA</i> 844 F.3d 268 (D.C. Cir. 2016).....	29
* <i>Verizon v. FCC</i> 740 F.3d 623 (D.C. Cir. 2014).....	18, 20
STATUTES	
*49 U.S.C. § 30102(a)(7).....	8
49 U.S.C. § 32101(7).....	8
49 U.S.C. § 32901(a)(3).....	15
*49 U.S.C. § 32901(a)(7).....	4, 7, 9, 15
49 U.S.C. § 32901(a)(11).....	12
*49 U.S.C. § 32901(a)(19).....	9
*49 U.S.C. § 32902(b).....	2, 4, 14, 22
*49 U.S.C. § 32902(b)(1)(C).....	22, 25

TABLE OF AUTHORITIES
(continued)

	Page
*49 U.S.C. § 32902(b)(2)(4).....	11
*49 U.S.C. § 32902(k).....	1, 14, 22
*49 U.S.C. § 32902(k)(1)	2, 3, 5, 11, 12, 22
*49 U.S.C. § 32902(k)(1)(A).....	25
*49 U.S.C. § 32902(k)(2)	2, 5, 11, 12, 22, 25
*49 U.S.C. § 32902(k)(3)	29
*49 U.S.C. § 32904(a)(1).....	22, 25
*49 U.S.C. § 32904(c)	3, 21, 22, 25
*49 U.S.C. § 32904(e)	4, 22, 24, 25
*49 U.S.C. § 32907(b).....	4
*49 U.S.C. § 32910(d).....	21, 22
Clean Air Act.....	6, 19, 21, 22, 25, 28
Energy Independence and Security Act of 2007 .	2, 4, 5, 6, 7, 8, 9, 10, 11, 12, 14, 16, 19, 21, 22, 23, 24, 25, 28, 30
Energy Policy and Conservation Act.....	1, 11, 22
Investment Advisers Act.....	18
Motor Vehicle Safety Act.....	8, 16
Pub. L. No. 94–163, § 2, 89 Stat. 871 (1975).....	2
Pub. L. No. 110-140, 121 Stat. 1492 (2007)	2
*Pub. L. No. 110-140, § 108(a).....	2, 11

TABLE OF AUTHORITIES
(continued)

	Page
Ten-in-Ten Fuel Economy Act.....	2
 OTHER AUTHORITIES	
40 C.F.R. pt. 1037.....	3
40 C.F.R. § 1037.107.....	25
*40 C.F.R. § 1037.501.....	3
*40 C.F.R. § 1037.515.....	3
*40 C.F.R. § 1037.755.....	4, 24
49 C.F.R. § 523.2.....	10
49 C.F.R. § 535.....	3
*49 C.F.R. § 535.6.....	4, 24
*49 C.F.R. § 535.6(e)(3).....	3
*49 C.F.R. § 535.6(e)(4).....	4
*49 C.F.R. § 535.8.....	24
*49 C.F.R. § 535.8(a).....	4
*49 C.F.R. § 535.8(g).....	4
*49 C.F.R. § 535.8(h)-(j).....	4, 24
*49 C.F.R. § 535.8(j).....	4
*49 C.F.R. § 535.10(b).....	3, 4
*49 C.F.R. § 571.3.....	8, 9, 10
49 C.F.R. § 571.106.....	8

TABLE OF AUTHORITIES
(continued)

	Page
49 C.F.R. § 571.108	8
49 C.F.R. § 571.121	8
76 Fed. Reg. 57,106, 57,115 (Sept. 15, 2011)	16
76 Fed. Reg. 57125	19
76 Fed. Reg. 57130	21
76 Fed. Reg. 57132	23
81 Fed. Reg. 73,478, 73,521 (Oct. 25, 2016)	13
81 Fed. Reg. 73479-73480	23
81 Fed. Reg. at 73482	13
81 Fed. Reg. 73512	21
81 Fed. Reg. 73644-73645	19
81 Fed. Reg. 73644-73645, 73969	20
81 Fed. Reg. 73969	19
S. Rep. No. 110-278 (April 7, 2008)	11

GLOSSARY

EISA	Energy Independence and Security Act of 2007
EPA	United States Environmental Protection Agency
NHTSA	National Highway Traffic Safety Administration
TTMA	Truck Trailer Manufacturers Association, Inc.

STATEMENT OF THE ISSUES¹

1. Whether tractor-trailers and standalone trailers are “vehicles” subject to NHTSA’s regulatory authority under the Energy Independence and Security Act, 49 U.S.C. § 32902(k).

2. Whether the regulations setting out the joint process for establishing compliance with each Agency’s substantive standards can continue to function with respect to NHTSA’s fuel economy standards even in the absence of EPA’s emissions standards.

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes and regulations are reproduced in the Addendum to this brief.

STATEMENT OF THE CASE

This Memorandum adopts in full the Public Health and Environmental Respondent-Intervenors’ Background discussion (NGO Br. 3-8), with the following additions.

Congress created the national fuel economy program as part of the Energy Policy and Conservation Act for the express purpose of “conserv[ing] energy” and

¹ State Respondent-Intervenors also fully support the arguments regarding EPA’s independent statutory authority to regulate greenhouse gas emissions from trailers made in the Public Health and Environmental Respondent-Intervenors’ brief. *See* ECF 1842515 (May 12, 2020) (“NGO Br.”).

“provid[ing] for [the] improved energy efficiency of motor vehicles.” Pub. L. No. 94–163, § 2, 89 Stat. 871 (1975). Congress reaffirmed this purpose in 2007 with the passage of the Energy Independence and Security Act (EISA), the stated purpose of which was to “move the United States toward greater independence and security, to increase the production of clean renewable fuels, to protect consumers, [and] to increase the efficiency of products, buildings, and vehicles[.]” Pub. L. No. 110-140, 121 Stat. 1492 (2007).

