[NOT YET SCHEDULED FOR ORAL ARGUMENT]

No. 16-1430

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.

On Petition for Review from a Final Rule of the
United States Environmental Protection Agency and the
National Highway Traffic Safety Administration

INITIAL OPENING BRIEF OF PETITIONER TRUCK TRAILER MANUFACTURERS ASSOCIATION, INC.

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Petitioner submits this statement pursuant to Local Rule 28(a)(1):

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 Environmental Protection Agency; the National Highway Traffic Safety Administration; and James C. Owens, in his official capacity as Acting Administrator of the National Highway Traffic Safety Administration. 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 ruling under review is "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 previously 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 unconsolidated the two cases and ordered that Case No. 16-1447 continue to be held in abeyance. Counsel is not aware of any other related cases.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, petitioner Truck Trailer Manufacturers Association, Inc., states that it is a nonprofit, nonstock trade association that represents the interests of manufacturers of truck trailers across the United States and internationally. The Association estimates that its members produce more than 90% of truck trailers sold in the United States each year. The Association has no parent company, and no publicly held company has a 10% or greater ownership interest in the Association.

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GLOSSARY

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

INTRODUCTION

In 2016, the Environmental Protection Agency and the National Highway Traffic Safety Administration decided, for the first time in their histories, to impose a unified set of "emissions" and "fuel economy" standards on heavy-duty trailers. Trailers emit no pollutants and consume no fuel, so it is not surprising that the agencies have never previously attempted such regulations. EPA nonetheless premised its trailer regulation on a Clean Air Act provision authorizing the regulation of "motor vehicles"—expressly defined to mean "self-propelled" vehicles. But trailers are not self-propelled: they lack engines and they can move only when pulled by a tractor or another heavy-duty truck. For its part, NHTSA relied on a provision of the Energy Independence and Security Act of 2007 that authorizes "fuel economy" programs for certain "vehicles." But trailers are not "vehicles" and have no "fuel economy" to regulate.

Understandably, both agencies have since questioned the legality of their trailer regulations; since mid-2017, they have been reconsidering them. Because EPA's standards were set to take effect in 2018, in late 2017 Petitioner Truck Trailer Manufacturers Association, Inc. (TTMA) asked this Court to stay EPA's trailer regulation on the ground that it was flatly inconsistent with the Clean Air Act. This Court agreed. It concluded that TTMA was likely to succeed in

establishing that EPA lacked statutory authority to regulate trailers, and accordingly stayed EPA's portions of the Final Rule.

With NHTSA's standards set to take effect next year, and with no end in sight for the agencies' ongoing reconsideration, TTMA now asks this Court to vacate the Final Rule's "emissions" and "fuel economy" standards for trailers—a step that follows naturally from the Court's stay. As this Court has already concluded, EPA cannot regulate trailers because they are not self-propelled. And under black-letter principles of severability, all of the provisions governing trailers, including NHTSA's standards, must therefore be vacated. The Final Rule makes clear that the trailer regulations were the product of close collaboration between the two agencies, and that the agencies together designed the standards as a single, intertwined scheme. Indeed, the standards are so tightly bound that even if the agencies *intended* them to be severable—which they did not—NHTSA's standards, which derive from EPA's, could not sensibly be left standing alone.

Severability aside, NHTSA's attempt to regulate trailers, like EPA's, exceeds its statutory authority. The Energy Independence and Security Act of 2007 (EISA) authorizes NHTSA to adopt "fuel economy standards" for certain "vehicles." But trailers have no "fuel economy." They do not consume fuel, and the number of miles they travel per gallon is dependent on non-trailer variables such as the efficiency of the vehicles that haul them. And in any event, trailers are

not "vehicles"—a term which in a statute about fuel efficiency, like the EISA, clearly means vehicles that *use* or *consume fuel*. Upholding NHTSA's regulation of trailers would require this Court to import the definition of "vehicle" from a different statute that NHTSA administers—a statute about safety (not fuel) that explicitly covers trailers. Congress knew how to capture trailers when it wanted to, and it chose not to do so in the EISA.

Because NHTSA's portions of the rule are not severable from EPA's portions of the rule, or because NHTSA lacks statutory authority, this Court should grant the petition for review and vacate all aspects of the Final Rule setting emissions and fuel economy standards for trailers.

