ORAL ARGUMENT ON MERITS SCHEDULED SEPTEMBER 15, 2020

**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,

and

CALIFORNIA AIR RESOURCES BOARD, *et al.*,

Intervenors.

No. 16-1430

TTMA's REPLY IN SUPPORT OF MOTION TO STAY NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION RULES RELATING TO TRAILERS

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40 C.F.R. § 1037.150(u) 2

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

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GLOSSARY

EISA	Energy Independence and Security Act of 2007
EPA	United States Environmental Protection Agency
GCWR	Gross Combined Weight Rating
GVWR	Gross Vehicle Weight Rating
NHTSA	National Highway Traffic Safety Administration
NOPR	Notice of Proposed Rulemaking
TTMA	Truck Trailer Manufacturers Association, Inc.

REPLY

NHTSA all but concedes that its trailer rules should be stayed. NHTSA accepts that, given the stay, EPA is not issuing certificates of conformity to trailer manufacturers. NHTSA also does not contest that without EPA certificates it is literally impossible for TTMA's members to comply with NHTSA's regulations as written. This is dispositive: it proves that NHTSA's rules are nonseverable from EPA's and shows that TTMA's members are suffering irreparable harm because it is impossible to produce compliant trailers. Indeed, NHTSA does not dispute that this grave uncertainty plus the millions in compliance costs constitutes serious, irreparable harm. Intervenors' arguments to the contrary, all ones the government is unwilling to make, boil down to a charge that TTMA should have sought a stay before the harm became concrete. And yet Intervenors strenuously argue that manufacturers' harms are still not concrete enough to warrant a stay. Intervenors cannot have it both ways. This Court should immediately stay NHTSA's trailer rules.

I. TTMA Is Likely To Prevail on the Merits

A. The Trailer Standards Are Not Severable

1. Five briefs in, neither NHTSA nor Intervenors have explained how the core elements of NHTSA's trailer rules can function without EPA's. The facts on the ground no longer leave any doubt that the rules are inextricably intertwined: Since this Court's stay, EPA has not been issuing certificates of conformity.

Mot.16-18. No one disputes that an EPA certificate is an absolute requirement for compliance with NHTSA's rules. That alone is enough to render the rules nonseverable, no matter the Agencies' expressed intent. Mot.4-6; *MD/DC/DE Broadcasters Ass'n v. FCC*, 236 F.3d 13, 22 (D.C. Cir. 2001).

Beyond necessitating an EPA certificate of conformity, NHTSA's rules make "*the* method for determining the fuel consumption performance rates for trailers" strictly dependent on EPA's emissions standards and EPA's operational authority. 49 C.F.R. §535.6(e). To assess NHTSA compliance, manufacturers must "determine the CO_2 emissions and fuel consumption results for partial- and full-aero trailers using the equations and technologies specified in 40 CFR part 1037, subpart F"—EPA's rules. 49 C.F.R. §535.6(e)(3)-(4). NHTSA's rules state (*id.* §535.6(e)(3)) that the "input values" for those equations must be determined based on "testing … in accordance with 40 C.F.R. 1037.515." Section 1037.515 in turn requires trailer manufacturers to rely on devices whose test values have been pre-approved by EPA, 40 C.F.R. §§1037.150(u), 1037.211, or to perform their own tests after EPA approves their test plan, *id.* §1037.526. But EPA is no longer providing these approvals. Or as stated elsewhere in the NHTSA regulations, NHTSA "will" use "EPA final verified values" to determine compliance. 49 C.F.R. §535.10(c)(4). But EPA is no longer verifying anything for trailers. Mot.16-18.

2. Instead of explaining how NHTSA's core regulatory provisions can operate without EPA, NHTSA and Intervenors offer distractions.

One theory is that the EPA provisions on which NHTSA's trailer rules depend could be authorized by statutory provisions outside the Clean Air Act. Resp.9; Intervenors.14. That is irrelevant, wrong, and would nullify this Court's stay. Agency action stands or falls on what the agency did, not what it could have done, and EPA's trailer regulations relied exclusively on the Clean Air Act. 81 Fed. Reg. at 73,969. That was no accident. EPA didn't rely on 49 U.S.C. § 32904, the provision both parties now cite, because it only authorizes EPA to assist NHTSA in regulating *automobiles*. Resp.9 (admitting that §32904 is relevant only "to other types of vehicles"). EPA didn't rely on §32902 because it merely directs NHTSA to "consult" EPA. Intervenors thus are wrong that "EPA can issue certificates of conformity even where it is not enforcing its own substantive standards." Intervenors.15.