In Title I of EISA, Congress enacted the “Ten-in-Ten Fuel Economy Act”, which, in pertinent part, required the Secretary of Transportation, in consultation with the Secretary of Energy and the Administrator of the Environmental Protection Agency (EPA), to prescribe separate average fuel economy standards for “work trucks and commercial medium-duty or heavy-duty on-highway vehicles.” 49 U.S.C. § 32902(b).

Congress prescribed a process to govern NHTSA’s development of “a fuel efficiency improvement program designed to achieve the maximum feasible improvement” for medium- and heavy-duty vehicles: (1) a study by the National Academy of Sciences, Pub. L. No. 110-140, § 108(a); (2) a subsequent study by NHTSA, 49 U.S.C. § 32902(k)(1); and then (3) a rulemaking to develop the regulations themselves, *id.* § 32902(k)(2). Congress made clear that before regulating heavy-duty vehicles, NHTSA must study “the appropriate metric for

measuring and expressing commercial medium- and heavy-duty on-highway vehicle and work truck fuel efficiency performance,” considering “the work performed by such on-highway vehicles and work trucks and types of operations in which they are used.” *Id.* § 32902(k)(1). And Congress specifically tasked EPA with developing compliance procedures for those standards. *Id.* § 32904(c).

Following this process, NHTSA in collaboration with EPA issued fuel-efficiency and greenhouse gas emission standards for medium- and heavy-duty vehicles, which included specific standards for trailers. The Public Health and Environmental Respondent-Intervenors’ description of these regulations is incorporated herein. NGO Br. 4-8.

Because the Agencies developed a joint process for establishing and verifying manufacturers’ compliance with each Agency’s respective standards, it is important to understand how that process functions with respect to NHTSA’s standards. For trailers, the compliance process is essentially four steps.² *First*, manufacturers perform (or arrange for) emissions testing and modeling of their trailers “using the equations and technologies specified” by EPA. 49 C.F.R. §§ 535.6(e)(3), 535.10(b); 40 C.F.R. §§ 1037.501, 1037.515. *Second*, manufacturers use the results of the equations as inputs to a further equation

² EPA’s compliance process regulations for trailers are located in 40 C.F.R. part 1037. NHTSA’s regulations are located in 49 C.F.R. part 535.

supplied by NHTSA in order “to calculate equivalent fuel consumption.” 49 C.F.R. §§ 535.6, 535.6(e)(4), 535.10(b). *Third*, manufacturers report the equivalent fuel consumption results to the Agencies via EPA’s database. 49 C.F.R. § 535.8(a); 49 U.S.C. § 32907(b). The Agencies reserve the right to separately request any necessary information from manufacturers. 49 C.F.R. § 535.8(g), (j). *Fourth*, EPA conducts “any verification testing required to validate the manufacturer’s submitted final data,” and reports the results to NHTSA. 49 C.F.R. § 535.8(h)-(j); 40 C.F.R. § 1037.755; 49 U.S.C. § 32904(e). NHTSA and EPA reserve the right to separately verify manufacturers’ testing and calculations for purposes of compliance with their respective standards. 49 C.F.R. § 535.6.

SUMMARY OF ARGUMENT

Congress mandated in EISA that NHTSA establish fuel economy standards for three categories of vehicles: (A) passenger automobiles, (B) non-passenger automobiles, and (C) work trucks and commercial medium-duty or heavy-duty on-highway vehicles. 49 U.S.C. § 32902(b). NHTSA’s fuel economy standards for trailers are authorized because both tractor-trailers, and trailers themselves, are “commercial medium- or heavy-duty on-highway vehicles,” defined by Congress as any “on-highway vehicle with a gross vehicle weight rating of 10,000 pounds or more.” *See* 49 U.S.C. § 32901(a)(7).

TTMA does not dispute that trailers move on highways and weigh 10,000 pounds or more; rather, TTMA claims that a trailer is not a “vehicle” because it does not use fuel. Br. of Pet’r TTMA at 37-39, ECF 1827990 (Feb. 10, 2020) (“TTMA Br.”). Congress’s definition, however, nowhere requires the use of fuel. Both as commonly understood and as historically used by NHTSA, the term “vehicle” has a broad meaning that encompasses those vehicles, like trailers, that are drawn by mechanical power. Moreover, a reading of the term that excludes trailers would contravene EISA’s stated purpose of improving the fuel economy of the commercial vehicles used on America’s highways.

NHTSA correctly identifies many of the flaws in TTMA’s arguments in arguing that its interpretation is reasonable. However, NHTSA’s interpretation is not only reasonable; it is the only permissible interpretation. EISA clearly mandates that NHTSA implement a “fuel efficiency improvement program” for heavy-duty on-highway vehicles that achieves “the *maximum feasible improvement*.” 49 U.S.C. § 32902(k)(2) (emphasis added). It requires NHTSA to comprehensively consider all practical aspects of heavy-duty commercial highway vehicle activity—e.g., the work performed and “total overall energy consumption”—before implementing its regulatory program. 49 U.S.C. § 32902(k)(1). These far-reaching directives are incompatible with the artificially narrow definition of the term “vehicle” that TTMA urges.

These statutory provisions unambiguously authorize NHTSA's fuel economy standards. EPA's Clean Air Act authority for its greenhouse gas standards is likewise sound, as argued by the Agencies and other Respondent-Intervenors. Nevertheless, NHTSA's separately authorized and independent standards would stand on their own even if the Court were to find that EPA's standards exceed that agency's authority. TTMA improperly seeks to apply severance—a remedy for partial invalidity of a single agency's regulations—to separate standards adopted by two *different* agencies. Here, the Agencies stated that the standards are independent and severable.