JURISDICTIONAL STATEMENT

This case is before the Court on TTMA's petition for review of a nationally applicable final rule jointly promulgated by EPA and NHTSA: "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) ("the Final Rule"). TTMA timely filed its petition for review on December 22, 2016, within 60 days of the rule's publication in the Federal Register. This Court has jurisdiction under 42 U.S.C. § 7607(b)(1); 49 U.S.C. § 32909; and 5 U.S.C. § 702.

STATEMENT OF ISSUES

1. Whether EPA's "emissions" standards for trailers exceed the agency's statutory authority to regulate "motor vehicles" under the Clean Air Act.

2. Whether NHTSA's "fuel economy" standards for trailers can be severed from EPA's emissions standards, given that the standards were the product of a "close partnership" between the agencies and were designed to be "a unified, national program."

3. Whether, assuming NHTSA's trailer fuel economy standards are severable, those standards exceed the agency's statutory authority to regulate the "fuel economy" of certain "vehicles" under the Energy Independence and Security Act of 2007.

STATUTES AND REGULATIONS

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

STATEMENT OF THE CASE

A. Statutory Background

1. Section 201 of the Clean Air Act

First enacted in 1965, Section 201 of the Clean Air Act directs EPA to establish "standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in [EPA's] judgment cause, or contribute to, air pollution which may reasonably be anticipated

to endanger public health or welfare." 42 U.S.C. § 7521(a)(1). The statute defines "motor vehicle" to mean "any self-propelled vehicle designed for transporting persons or property on a street or highway." *Id.* § 7550(2).

2. Title I of the Energy Independence and Security Act of 2007

Title I of the EISA, also known as the "Ten-in-Ten Fuel Economy Act," builds on fuel economy standards for passenger automobiles enacted in 1975 as part of the Energy Policy and Conservation Act, Pub. L. No. 94-163, 89 Stat. 871 (Dec. 22, 1975). Congress passed the EISA in 2007 to increase the fuel economy standards for cars and to extend those standards to other, heavier vehicles. S. Rep. No. 110-278, at 1 (Apr. 7, 2008). Section 101 of the EISA directs the Secretary of Transportation to "prescribe separate average fuel economy standards" for "passenger automobiles," "non-passenger automobiles," and "work trucks and commercial medium-duty and heavy-duty on-highway vehicles in accordance with subsection (k)." 49 U.S.C. § 32902(b)(1). A "medium- and heavy-duty on-highway vehicle" means an "on-highway vehicle with a gross vehicle weight rating of 10,000 pounds or more." *Id.* § 32901(a)(7). The term "vehicle" is not defined in the statute.

Enactment of the EISA triggered a multi-step sequence culminating in the NHTSA rulemaking at issue in this case. First, "[a]s soon as practicable after the date of enactment," NHTSA was to enlist the National Academy of Sciences "to

develop a report evaluating medium-duty and heavy-duty truck fuel economy standards," including "an assessment of technologies and costs to evaluate fuel economy for medium-duty and heavy-duty trucks." Pub. L. No. 110-140, § 108(a), 121 Stat. 1505 (Dec. 19, 2007). Then, after publication of that study, the Secretary of Transportation, in consultation with the Secretary of Energy and the EPA Administrator, would "examine the fuel efficiency of commercial medium- and heavy-duty on-highway vehicles and work trucks." 49 U.S.C. § 32902(k)(1). Finally, within two years of that examination, the Secretary—again in consultation with the Department of Energy and EPA—would engage in rulemaking to "determine … how to implement a commercial medium- and heavy-duty on-highway vehicle and work truck fuel efficiency improvement program." *Id.* § 32902(k)(2).

B. The Final Rule

1. In October 2016, EPA and NHTSA ("the Agencies") jointly promulgated a Final Rule establishing "Phase 2" emissions and fuel economy standards for a range of on-road medium- and heavy-duty vehicles and engines, such as tractors, pickup trucks, and vocational vehicles. *See* 81 Fed. Reg. 73,478. This Phase 2 regulation "buil[t] on" the Agencies' "Phase 1" program, *id.* at 73,479, which included standards for trucks, vans, vocational vehicles, and engines—but not trailers. *Id.* at 73,480; *see* EPA & NHTSA, *Greenhouse Gas Emissions Standards*

and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles, 76 Fed. Reg. 57,106 (Sept. 15, 2011).