NHTSA's fluffier variant of this argument is that the Agencies' history of "cooperation" somehow renders their rules severable. Resp.8-9. Whatever their ability to "cooperate," agencies need statutory authority to *regulate*, and that includes implementing a testing and certification process. Nor may NHTSA outsource its own (putative) authority to another agency without congressional

authorization. For these reasons, EPA in fact has *not* been certifying trailer devices or issuing certificates of conformity to trailers.

3. NHTSA suggests that even without EPA's standards manufacturers "can" install equipment "to comply with NHTSA's fuel efficiency standards." Resp.7-8; *see* Intevenors.14. This is rope-a-dope. Manufacturers cannot determine *whether* their trailers comply without EPA's rules; that's the point of the certificate of *conformity*. *Supra* p.2. Likewise, that NHTSA can later "verify" submissions "separately or in coordination" (49 C.F.R. §535.6; Intervenors.15), is irrelevant because compliance measurement is based on an EPA compliance value derived from EPA's standards and EPA-approved testing and input values.

In a cryptic footnote, NHTSA states that this Court's prior stay "may properly be understood" as staying "any portion of the rule dependent on EPA's statutory authority to promulgate greenhouse gas standards." Resp.10 n.1. If NHTSA is suggesting that somehow the Court could stay the certificate requirement but keep the substantive standards, that is a nonstarter. NHTSA's standards depend on EPA testing, and obtaining a certificate of conformity is the only way manufacturers can establish they have satisfied the standards.

4. Severability works no differently for joint rules. *Contra* Intervenors.12. Nothing about the question "whether the remainder of the regulation could function sensibly without the stricken provision" depends on the number of

agencies involved. *MD/DC/DE Broadcasters*, 236 F.3d at 22. The very case Intervenors cite repeatedly, *Delta Construction Co. v. EPA*, 783 F.3d 1291 (D.C. Cir. 2015), applies ordinary severability principles to a joint rule, stating that the question is whether "NHTSA's standards … are dependent on EPA's standards." *Id.* at 1297. There, this Court said NHTSA's standards were not; here they self-evidently are.

4. Divining "intent" here is unnecessary because NHTSA's rules cannot function without EPA's. Mot.4. But intent only confirms nonseverability. Mot.6-7. The Agencies cannot seriously suggest that they would have enacted NHTSA's rules in the same form, with 400 citations to EPA's rules, if EPA lacked regulatory authority. Neither NHTSA nor Intervenors attempt to distinguish this rule from the "integrated" or "intertwined" or "unitary" agency actions this Court has held nonseverable. Br.28.

B. NHTSA Lacks Statutory Authority

Regardless of severability, NHTSA's trailer standards are invalid.

1. The sole regulatory authority Congress gave NHTSA is the authority to impose "fuel economy standards," and "fuel economy" means miles traveled per gallon of fuel consumed. NHTSA does not argue that trailers have "fuel economy." 81 Fed. Reg. at 73,521 (NHTSA conceding that trailers "do not consume fuel"). NHTSA's regulations must qualify as "fuel economy standards,"

and they do not, because trailers do not consume fuel. That ends the case. Mot.8-11. That "trailers should not be considered '*vehicles*' … because they do not consume fuel" (Resp.4) is an *additional* argument for why NHTSA cannot regulate trailers. *Infra* pp.7-8.

NHTSA and Intervenors continue to mischaracterize the statute as authorizing freestanding "fuel efficiency improvement program[s]." Section 32902(b)(1) says NHTSA can "prescribe … average *fuel economy standards*" for certain vehicles, and § 32902(k)(2) reiterates that the way NHTSA improves "fuel efficiency" is by imposing "fuel economy standards" on vehicles and trucks that use fuel. Congress even clarified in subsection (k) that "standard[s]" for vehicles and work trucks "adopted pursuant to this subsection" must be "fuel economy standard[s]." 49 U.S.C. § 32902(k)(3). Under the EISA, if NHTSA is not regulating trailers' "fuel economy," then it cannot regulate trailers.

Intervenors cite no text supporting their theory that "Congress rejected … the existing measure of the statutory definition of fuel economy." Intervenors.8. As just noted, § 32902(k) is a mechanism for enacting "fuel economy standard[s]" and Congress incorporated the ordinary meaning of that term from § 32901(11). The idea that trailers must use fuel "in fulfilling their intended purpose of transporting goods" is factually wrong (trailers routinely function as non-mobile

storage containers, *see* Br. 25) and logically limitless (it would assign fuel economy to people who drive vehicles).