Through EISA, Congress created a statutory structure contemplating a joint compliance process for independent, but aligned, standards, and the Agencies' properly promulgated regulations implement that joint compliance process. NHTSA and EPA's jointly-promulgated regulations setting out testing and calculation procedures as part of the joint process for establishing and verifying compliance with each Agency's standards can still serve these functions with respect to NHTSA's standards should EPA's substantive standards be invalidated. Thus, these compliance process regulations are severable from EPA's substantive standards.

Even if the Court finds that EPA lacks authority for its standards and its compliance process regulations cannot be severed, the Court should remand the

Agencies' joint compliance process regulations without vacatur so NHTSA (acting alone or with EPA) can correct any discerned defect in the Agencies' compliance process for NHTSA's standards. Vacatur would be unnecessarily disruptive and would result in significant adverse effects to human health and the environment.

STANDARD OF REVIEW

This Memorandum adopts in full the Standard of Review as provided in the Public Health and Environmental Respondent-Intervenors' brief. NGO Br. 10-11.

ARGUMENT

I. EISA UNAMBIGUOUSLY REQUIRES NHTSA TO REGULATE THE FUEL ECONOMY OF TRAILERS

A. The Plain and Unambiguous Meaning of the Term "Vehicle" Includes Trailers

Congress required NHTSA to establish fuel economy standards for any "on-highway vehicle with a gross vehicle weight rating of 10,000 pounds or more." *See* 49 U.S.C. § 32901(a)(7) (defining commercial medium-duty or heavy-duty on-highway vehicles). Both the plain meaning of the term "vehicle" and NHTSA's historical understanding of the term confirm that, viewed either as one-half of the tractor-trailer combination vehicle or alone, trailers meet this definition. *Nat'l Env'tl. Dev. Assoc.'s Clean Air Project v. EPA*, 891 F.3d 1041, 1048 (D.C. Cir. 2018) (explaining that in questions of statutory interpretation, courts "begin with the text") (internal quotation marks and citations omitted).

At the time of EISA's enactment, Black's Law Dictionary defined "vehicle" as "[s]omething used as an instrument of conveyance," or "[a]ny conveyance used in transporting passengers or things by land, water, or air." Black's Law Dictionary (8th ed. 2004). Moreover, elsewhere in Title 49, Subtitle VI, which encompasses "Motor Vehicle and Driver Programs" (including EISA), Congress twice defined the term "motor vehicle" as "a vehicle driven or drawn by mechanical power and manufactured primarily for use on public streets, roads, and highways[.]" 49 U.S.C. § 30102(a)(7) (governing the Motor Vehicle Safety Act); 49 U.S.C. § 32101(7) (governing Part C of Subtitle VI with the exception of Chapter 329). These definitions, which predate EISA, encompass the trailer. And indeed, NHTSA has since 1968 defined a trailer as "a motor vehicle," *see* 49 C.F.R. § 571.3, and has regulated trailers as such, *see, e.g., id.* §§ 571.106, 571.108.

While Congress did not expressly incorporate these definitions of "motor vehicle" into EISA,³ it was aware of them when drafting the Act. *Bragdon v. Abbott*, 524 U.S. 624, 631 (1998) ("Congress' repetition of a well-established term carries the implication that Congress intended the term to be construed in accordance with pre-existing regulatory interpretations."). Yet notably, when Congress provided definitions for the particular categories of vehicles NHTSA is

³ Congress instead used the broader term "vehicle," which it left undefined.

to regulate separately under EISA, it did not exclude trailers. *See* 49 U.S.C. § 32901(a)(7), (19). In contrast, Congress did exclude medium-duty passenger vehicles from its definition of “work truck,” showing its willingness to exclude categories of vehicles where desired. *See id.* § 32901(a)(19).

Congress’ use of vehicle weight and purpose to define the heavier duty category of vehicles further confirms Congress’ intent to *include all* means of conveyance that travel on highways and meet the relevant weight criteria. *See, e.g.,* 49 U.S.C. § 32901(a)(19) (defining “work truck” as “a vehicle . . . rated at between 8,500 and 10,000 pounds gross vehicle weight” that is not a medium-duty passenger vehicle); 49 U.S.C. § 32901(a)(7) (defining “commercial medium- and heavy-duty on-highway vehicle” as any “on-highway vehicle with a gross vehicle weight rating of 10,000 pounds or more”). No one disputes that trailers are a means of conveyance that meet the weight rating and travel on highways; thus, trailers are necessarily encompassed by this broad definition.

Congress’ use of the term “gross vehicle weight rating” (*see* TTMA Br. 45-46) does not change this analysis. Since well before Congress drafted EISA, NHTSA has defined “gross vehicle weight rating” as “the value specified by the manufacturer as the loaded weight of a single vehicle.” 49 C.F.R. § 571.3. For combination vehicles, the weight can also be articulated as the “gross combination weight rating,” which means “the value specified by the manufacturer as the

loaded weight of a combination vehicle.” *Id.* § 571.3.⁴ Applying these definitions, a trailer can have a gross vehicle weight rating based on the loaded weight of the trailer alone, or can be included in a gross combination weight rating, based on the loaded weight of the tractor-trailer combined.