As relevant here, the Final Rule for Phase 2 included, for "the first time," greenhouse-gas-emissions and fuel-consumption standards that apply directly to new trailers that are hauled by heavy-duty tractors or other heavy-duty trucks. 81 Fed. Reg. at 73,644. The Agencies explained that "[t]hroughout every stage of development for these programs," they had "worked in close partnership … with one another." *Id.* at 73,479. The trailer provisions in particular were designed "to be a unified national program, so that when a trailer model complies with EPA's standards it will also comply with NHTSA's standards, and vice versa." *Id.* at 73,640.

Prior to the Final Rule, neither agency regulated the greenhouse-gas or fuel-consumption impacts (or aerodynamic attributes) of trailers in any way. *Id.* at 73,640. The Agencies instead relied on voluntary programs, such as EPA's SmartWay Program, and on market incentives to encourage trailer manufacturers and customers to adopt aerodynamic and other technologies where they would be effective in reducing the emissions impacts of the vehicles that pull trailers. *Id.* at 73,640-41.

2. TTMA objected to the Final Rule on the ground that EPA lacked authority to regulate trailers because they are not "motor vehicles" as that term is

defined in the Clean Air Act. *Id.* at 73,514 (noting TTMA's objections). But EPA concluded that it had the power to regulate trailers as "incomplete motor vehicles." *Id.* TTMA likewise objected that NHTSA lacked authority to regulate trailers because they were not "vehicles" and had no "fuel efficiency," and thus were not covered by the EISA. *Id.* at 73,520. NHTSA, however, concluded that it could regulate trailers based on the Motor Vehicle Safety Act—a different statute nowhere incorporated in the EISA—which, unlike the EISA, expressly defines "motor vehicle" to include a "vehicle … drawn by mechanical power." *Id.* at 73,521. And while NHTSA admitted that trailers did not "consume fuel," NHTSA asserted that trailers could be regulated for "fuel efficiency" because they "are designed to be pulled by a tractor, which in turn affects the fuel efficiency of the tractor-trailer as a whole." *Id.*

3. The Final Rule imposes "emissions limits" on certain types of trailers manufactured after January 1, 2018, *see* 81 Fed. Reg. at 74,049 (codified at 40 C.F.R. § 1037.5(h)(4)), including those manufactured by TTMA members. And it imposes "fuel consumption" limits on trailers manufactured after January 1, 2021. Since trailers do not emit anything or consume any fuel, the Final Rule's "emissions" and "fuel economy" standards for trailers are based on a model the Agencies created that takes greenhouse gases emitted and fuel consumed by hypothetical tractors and fictitiously attributes the emissions and consumption to a

hypothetical trailer. The Agencies then impose aerodynamic equipment requirements on trailers based on the fictitious account of the trailers' "emissions" and "fuel consumption."

More specifically, the Agencies adopted a "compliance equation" that is based on a simulation of emissions from a theoretical standard tractor pulling a trailer under particular conditions. 81 Fed. Reg. at 74,073 (codified at 40 C.F.R. § 1037.515(a)(1)); *see id.* at 73,647, 73,665-66. The Agencies used a theoretical standard tractor because a single trailer is routinely attached to and hauled by many different tractors over the course of its useful life, *see* J.A.## (TTMA Comment Letter at 4 (Sept. 30, 2015)), so it would be impossible to calculate the expected emissions generated by the tractor to which any trailer or class of trailers is attached. The hypothetical emissions calculation also takes no account of the different uses to which trailers may be put, even though a trailer filled to the brim with lighter cargo generates less drag than an identically-sized trailer filled with heavier cargo. The emissions calculation is then converted using a mathematical formula to a corresponding "fuel consumption[] value," which can be measured against NHTSA's fuel-efficiency standards. 81 Fed. Reg. at 73,666; *see* 49 C.F.R. § 535.6(e).

To ensure that the equation shows compliant "emissions" and "fuel consumption" from the theoretical tractor, trailer manufacturers must install

aerodynamic devices, such as side skirts and trailer tails, low-rolling resistance tires, and automatic tire inflation systems (or some combination). 81 Fed. Reg. at 73,647. Depending on specific trailer designs, as the standards tighten over time under the regulations, manufacturers may also be forced to use lighter-weight materials. *Id.* at 73,653-54.