2. Even if the standards are "fuel economy" standards, trailers are not "vehicles" under the EISA. Mot.11-16; Reply Br.24-28. No one responds to the wide-ranging textual and contextual signals showing that a "vehicle" in this statute about fuel unambiguously means a fuel-consuming vehicle. Mot.11-15. That the Safety Act's definition of "vehicle" *expressly* covers trailers—and the EISA does not in the relevant section—proves the opposite of what Intervenors think it does. Indeed, the fact that the EISA expressly allows regulation of "trailers" in a single limited context, relating to refrigeration, 42 U.S.C. §17242(a)(2), confirms that Congress would have specified that §32902 applies to "trailers" had it so intended.

3. The theory that NHTSA can regulate "tractor-trailers" as fuel-consuming "vehicles" cannot be squared with the statute or the actual regulatory scheme. The Final Rule regulates tractors as vehicles and trailers as vehicles—not "tractor trailers" as vehicles. 49 C.F.R. §535.3(a); §523.6 (defining categories of heavy-duty vehicles subject to regulation under 49 C.F.R. part 535 to include "truck tractors" and "heavy-duty trailers," but not "tractor-trailers"). Not a single provision in NHTSA's rule (or EPA's) applies to a "tractor-trailer." The certificate of conformity, which by statute must apply to the "vehicle," 42 U.S.C. §7522(a)(1), goes to a trailer, not a tractor-trailer. 49 C.F.R. §535.10(a)(5); 40

C.F.R. §§1037.201, .230. A separate one goes to each tractor. The Agencies took that approach because they recognized that there is no unitary "tractor-trailer"—tractors and trailers are separate products, with separate vehicle identification numbers mandated by federal law, manufactured and owned by different companies.

Nor does anyone explain Congress's interchangeable use of "truck" and "vehicle" in the statute and legislative history, which signals that vehicle means the tractor, not a "tractor-trailer." Br.44-45. Intervenors assert that "truck" can mean "tractor-trailer," but the EISA is dispositive on the point. 42 U.S.C. §17242(a)(2) ("commercial refrigerated trailer[s]" versus "commercial refrigerated truck[s]"). NHTSA itself defines "truck" to exclude a "trailer." 49 C.F.R. § 571.3.

Again disregarding inconvenient regulatory definitions, Intervenors ignore that the Final Rule uses "gross vehicle weight rating" (GVWR) in a way that cements Congress's exclusion of "tractor-trailers." The Agencies view GVWR as distinct from the "gross *combined* weight rating" (GCWR), where GCWR is the "maximum load that the vehicle can haul, *including the weight of a loaded trailer*." 81 Fed. Reg. at 73,485 (emphasis added). When Congress chose GVWR in defining a "medium- and heavy-duty on-highway vehicle," it could not have intended to capture tractor-trailers. Congress could have readily captured tractor-

trailers along with the vehicles Intervenors mention (Intervenors.7) by using the phrase "GCWR *or* GVWR."

II. TTMA's Members Will Be Irreparably Harmed Absent a Stay

TTMA's members are suffering irreparable harms. NHTSA agrees, and does not contest that the equities favor a stay. Resp.2-3, 10. As the Agencies recognized in the final rule, "a large fraction of the trailer industry is composed of small businesses and even the largest trailer manufacturers do not have the same resources available to them as do manufacturers in some of the other heavy-duty sectors." 81 Fed. Reg. at 73,647. Compliance poses "challenging obstacles for this newly regulated industry." *Id.* at 73,649. That is especially so since the EPA's program for pre-approving aerodynamic device test data—which the Agencies promised would reduce compliance burdens, *id.*—is nonfunctional.

1. Intervenors' primary argument (Intervenors.16-18) is that TTMA waited too long to seek a stay. But their claim that TTMA gave "no indication as to why it waited until December of 2019 to seek to lift the abeyance or why it waited until just before oral argument to seek this stay" (Intervenors.4) is incorrect. TTMA explained that it moved to lift the abeyance in December because the government missed its promised deadline for issuing a NOPR. Doc.1818576 at 7. And TTMA's stay motion explained that it waited to seek a stay until its members could demonstrate clear irreparable harm. Mot.17.