TTMA’s argument that the term “gross vehicle weight rating” necessarily excludes trailers misses the mark. First, it relies on materials published *after* Congress enacted EISA and an agency pamphlet concerning “trailer[s] for *noncommercial*, personal use.” TTMA Br. 45-46 (emphasis added). Congress cannot be presumed to have drawn on documents that did not yet exist or are unrelated to commercial tractor-trailers. Second, trailers, on their own, can satisfy the gross vehicle weight rating established by Congress. And third, Congress was defining an entire category of medium- and heavy-duty vehicles, many of which are not combination vehicles (e.g. bucket trucks, pickup trucks, garbage trucks, and delivery vehicles). Thus, the suggestion that Congress “would have chosen the other term—gross combined weight rating—had it wanted to refer to the combined vehicle and trailer” (*id.* at 46) disregards that the use of that term might well have excluded vehicles Congress intended to include. Congress’ use of a more

⁴ NHTSA incorporated these same definitions into its regulations under EISA. 49 C.F.R. § 523.2.

generally applicable weight rating confirms, yet again, that Congress intended its definition to be *inclusive*.

Moreover, that Congress intended the term “vehicle” to cover trailers is unambiguous in the “context” of the “overall statutory scheme.” *PDK Labs. Inc. v. DEA*, 362 F.3d 786, 796 (D.C. Cir. 2004). Congress enacted EISA in 2007 to fill gaps left by fuel economy achievements under the Energy Policy and Conservation Act (P.L. 94-163), passed in 1975. *See* S. Rep. No. 110-278, at 5 (April 7, 2008). Congress intended “to reduce fuel consumption,” and thereby simultaneously, *inter alia*, reduce American dependence on foreign oil and the cost of gasoline. *Id.* at 2. As TTMA acknowledges, EISA is designed to serve these same purposes by improving the “fuel economy” of certain categories of vehicles, including medium- and heavy-duty on-highway vehicles. *See* Br. 37.

EISA directs NHTSA to create a “fuel efficiency improvement program” for “commercial medium- and heavy-duty on-highway vehicles” that will achieve the “*maximum feasible improvement*.” 49 U.S.C. § 32902(k)(2) (emphasis added). Rather than set an initial minimum standard fuel economy as Congress did for passenger vehicles (49 U.S.C. § 32902(b)(2)(4)), Congress laid out a process to govern NHTSA’s development of the first fuel efficiency regulations for this category of vehicles. This process included a study by the National Academy of Sciences, Pub. L. No. 110-140, § 108(a), a subsequent study by NHTSA, 49 U.S.C.

§ 32902(k)(1), and a rulemaking to develop the regulations themselves, *id.*

§ 32902(k)(2).

Congress directed NHTSA to comprehensively consider the practical aspects of commercial highway vehicle activity in developing its regulations. Among other things, Congress instructed NHTSA to determine “the appropriate metric for measuring and expressing commercial medium- and heavy-duty on-highway vehicle and work truck fuel efficiency performance,” which takes into consideration “*the work performed* by such on-highway vehicles and work trucks and *types of operations in which they are used*,” in addition to their “*functionality*, use, duty cycle, . . . and *total overall* energy consumption.” 49 U.S.C.

§ 32902(k)(1) (emphases added).

In so doing, Congress rejected the incorporation of the existing measure of “fuel economy,” developed for light-duty vehicles, into the medium- and heavy-duty vehicle standards, because the existing definition did not take into consideration “the work performed” by these larger, industrial vehicles. *See* 49 U.S.C. § 32901(a)(11). Indeed, pursuant to Section 108 of EISA, the National Academy of Sciences studied the issue and determined that gas mileage “is not the appropriate measure for [medium- and heavy-duty vehicles],” and rather, the “most meaningful metric of fuel efficiency will be in relation to the work performed, such as fuel consumption per unit payload carried.” *See* Technologies and Approaches

to Reducing the Fuel Consumption of Medium- and Heavy-Duty Vehicles (2010 NAS Study) at 2 (JA290).

Taking into consideration the “work performed” by tractor-trailers—as Congress requires NHTSA to do—trailers have “fuel economy,” because they require the consumption of fuel to convey goods. Improvements in the fuel economy of trailers would improve the fuel efficiency of the tractor-trailer. *See* 81 Fed. Reg. 73,478, 73,521 (Oct. 25, 2016) (“Inherently, trailers are designed to be pulled by a tractor, which in turn affects the fuel efficiency of the tractor-trailer as a whole.”); Factors and Considerations for Establishing a Fuel Efficiency Regulatory Program for Commercial Medium- and Heavy-Duty Vehicles (2010 NHTSA Study) at 31-35 (JA300-304) (summarizing the impact on fuel consumption of different trailer features). NHTSA’s trailer regulations are expected to result in a 9 percent increase in fuel savings by model year 2027, separate from any fuel savings attributable to tractors alone. 81 Fed. Reg. at 73482; *see also* 2010 NAS Study at Appendix F (JA294-295). Thus, NHTSA must regulate both parts of the tractor-trailer to achieve the “maximum feasible improvement” in this category of vehicle.

B. Congress' Intent that the Term "Vehicle" Include Tractor-Trailers is Consistent with its Colloquial Use of the Term "Truck"

TTMA notes that Congress used the term "truck" in the legislative history and an uncodified section of EISA directing the scope of the National Academy of Science's study. Br. 43-44. Contrary to TTMA's assertion, the plain meaning and common usage of the word "truck" includes tractor-trailers. *See, e.g.*, 2010 NAS Study at 1 (JA289) (defining seven types of "trucks" including the tractor trailer, box truck, bucket truck, and pickup truck); Dictionary.com, <https://www.dictionary.com/browse/truck> (defining "truck" as "any of various forms of vehicle for carrying goods and materials, usually consisting of a single self-propelled unit but also often composed of a trailer vehicle hauled by a tractor unit"). The Academy in fact understood this word in its colloquial sense, and used it interchangeably with the word "tractor-trailer." *See, e.g.*, 2010 NAS Study at 2 (JA290) ("A partially loaded *tractor trailer* would consume less fuel per mile than a fully loaded *truck*, but this would not be an accurate measure of the fuel efficiency of moving goods.") (emphasis added). There is no reason to view Congress' use of the word "truck" as excluding tractor-trailers.