In evaluating the effectiveness and costs of these aerodynamic requirements, the Agencies relied on assumptions about the speeds at which tractors haul trailers. *See* 81 Fed. Reg. at 73,654. But for several reasons, those assumptions were unrealistically high. *See* J.A.## (EPA & NHTSA, *Response to Comments for Joint Rulemaking*, EPA-420-R-16-901, at 1030-31 (Aug. 2016)); J.A.## (Supplement to Pet'n for Reconsideration & Stay ("Supplement") at 9-10 (June 26, 2017)). For example, the EPA data on which the Agencies relied showed that longer trailers travelled at speeds exceeding 50 miles per hour 95% of the time. J.A.## (Response to Comments, *supra*, at 1031). And yet the Agencies in the Final Rule assumed that those trailers travelled at speeds exceeding *55* miles per hour—five miles per hour greater—95% of the time. 81 Fed. Reg. at 73,654. The Agencies' faulty assumptions exponentially exaggerated the expected drag reduction from aerodynamic devices (drag is a function of velocity *squared*), which in turn inflated the Agencies' predictions of the reductions in emissions and fuel consumption that the rule would achieve. J.A.## (Supplement at 10).

Nor did the Agencies fully account for the additional weight of aerodynamic devices, which would add some 400 pounds per trailer. *See* J.A.## (Response to Comments, *supra*, at 1018-19); J.A.## (Supplement at 11). That additional weight would increase fuel consumption and—because heavy-duty trucks are subject to a combined weight limit for the tractor and everything it hauls—the heavier trailer would necessarily displace cargo. *Id.* Trucks would therefore need to take more trips to deliver the same amount of cargo, causing more emissions and more fatal accidents. J.A.## (Supplement at 11-12). The Agencies underestimated the effects of this additional weight.

C. TTMA's Petition for Review, Request for Reconsideration, and Motion for a Stay

On December 22, 2016, TTMA petitioned for review of the Final Rule in this Court. Petition for Review, No. 16-1430 (Dec. 22, 2016). On April 3, 2017, TTMA requested that the two agencies reconsider the trailer provisions of the Final Rule. J.A.##. TTMA supplemented its petition for reconsideration on June 26, 2017. J.A.##. TTMA explained that EPA lacks statutory authority to regulate the purported greenhouse gas emissions of trailers and that NHTSA lacks statutory authority to regulate the purported fuel economy of trailers. J.A.## (Supplement at 6-9 & n.15). TTMA also argued that the Final Rule was arbitrary and capricious on several grounds, including that the Agencies used unrealistically high assumptions about the speed at which tractors travel, and that they failed to

properly account for the additional weight of the required aerodynamic devices. J.A.## (Supplement at 9-12); *supra* pp.10-11.

On August 17, 2017, the Agencies sent letters to TTMA indicating that they intended to revisit or reconsider the Final Rule's trailer provisions. J.A.##; J.A.##. In light of those letters, on September 18, 2017, the Agencies sought an indefinite abeyance "pending completion of administrative proceedings regarding the challenged rule." Mot. to Continue Abeyance at 2 (Sept. 18, 2017).

TTMA then moved for a stay of the EPA portions of the rule, which had been set to take effect in 2018. TTMA argued that, because trailers are not "self-propelled," they are not "motor vehicles," and thus EPA unambiguously lacked statutory authority to regulate them. Stay Mot. at 6-12 (Sept. 25, 2017).

EPA did not oppose the stay, citing its intent to "develop and issue a Federal Register notice of proposed rulemaking on this matter, consistent with the requirements of the Clean Air Act." U.S. Resp. to Stay Mot. at 2-3 (Oct. 12, 2017). Several states and environmental organizations, however, filed oppositions defending EPA's statutory authority to regulate trailers. *See* Environmental Opp. at 6-14 (Oct. 12, 2017); States' Opp. at 1 (Oct. 12, 2017). TTMA did not at that time seek a stay of the NHTSA portions of the rule, which take effect on January 1, 2021. 81 Fed. Reg. at 74,328; 49 C.F.R. § 535.3(d)(5)(iv).

D. This Court's Stay and Post-Stay Proceedings

On October 27, 2017, the Court granted TTMA's motion and stayed the EPA portions of the Final Rule regulating trailers, finding that TTMA had "satisfied the stringent requirements for a stay pending court review." Order at 1 (citing *Nken v. Holder*, 556 U.S. 418, 434 (2009)). The Court also granted the Agencies' motion to continue the abeyance and directed the parties to file status reports at 90-day intervals. *Id.* at 2.