Even now, Intervenors argue that TTMA has not established irreparable harm because its claims of lost revenue and market share are not sufficiently "concrete." Intervenors.20. They are. Obviously TTMA is relying on "many of the same harm allegations" that appeared in its motion to stay EPA's rules (Intervenors.18) because at the time of TTMA's prior motion EPA's rules were about to take effect, just like NHTSA's are here. And of course "any uncertainty" will be resolved after this Court decides the merits (Intervenors.19); that argument would defeat every stay request.

2. Intervenors focus on supposed delay because they have no answer to the actual harms TTMA's members are suffering. Trailers undisputedly cannot comply with NHTSA's rules absent EPA certificates of conformity. EPA is not issuing those necessary certificates. Thus, no matter what steps TTMA's members take to comply with NHTSA's rules unilaterally, they cannot take orders now assured that they will be in compliance when NHTSA's rules take effect in January 2021. This Catch-22—sell no trailers or risk legal penalties—alone warrants a stay. Mot.16-17.

Again, Intervenors are wrong that EPA has certification power arising outside the Clean Air Act and thus unaffected by this Court's stay. *Supra* pp.3-4. Protecting TTMA from the harmful effects of a scheme that has unraveled because

at least one of the constituent agencies lacks statutory authority does not somehow "reward[]" TTMA. Intervenors.20

3. Independent from the Catch-22, forcing TTMA's members to attempt to comply with NHTSA's standards will cause a substantial loss of business, market share, and compliance costs—all classic irreparable harms. Mot.17-21.

When staying EPA's rules, this Court was not convinced by Intervenors' argument that because TTMA's members sell a large percentage of trailers, TTMA cannot lose market share. As a trade association, TTMA need only establish "a likelihood that irreparable harm will be suffered by one or more of its *member[s]*." *Air Transp. Ass'n of Am. v. Export-Import Bank of the U.S.*, 840 F. Supp. 2d 327, 336 (D.D.C. 2012) (emphasis added).

As for compliance costs, Intervenors cite nonbinding authority for the notion that those costs are not irreparable, ignoring precedent from this Court staying rules precisely to avoid forcing manufacturers "to build expensive new containment structures" when regulations were in flux. Mot.20 (quoting *Portland Cement Ass'n v. EPA*, 665 F.3d 177, 189 (D.C. Cir. 2011)). Intervenors' circular suggestion that "incurring these costs now is … necessary to ensure TTMA will be in compliance" *if* this Court upholds the rules (Intervenors.21), ignores that a stay requires a likelihood of success on the merits.

True, many of TTMA's members are "already providing … equipment" the rules would require to some customers. Intervenors.22. But doing so does not require TTMA's members to incur the substantial costs of testing and certifying trailers to comply with a regulatory regime. Moreover, many customers do *not* want this equipment, and the costs of equipping trailers with equipment customers do not want are themselves substantial and unrecoverable. Mot.18-19; *see, e.g.*, Harris ¶¶ 10, 23. TTMA's members are unlikely to be able to pass along costs for equipment the customers don't want (*contra* Intervenors.22), which is why this Court rejected Intervenors' same argument when staying EPA's rules.

III. The Equities Favor a Stay

Just as Congress's generalized "purpose" of reducing fuel consumption does not warrant rewriting NHTSA's regulatory authority, it does not warrant denying a stay (Intervenors.23). Intervenors' arguments start from the wrong baseline. The potential impacts of a stay are limited to the segment of the market for which trailer manufacturers would *not* install the mandated equipment because customers do not want it. Mot.18, 22. Any marginal fuel savings NHTSA's rules could achieve for that segment in the months between a stay and a decision surely do not outweigh the dire uncertainty, lost sales, and compliance costs that TTMA's members attested to, not to mention the threats to life and limb NHTSA identified (Mot.23).

CONCLUSION

The Court should stay NHTSA's trailer rules until this litigation is resolved.

Dated: September 14, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 2,599 words, excluding the parts of the filing exempted by Fed. R. App. P. 32(f). The filing complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) and 32(a)(6), respectively, because it was prepared in a proportionately spaced typeface using Microsoft Word in Times New Roman 14-point font.

Dated: September 14, 2020

/s/ Elisabeth S. Theodore
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CERTIFICATE OF SERVICE

I hereby certify that, on September 14, 2020, the foregoing document was electronically filed with the Court via the appellate CM/ECF system, and that copies were served on counsel of record by operation of the CM/ECF system on the same date.

Dated: September 14, 2020

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