Moreover, when it drafted the codified sections of EISA, Congress chose to use the word "vehicle," instead of truck. 49 U.S.C. § 32902(k); *see also id.* § 32902(b) (requiring regulations for "work *trucks*" but "medium-duty or heavy-

duty on-highway *vehicles*”). This demonstrates Congress’s intent that NHTSA adopt fuel economy standards for all vehicles meeting the weight and purpose criteria. Put simply, the use of “vehicle” in the statutory mandate for the standards confirms that Congress intended to include all trucks *and more* within the scope of NHTSA’s authority.

C. TTMA’s Arguments that Trailers Are Not “Vehicles” Lack Merit

TTMA’s primary challenge to NHTSA’s authority to regulate trailers is the assertion that trailers do not “use fuel.” Br. 40, 42, 47. This is both irrelevant and incorrect. Congress rejected a definition of medium- and heavy-duty vehicle that turns on the use of fuel. *Compare* 49 U.S.C. § 32901(a)(3) (defining “automobile” as “4-wheeled vehicle that is propelled by fuel, or by alternative fuel”) *with* 49 U.S.C. § 32901(a)(7) (defining “commercial medium- and heavy-duty on-highway vehicle” without a fuel-based limitation). “[W]here Congress includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) (internal quotation marks and citations omitted).

And in any event, trailers do “use” fuel in fulfilling their intended purpose of transporting goods. *See supra* at 13. Indeed, trailers “use” fuel in the same manner that tractors do—both require connection to an engine that then allows

them to move on a highway with the use of fuel.⁵ That a trailer might occasionally be used for storage, without moving or consuming fuel (*see* TTMA Br. 37), is immaterial. Just as Congress conferred authority on NHTSA under the Motor Vehicle Safety Act to regulate trailer safety features, even though a stationary trailer does not raise safety concerns, Congress conferred authority to regulate trailer's fuel-economy, as trailers are ultimately intended for on-highway travel.

Further, TTMA widely misses the mark in arguing that the regulation of trailers is equivalent to the regulation of wheelbarrows, car-top carriers, and bicycle racks. *See* TTMA Br. at 39, 41. Unlike the trailer, these items obviously do not satisfy the elements of the definition of a "medium- and heavy-duty on-highway vehicle," and they are not an inextricable component of a combination vehicle, as the tractor and trailer segments are for the tractor-trailer.

As NHTSA notes, the fact that EISA separately authorizes a program for rating the fuel-efficiency "effect[s] of tires," is similarly inapposite. Br. for Resp'ts at 22-23, ECF 1839164 (Apr. 21, 2020) ("Resp. Br.") (*citing* 49 U.S.C. § 32304A). That Congress singled out tires, separate from vehicles, for regulation underscores that Congress wanted a comprehensive approach to reducing fuel consumption and understood tires could make important contributions to

⁵ "Vehicles" are regulated separately from "engines" because the design of the specific vehicle has a significant influence on the emissions the engine produces. *See* 76 Fed. Reg. 57,106, 57,115 (Sept. 15, 2011).

maximizing the fuel-efficiency of on-highway vehicles. It in no way suggests, let alone establishes, that Congress intended a *narrow* definition or provided NHTSA authority to adopt a narrow interpretation of “commercial medium- or heavy-duty vehicles” such that it would be prevented from setting standards for trailers that likewise contribute substantially to fuel consumption.

And finally, TTMA’s reference to the federal criminal code’s treatment of the trailer (Br. 41) is misplaced. As the Agencies point out, “different courts’ extrapolation of language from a disparate statute and area of the law are not to be given substantial weight.” Resp. Br. at 38 (citing *Department of Homeland Sec. v. MacLean*, 574 U.S. 383, 398 (2015)).

II. NHTSA’S STANDARDS REMAIN EFFECTIVE EVEN IF EPA DOES NOT HAVE INDEPENDENT AUTHORITY TO REGULATE TRAILERS

As discussed, NHTSA’s standards are valid, and this remains true regardless of whether the Court finds that EPA exceeded its statutory authority in issuing its own standards. For the reasons explained in the briefs filed by the Agencies and other Respondent Intervenors, EPA’s standards are also within its authority. However, if this Court finds otherwise, it should nonetheless reject TTMA’s baseless attempt to distort principles of severability in order to invalidate NHTSA’s separate and independent standards. Further, the Agencies’ joint compliance process can continue to function with respect to NHTSA’s standards even in the absence of EPA’s standards.

A. NHTSA's Fuel Economy Standards are Independent from EPA's Greenhouse Gas Standards

Principles of severability govern a court's analysis of whether the partial invalidity of an agency's regulation requires the invalidation of some or all of the other provisions of that agency's regulation. *See, e.g., Verizon v. FCC*, 740 F.3d 623, 659 (D.C. Cir. 2014). The doctrine applies to other regulatory provisions adopted by "the agency" that adopted the invalid provision, *Davis County Solid Waste Mgmt. v. U.S. EPA*, 108 F.3d 1454, 1459 (D.C. Cir. 1997), not provisions independently adopted by a different agency pursuant to its own statutory authority. TTMA offers no support for its theory that a defect in one agency's regulation may somehow invalidate a regulation issued by a different agency pursuant to independent statutory authority. Each of the eight cases TTMA cites in support of its severability argument (*see* Br. 27-36) deals with severing part(s) of an action of a single agency.⁶ That analysis is inapposite here.

EPA's "statutory obligation" to regulate greenhouse gas pollution is "wholly independent of DOT's mandate to promote energy efficiency." *Massachusetts v.*

⁶ *See, e.g., Fin. Planning Ass'n v. SEC*, 482 F.3d 481 (D.C. Cir. 2007) (challenging authority of a single agency (SEC) to promulgate a single rule exempting certain broker-dealers from the Investment Advisers Act).