Beginning in January 2018, the Agencies at 90-day intervals filed eight materially identical status reports stating: "EPA is working to develop a proposed rule to revisit the Rule's trailer provisions. NHTSA continues to assess next steps after granting Trailer Petitioner's request for rulemaking."[1]

In light of the slow pace of the Agencies' reconsideration process, TTMA on December 3, 2019 moved to lift the abeyance and set a briefing schedule to ensure that this Court would have the ability to address TTMA's petition on the merits before the NHTSA fuel economy standards take effect in January 2021. This Court granted TTMA's motion on December 26.

[1] Status Report at 3 (Jan. 22, 2018); Status Report at 3 (April 25, 2018); Status Report at 3 (July 24, 2018); Status Report at 3 (October 22, 2018); Status Report at 3 (February 8, 2019); Status Report at 3 (May 9, 2019); Status Report at 3 (August 7, 2019); Status Report at 3 (November 5, 2019).

SUMMARY OF ARGUMENT

I. As this Court previously concluded in granting a stay, EPA lacks statutory authority to regulate trailers. Section 202 of the Clean Air Act allows EPA to set emissions standards only for "motor vehicles," a term expressly defined to mean "self-propelled vehicles." Trailers are not self-propelled; they cannot move unless hauled by vehicles with engines. EPA's unprecedented theory—that trailers can be regulated as "incomplete vehicles"—is both legally and factually incorrect. Legally, EPA has no authority to regulate incomplete vehicles, a made-up term that appears nowhere in the Clean Air Act. And factually, trailers are not incomplete vehicles. Because EPA is reconsidering the wisdom and legality of its trailer regulations, the deferential standard of *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984), does not apply. But even if *Chevron* applied, EPA's attempt to regulate trailers is invalid because it contradicts the plain terms of the Clean Air Act.

II. Under black-letter principles of severability, vacating EPA's greenhouse-gas-emissions standards for trailers requires vacating all of the Final Rule's provisions regulating trailers. When part of a rule has been deemed unlawful, this Court will vacate the entire rule unless there are affirmative indications that the agency would have promulgated the remaining portions anyway. There are no such indications in the Final Rule here. To the contrary, the

Agencies expressly created a "unified national program" with a set of interdependent standards. 81 Fed. Reg. at 73,640. Indeed, NHTSA's standards cannot operate without the EPA's. The Final Rule is rife with evidence that the Agencies worked in "close partnership" to design those unified standards, and that they evaluated their costs and benefits in the aggregate. At the very least, there is "substantial doubt" that either agency would have chosen to regulate trailers if the other had not done so, which under binding precedent requires vacatur of all of the trailer provisions. *Davis Cty. Solid Waste Mgmt. v. EPA*, 108 F.3d 1454, 1459 (D.C. Cir. 1997). Indeed, even if NHTSA had shown any intent that its provisions would stand alone, this Court would *still* need to vacate all of the trailer provisions because NHTSA's standards cannot "function sensibly" without EPA's. *MD/DC/DE Broadcasters Ass'n v. FCC*, 236 F.3d 13, 22 (D.C. Cir. 2001).

III. Even if NHTSA's provisions were severable, they are invalid because NHTSA lacks statutory authority to promulgate them. The EISA authorizes NHTSA to regulate the "fuel economy" of certain "vehicle[s]." Trailers are not "vehicles," nor do they have any "fuel economy." The text and structure of the EISA—a statute about *fuel*—makes crystal clear that the statute is referring to vehicles that *consume fuel*, not to trailers. In the Final Rule, NHTSA stated that the EISA conferred authority to regulate trailers because an entirely different statute related to safety grants NHTSA authority to regulate vehicles "drawn by

mechanical power." But Congress's express inclusion of trailers in that safety statute (and in other statutes), combined with its failure to mention trailers in the EISA, only confirms that the EISA does not cover trailers.

STANDING

TTMA is a membership organization that has associational standing to challenge the Final Rule on behalf of its members. *See, e.g.*, *Ctr. for Sustainable Econ. v. Jewell*, 779 F.3d 588, 596 (D.C. Cir. 2015). The Final Rule directly regulates TTMA's members by requiring them to make design changes to the trailers that they manufacture and market and to comply with an onerous federal compliance regime. Those design changes impose significant costs, and many trailer customers do not want to purchase the equipment that the Final Rule requires manufacturers to sell.