EPA, 549 U.S. 497, 531–32 (2007) (agencies have “independent” rulemaking authority even if there is some “overlap” between their two spheres). The Clean Air Act directs EPA to regulate pollutants that endanger human health and welfare, while EISA directs NHTSA to regulate fuel economy. As the Agencies explained in the rulemaking, “the trailer standards finalized here *will implement our respective statutory obligations.*” 81 Fed. Reg. 73644-73645 (emphasis added); *see id.* at 73969. Although the Agencies aligned compliance with their standards to “avoid inconsistency,” *Massachusetts*, 549 U.S. at 532, the standards arise from different authority, and have different goals and compliance schedules.⁷

Indeed, in the context of the Phase 1 rules (where “EPA and NHTSA collaborated” on joint standards as they did here), this Court recently explained that “even were [the Court] to vacate the EPA standards, the NHTSA standards would” remain. *Delta Const. Co. v. EPA*, 783 F.3d 1291, 1296 (D.C. Cir. 2015). That was because, though jointly promulgated, the NHTSA standards were “a separate action” with independent legal effect. *Id.* This Court rejected an argument that “the joint rule[s] create [] an indivisible ‘National Program,’” such

⁷ The passage in *Delta Const. Co. v. EPA*, 783 F.3d 1291 (D.C. Cir. 2015), on which the Agencies rely for their repeated assertion that standards for vehicular greenhouse-gas emissions and fuel economy are “effectively identical,” concerned 2014-2018 standards for heavy-duty vehicles. *See* Resp. Br. 1, 6, 45; *see also* 76 Fed. Reg. 57125. Whether or not that was true of those particular standards, it is not true of fuel-economy and greenhouse-gas-emission standards generally.

that “the fuel economy standards cannot be bifurcated from the greenhouse gas emission standards,” and instead concluded that “*nothing in NHTSA’s standards even suggests that they are dependent on EPA’s standards.*” *Id.* at 1297 (emphasis added). This Court should decline TTMA’s unsupported invitation to apply severability analysis to independently authorized standards adopted by two different agencies.

Further, even if a severability analysis were appropriate, the agency’s intent is key to the severability inquiry. *Sierra Club v. FERC*, 867 F.3d 1357, 1366 (D.C. Cir. 2017). The court must ask whether the agency “would have adopted” the remaining provisions absent the invalid rules, and “whether the remainder of the regulation could function sensibly without the stricken provision.” *Verizon*, 740 F.3d at 659; *see also Davis County*, 108 F.3d at 1459-60. Here, the Agencies made the independence and severability of their standards clear throughout the rulemaking process: “[T]he NHTSA fuel consumption standards are independent of the EPA greenhouse gas standards and vice versa... *The agencies therefore regard each of these standards as legally severable.*” Response to Comments at 486 (JA421) (emphasis added); *see also* 81 Fed. Reg. 73644-73645, 73969. And there is no indication that NHTSA’s substantive standards cannot function sensibly in the absence of the EPA’s substantive standards. That is the end of the matter.

B. The Joint Compliance Process Regulations Can Continue to Function Even if EPA's Substantive Standards Are Invalidated

While TTMA's statutory authority arguments are focused exclusively on the Agencies' independent substantive standards, TTMA's severability argument focuses on the Agencies' jointly promulgated regulations setting out the process for establishing and verifying compliance with each Agency's standards—regulations whose content TTMA does not even contest. Those compliance process regulations can continue to function with respect to NHTSA's standards even in the absence of EPA's standards.

1. Congress Established a Role for EPA in the Regulatory Framework for Fuel Economy Standards

Even if EPA's compliance process regulations were not authorized under the Clean Air Act, they are authorized as part of the regulatory framework for implementing EISA, which assigned EPA a role independent of its Clean Air Act duties. *See* 49 U.S.C. § 32910(d). EPA explicitly relied upon this authority when promulgating the process regulations for establishing and verifying compliance with NHTSA's fuel economy standards for trailers. 76 Fed. Reg. 57130 (“(a) EPA Testing Authority,” describing EPA's testing authority as deriving from its duties under 49 U.S.C. § 32904(c)); 81 Fed. Reg. 73512 (adopting by reference EPA's discussion of its authority in the Phase 1 rule promulgated in 2011 for purposes of the Phase 2 rule promulgated in 2016).

In enacting EISA, Congress mandated that NHTSA develop its fuel economy standards for heavy-duty vehicles in consultation with EPA. See 49 U.S.C. § 32902(b), (k). In addition, Congress directed EPA to perform validation testing and calculations to verify compliance with NHTSA’s standards for heavy-duty vehicles alongside its own Clean Air Act testing.⁸ See 49 U.S.C. §§ 32904(a)(1), (c), (e), and 32902(b)(1)(C). That EPA function under EISA is separate and distinct from EPA’s own Clean Air Act authority.

In addition to specifically directing EPA to perform this role, Congress gave NHTSA broad authority to establish this framework of joint regulatory responsibilities. Indeed, Congress mandated that NHTSA, in consultation with EPA, promulgate regulations concerning “appropriate test methods” and “measurement metrics,” among other aspects of NHTSA’s fuel economy program for heavy-duty vehicles. 49 U.S.C. § 32902(k)(2); *see also id.* § 32902(k)(1)(A). And Congress gave the Agencies the flexibility to establish this joint regulatory structure, including authorizing EPA to “prescribe regulations to carry out duties of the Administrator under this chapter.” *Id.* § 32910(d).