STANDARD OF REVIEW

This Court reviews de novo whether an agency exceeded limits on its authority set forth in "the text, structure, purpose, and history of an agency's authorizing statute." *Hearth, Patio & Barbecue Ass'n v. Dep't of Energy*, 706 F.3d 499, 503 (D.C. Cir. 2013) (internal quotation omitted). If an agency acts beyond that authority, then its "regulations cannot survive judicial review." *Am. Library Ass'n v. FCC*, 406 F.3d 689, 699 (D.C. Cir. 2005).

ARGUMENT

This Court should vacate all portions of the Final Rule that regulate trailers. Trailers are not "motor vehicles" under the Clean Air Act, and thus EPA lacks statutory authority to impose emissions standards on trailers. Because the Final Rule leaves significant doubt as to whether either agency would have regulated trailers absent the participation of both agencies, NHTSA's portions of the rule must also be vacated under standard principles of severability. And even if NHTSA's provisions could stand alone, they are themselves invalid—trailers are not vehicles that consume fuel and therefore are not subject to "fuel economy" regulation under the EISA.

I. EPA Lacks Statutory Authority To Regulate Emissions From Trailers

EPA lacks authority to impose emissions standards on trailers under the Clean Air Act. This Court evidently agrees; it stayed the EPA portions of the rule, which it could do only if TTMA had made "a strong showing that [it] is likely to succeed on the merits." *Nken v. Holder*, 556 U.S. 418, 434 (2009).

A. EPA Cannot Regulate Trailers Because Trailers Are Not "Self-Propelled"

1. Section 202(a)(1) of the Clean Air Act, upon which the Final Rule's emissions standards rely, authorizes EPA to prescribe "standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in [its] judgment cause, or contribute to, air

pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7521(a)(1). The Act defines the term "motor vehicle" to mean "any self-propelled vehicle designed for transporting persons or property on a street or highway." *Id.* § 7550(2).

No one disputes that a trailer is not self-propelled. That ends the matter. If a trailer is not self-propelled, it is not a motor vehicle under § 7550(2), and EPA may not regulate it under § 7521(a)(1).

2. To avoid this simple conclusion, EPA in the Final Rule called a trailer an "incomplete vehicle," 81 Fed. Reg. 73,514, an invented term that appears nowhere in the Clean Air Act. EPA claimed authority to "set standards for all or just a portion of the motor vehicle notwithstanding that an incomplete motor vehicle may not yet be self-propelled." *Id.* EPA purported to locate regulatory authority over "incomplete motor vehicles" in the final sentence of Section 202(a)(1), which is aimed at ensuring that vehicles and engines comply with emission standards not just when new, but for the vehicle or engine's full useful life. That sentence states that emissions standards "shall be applicable to such vehicles and engines for their useful life …, whether such vehicles and engines are designed as complete systems or incorporate devices to prevent or control such pollution." 42 U.S.C. § 7521(a)(1); *see* 81 Fed. Reg. at 73,514.

Nothing in that sentence eliminates the requirement that the *subject* of EPA's regulation, if it is not an engine, must be a "motor vehicle," meaning that it must be "self-propelled." 42 U.S.C. § 7550(2). The phrase "*such* vehicles," a reference back to the term "motor vehicle" in the first sentence of Section 202(a)(1), confirms that the subject of regulation must qualify as a motor vehicle. The reference to vehicles or engines that are "complete systems or incorporate devices to prevent or control such pollution" simply ensures that EPA can regulate engines or vehicles that include emissions control systems. A vehicle that incorporates emissions control systems is nonetheless self-propelled, and it is still a motor vehicle. The Act clarified that motor vehicles or engines, including those that incorporate emissions control systems, must comply for their full useful life. That clarification does not somehow implicitly signal that EPA also can regulate products that are *not* motor vehicles, *i.e.*, products that are not self-propelled.

Indeed, were EPA's analysis correct, the phrase "motor vehicle engine" in Section 202(a)(1) would be entirely superfluous. After all, under EPA's theory that the phrase "motor vehicle" includes a "portion" or "component" of a motor vehicle, an engine is an "incomplete vehicle" too. Congress would have had no reason to separately authorize EPA's regulation of motor vehicle engines if the term "motor vehicle" already covered so-called "portions" of a vehicle.