⁸ This is consistent with EPA’s pre-existing duty under the Energy Policy and Conservation Act performing these same functions to verify compliance with NHTSA’s standards for light-duty vehicles. While 49 U.S.C. § 32902(k)(2) gives NHTSA broad discretion to determine how to implement a fuel efficiency improvement program, including compliance procedures, that section’s list of *commands* to NHTSA does not include “calculate average fuel economy”; Congress specified that EPA should perform that function in the first instance.

The Agencies' joint adoption of testing and calculation procedures is exactly what Congress had in mind in EISA. Consistent with their mandate to develop a fuel efficiency improvement program that is "cost-effective" and "technologically feasible," the Agencies "worked with industry, states, and other stakeholders" to develop a joint regulatory structure allowing manufacturers to establish compliance with both EPA's emissions standards and NHTSA's fuel economy standards via a single streamlined process. See 81 Fed. Reg. 73479-73480; 76 Fed. Reg. 57132. That process was reasonable and lawful.

2. EPA's Compliance Process Regulations are Severable from EPA's Substantive Standards

Even if EPA's substantive emissions standards were invalid (they are not), its compliance process regulations are severable. As discussed, severability of an agency action "turns on the agency's intent" and on whether the remainder of the regulation can function sensibly on its own. *Sierra Club*, 867 F.3d at 1366; see *supra* at 20. Here, those considerations make clear that EPA's compliance process regulations remain valid in any event.

TTMA asserts that "[i]f EPA lacks statutory authority to prescribe emissions standards for trailers, it is not even possible to comply with NHTSA's fuel consumption standards." Br. 31. This is incorrect. There is a single process for verifying compliance with both Agencies' standards (detailed in in the foregoing Statement of the Case), but the *existence* of EPA's *substantive standards* is

irrelevant to the *process of verifying compliance* with NHTSA's standards. All that matters is the existence of the Agencies' process regulations setting forth the steps for conducting testing and calculating compliance. As TTMA notes, "the NHTSA compliance equation simply applies a constant coefficient to the EPA compliance equation." Br. 31-32. There is no reason manufacturers cannot walk through the established process if they are only obliged to comply with NHTSA's standards.

As discussed *supra*, to the extent any agency validation testing and calculations are necessary to confirm manufacturers' compliance with NHTSA's fuel economy standards, EISA directs EPA to validate regardless of the existence of EPA's own standards, and the Agencies structured their regulations accordingly. 49 U.S.C. § 32904(e); 49 C.F.R. § 535.8(h)-(j); 40 C.F.R. § 1037.755. While Congress and the Agencies chose to give EPA primary responsibility for validating the testing and calculations performed by manufacturers, NHTSA "reserve[s] the right to verify separately ... the results of any testing and measurement established by manufacturers" and receives the data necessary to do so from manufacturers, enabling NHTSA to perform validation testing and calculate average fuel economy in the event EPA is unable or unwilling to do so. 49 C.F.R. §§ 535.6 and 535.8. Thus, the joint regulatory structure for establishing compliance with each Agency's

standards can still function for NHTSA's standards in the absence of EPA's standards.

It is inconceivable that Congress would have created a statutory structure contemplating a shared compliance process⁹ for totally independent agency standards¹⁰ if it did not intend that process to apply to either set of standards independently. EISA required EPA to adopt its compliance process regulations regardless of the existence its own Clean Air Act standards (49 U.S.C. §§ 32904(a)(1), (c), (e), and 32902(b)(1)(C)), and at least authorized EPA to do so if the Agencies determined such a structure to be the best way to implement a heavy-duty fuel efficiency improvement program (*id.* § 32902(k)(1)(A) and (k)(2)). Accordingly, Congress and the Agencies clearly intended EPA's testing and calculation regulations to be severable from its substantive standards.

The functional operation of EPA's compliance process regulations would in no way be impaired by the absence of the regulation containing EPA's trailer emissions standards. 40 C.F.R. § 1037.107. But even if they were, the wholesale invalidation of the Agencies' regulations would still be unwarranted.

It is a routine feature of severability doctrine that a court may invalidate only some applications even of indivisible text, so long as the valid applications can be separated from invalid ones. As the

⁹ "To the extent practicable, fuel economy tests shall be carried out with emissions tests ..." 49 U.S.C. § 32904(c).

¹⁰ "[N]othing in NHTSA's standards even suggests that they are dependent on EPA's standards." *Delta Const. Co., Inc.*, 783 F.3d at 1297.

Supreme Court has explained, when a court encounters statutory or regulatory text that is invalid as applied to one state of facts and yet valid as applied to another, it should try to limit the solution to the problem by, for instance, enjoining the problematic applications while leaving other applications in force.

NRDC v. Wheeler, 955 F.3d 68, 81-82 (D.C. Cir. 2020) (internal quotation marks and citations omitted). Thus, should this Court determine that EPA's greenhouse gas standards for trailers were unauthorized, routine application of the severability remedy in this case could simply take the form of an order enjoining application of EPA's compliance procedure regulations to EPA's substantive standards, while permitting application to NHTSA's standards.

The fact that EPA did not include a severability clause does not alter this conclusion. TTMA asserts that "[t]his Court properly treats the absence of a severability clause as good evidence that the agencies did not intend severability." Br. 29. However, neither of the cases TTMA cites supports this assertion. Rather, in each case, this Court simply noted the absence of severability clause without taking the further step of assigning weight to this absence. In fact, this Court has stated that:

[o]ur inquiry does not end simply because the Regulation contains no severability clause. The Supreme Court has held that the ultimate determination of severability will rarely turn on the presence or absence of such a clause. In assessing severability, we must contemplate whether [the Agency] would have enacted the other challenged provisions in the absence of a permit requirement. In such an inquiry, the presumption is always in favor of severability.