EPA's theory that Congress silently authorized its regulation of trailers is also irreconcilable with the language of numerous other federal statutes that define the term "motor vehicle" to reach trailers expressly, including three granting rulemaking authority to the Department of Transportation. *E.g.*, 40 U.S.C. § 17101(2) ("'motor vehicle' means a vehicle, self-propelled or drawn by mechanical power…"); *id.* § 17501(2) ("'motor vehicle' means … a vehicle self-propelled or drawn by mechanical power"); 18 U.S.C. § 31(a)(6) ("'motor vehicle' means every description of carriage or other contrivance propelled or drawn by mechanical power"); 49 U.S.C. § 30102(a)(7) ("'motor vehicle' means a vehicle driven or drawn by mechanical power"); *id.* § 32101(7) (same); *id.* § 30301(4) ("'motor vehicle' means a vehicle, machine, tractor, trailer, or semitrailer propelled or drawn by mechanical power").

Congress thus "knew how to provide" for regulation of trailers when it wished to. *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 485 (1996) (declining to read remedy into one environmental statute because analogous statute *expressly* included that remedy). Congress omitted language like "drawn by mechanical power" in the Clean Air Act because it intended to cabin EPA's authority to engines and vehicles that generate power and emit pollutants, not trailers that are sold completely separately and pulled by such vehicles and engines.

3. EPA purported to find support in three other Clean Air Act provisions that it described as "incomplete vehicle provisions." 81 Fed. Reg. at 73,514. But those provisions each expressly require that "motor vehicles" meet specified standards. None specify any requirements for components of motor vehicles, let alone impose requirements directly on a component sold completely separately and that may later be attached to a motor vehicle. *See* 42 U.S.C. § 7521(a)(6) (EPA must require that "new light-duty vehicles … be equipped with" onboard vapor recovery systems); *id.* § 7521(a)(5)(A) ("fill pipe standards for new motor vehicles"); *id.* § 7521(k) (regulations "applicable to evaporative emissions of hydrocarbons from all gasoline-fueled motor vehicles").

EPA's statement that these provisions concern "incomplete vehicles" is puzzling at best. Of course regulating a "motor vehicle" may *impact* components of that vehicle, or even necessitate adding new ones. But no normal speaker of English would conclude, for example, that a provision requiring a vehicle to contain an onboard vapor recovery system constitutes regulation of an "incomplete vehicle." Rather, that provision would require *the motor vehicle* to have a certain component.

Even if EPA could regulate an "incomplete vehicle" under the convoluted theory that Section 202(a)(1) refers to "systems" that are not "complete," a trailer would not qualify. A trailer does not become a "vehicle," incomplete or otherwise,

simply because it can be attached to a vehicle. Wagons are attached to horses; that does not make a wagon an "incomplete horse." Trailers are manufactured and often sold separately to different ultimate purchasers from tractors, and the same trailers are routinely attached to and hauled by many different tractors driven by many different operators over the course of their useful lives. J.A.## (TTMA Comment Letter at 4 (Sept. 30, 2015)). Each tractor likewise hauls many different trailers. *Id.* A particular tractor-trailer combination is thus in no sense a single motor vehicle.

In fact, EPA itself in previous rulemakings has taken the view that trailers are *not* vehicles, incomplete or otherwise; instead, the tractor is the vehicle, and the trailer is not. *E.g.*, 76 Fed. Reg. 57,106, 57,114 (Sept. 15, 2011) (explaining that "gross combined weight rating … describes the maximum load that the vehicle can haul, including the weight of a loaded trailer *and the vehicle itself*") (emphasis added)). That definition is repeated in a footnote in the Final Rule, *see* 81 Fed. Reg. at 73,485 n.26, suggesting EPA in moments of candor continues to distinguish between a trailer and an actual motor vehicle.

More broadly, the United States government has repeatedly and successfully urged that trailers are *not* vehicles for purposes of the materially identical definition in the federal criminal laws, precisely because they are not self-propelled. *See* 18 U.S.C. § 2311 (defining motor vehicle to be "self-propelled");

Bernard v. United States, 872 F.2d 376, 377 (11th Cir. 1989). And the United States has urged courts that this does not change even when the trailer is attached to the truck. *Id.* In other words, the United States has in other contexts maintained that the words "self-propelled" preclude the Final Rule's "incomplete vehicle" theory. The United States' position that a trailer attached to a tractor still is not a vehicle has enabled the government to charge individuals who steal a combination tractor-trailer with two crimes—stealing a vehicle (the tractor) and stealing a "good" (the trailer)—and obtain consecutive sentences. *E.g.*, *Bernard*, 872 F.2d at 377; *United States v. Lofty*, 455 F.2d 506, 506 (4th Cir. 1972); *United States v. Kidding*, 560 F.2d 1303, 1308 (7th Cir. 1977). As the Seventh Circuit explained, "[c]learly a trailer, if it stands alone, is not a motor vehicle," and the combination of the trailer and tractor does not change that result, because the "trailer was not indispensable to making the tractor a 'vehicle.'" 560 F.2d at 1308. The same is true here.