Cnty. for Creative Non-Violence v. Turner, 893 F.2d 1387, 1394 (D.C. Cir. 1990)

(internal quotation marks and citations omitted).

3. Even if EPA’s Standards and Compliance Process Regulations were Entirely Invalidated, Both Agencies’ Regulations Pertaining to NHTSA’s Standards Should be Remanded Without Vacatur

Assuming, *arguendo*, that EPA’s standards and compliance process regulations are entirely invalidated, TTMA concludes that “all portions of the Final Rule pertaining to trailers ... must be vacated.” Br. 27. But vacatur is neither required nor appropriate here. In *Allied-Signal, Inc. v. Nuclear Regulatory Comm’n*, the Court explained that “whether to vacate [an inadequately supported rule] depends on [1] the seriousness of the order’s deficiencies ... and [2] the disruptive consequences of an interim change that may itself be changed.” 988 F.2d 146, 150-151 (D.C. Cir. 1993) (internal quotation marks and citations omitted). This case thus articulates two equitable factors this Court considers in determining whether to vacate an agency’s decision on remand, either of which may be dispositive.¹¹

¹¹ *See id* at 150-154 (“[W]e here give little weight to the possibility that the Commission could pull a reasonable explanation out of the hat. Nonetheless, vacating the [rule] would give [regulated entities] a peculiar windfall... Accordingly, we refrain from vacating...); *Fox Television Stations, Inc. v. F.C.C.*, 280 F.3d 1027, 1048-1049 (D.C. Cir. 2002) (“Applying [the *Allied-Signal*] test ... we cannot say [] the Rule is likely irredeemable... For this reason alone, a remand rather than vacatur is indicated... In these circumstances, the other factor to be considered ... is only barely relevant.”).

In cases considering the first *Allied-Signal* factor, this Court has remanded without vacating a regulation when “an agency may be able readily to cure a defect.” *Heartland Regional Med. Ctr. v. Sebelius*, 566 F.3d 193, 198 (D.C. Cir. 2009). These cases dealt with agency actions that were inadequately explained or justified (see, e.g., *id.*; *Fox Television Stations, Inc.*, 280 F.3d at 1048-1049), or where the agency failed to follow proper rulemaking procedure (*Fertilizer Inst. v. EPA*, 935 F.2d 1303, 1312 (D.C. Cir. 1991)). Nevertheless, the reasoning underpinning this Court’s decisions applies equally here. NHTSA (acting alone or with EPA) has authority under EISA to implement a compliance process. If the Court discerns a defect in the Agencies’ compliance process for NHTSA’s standards arising from a lack of Clean Air Act authority by EPA, and that defect cannot be remedied via severance, NHTSA (acting alone or with EPA) can adjust the regulations establishing the compliance process.¹²

The second *Allied-Signal* factor also supports remand without vacatur because vacating NHTSA’s standards and/or either Agencies’ compliance process regulations would be unnecessarily disruptive and harmful. Notably, Congress intended to afford manufacturers regulatory stability, as EISA provides “not less than” “4 full model years of regulatory lead-time” and “3 full model years of

¹² While NHTSA granted a petition to reconsider its trailer standards, nothing in the record indicates the agency has taken any action toward changing this 4-year-old rule.

regulatory stability” for heavy-duty fuel economy standards. 49 U.S.C.

§ 32902(k)(3). NHTSA’s trailer standards have been in place for four years, and uncertainty and disruption will result if the entire compliance process is abruptly vacated in order to address a problem stemming from a different statutory scheme. This is unnecessary since NHTSA has authority for its standards and the existing compliance process can function in the interim as to NHTSA’s standards alone.

This Court has also “frequently remanded without vacating when a rule’s defects are curable and where vacatur would at least temporarily defeat ... the enhanced protection of the environmental values covered by” the rule at issue. *U.S. Sugar Corp. v. EPA*, 844 F.3d 268, 270 (D.C. Cir. 2016) (internal quotation marks and citations omitted); *see also NRDC v. EPA*, 489 F.3d 1250, 1265 (D.C. Cir. 2007) (similar). Here, NHTSA concluded its standards would reduce air pollutant emissions and improve air quality, “result[ing] in reduced adverse health effects ... nationwide.” Final Environmental Impact Statement Summary at 8, 14 (JA446,452). NHTSA also determined that regulated vehicles and engines were responsible for “approximately 7.6 percent of total U.S. CO2 emissions” in 2014. *Id* at 20 (JA458). Without NHTSA’s standards, “total CO2 emissions from HD vehicles in the United States will increase substantially,” *id* at 20 (JA458), and thus NHTSA’s standards would “make an important contribution to reducing the risks associated with climate change,” *id* at 22-23 (JA460-461).

Accordingly, even if the Court finds that EPA lacks authority for its standards and that its compliance process regulations cannot be severed, the Court should remand all the EISA compliance process regulations without vacating them.

CONCLUSION

For the foregoing reasons, Respondent-State Intervenors urge this Court to deny TTMA's Petition for Review.

Dated: June 23, 2020

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CERTIFICATE OF COMPLIANCE

I hereby certify that this filing complies with the requirements of Fed. R. App. P. 27(d)(1)(E) because it has been prepared in 14-point Times New Roman, a proportionally spaced font.

I further certify that this filing complies with the type-volume requirements of Fed. R. App. P. 27(d)(2)(C) because it contains 6,497 words, excluding the parts of the filing exempted under Fed. R. App. P. 32(f), according to Microsoft Word.

Dated: June 23, 2020

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CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing OPPOSITION TO PETITIONER TRUCK TRAILER MANUFACTURERS ASSOCIATION'S INITIAL OPENING BRIEF on all parties via the Court's electronic case filing system.

Dated: June 23, 2020

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