Finally, the "incomplete vehicle" theory would render EPA's regulatory authority essentially limitless. EPA protests that interpreting Section 202(a)(1) to cover "incomplete vehicles" "is not to say that the Act authorizes emission standards for any part of a motor vehicle, however insignificant." 81 Fed. Reg. at 73,514. But under EPA's interpretation in the Final Rule, the Act *does* authorize EPA to set emissions standards for any part of a motor vehicle. Nothing in the Act

provides any basis upon which to distinguish between a trailer and a tire, wheel, or any other component. The Final Rule announces that a trailer "properly fall[s] on the vehicle side of the line," 81 Fed. Reg. at 73,515, but this is just *ipse dixit*. The absence of any "intelligible principle," *Mistretta v. United States*, 488 U.S. 361, 372 (1989), cabining EPA's authority to decide what constitutes an "incomplete vehicle" is a strong indication that the Act does not in fact permit regulation of "incomplete vehicles."

4. The Agencies—later echoed by the Intervenors—also theorized that "tractor-trailers" are self-propelled vehicles designed for transporting property, and that trailer manufacturers are "engaged in … the manufacturing or assembling of the tractor-trailer." 81 Fed. Reg. at 73,516; *see also* Environmental Stay Opp. at 7-9. This Court was not moved by that argument in granting the stay, for good reason. TTMA's members do not manufacture "tractor-trailers." They manufacture trailers only, and they sell those trailers to end-users like cargo shippers, motor carrier fleets, independent owner-operators and retailers, or to companies that own fleets of trailers and lease the trailers to motor carriers. *See* J.A.## (EPA & NHTSA, *Regulatory Impact Analysis* ("RIA") at 1-1 to 1-7 (Aug. 2016), https://bit.ly/2R9ZfGq). It is undisputed that someone other than the tractor or trailer manufacturer assembles the tractor-trailer by attaching the trailer to the tractor, 81 Fed. Reg. at 73,516, and that trailers are typically attached to many

different tractors over their lives. Moreover, trailers have commercial uses beyond attachment to the tractor, including for storage. *See* J.A.## (RIA at 1-3). The government itself acknowledges that some shippers own as many as six trailers per tractor. *See* J.A.## (RIA at 1-7).

The argument that a vehicle may have more than one manufacturer under the Clean Air Act is thus simply a distraction. First, it is not true. The statutory regime contemplates a single manufacturer responsible for each motor vehicle. *See, e.g.*, 42 U.S.C. § 7522(a)(1) (prohibiting a manufacturer from selling a motor vehicle unless covered by certificate of conformity); § 7524(a) (manufacturer subject to penalty for "each motor vehicle"); § 7541(a)(1) (imposing warranty requirements on "the manufacturer of each new motor vehicle"); §§ 7541(c), (c)(3)(A), (c)(3)(C), (d), (h).

Second, it is irrelevant. Again, TTMA's members do not make "tractor-trailers" and are not "engaged in the manufacturing … of new motor vehicles [or] new motor vehicle engines." 42 U.S.C. § 7550(1). Intervenors' argument that the word "engaged" somehow expands the universe of regulated manufacturers of new motor vehicles to entities that sell a separate product that a third party attaches to a tractor has no textual mooring; reads the definition of "motor vehicle" out of the statute; makes the various certification, enforcement, and warranty provisions incoherent; renders references to "new motor vehicle engines" surplusage; and

would make every manufacturer of side mirrors and windshields potentially subject to EPA regulation.

B. *Chevron* Does Not Apply, but the Rule Fails Even if It Does

Chevron does not apply, and even if it did the Final Rule would be invalid. An agency must seek *Chevron* deference for the Court to apply it. *See Glob. Tel*Link v. FCC*, 866 F.3d 397, 407-08 (D.C. Cir. 2017) (no *Chevron* deference where agency no longer seeks it). Here, EPA has not only declined to rely on *Chevron* in this litigation; it is actively reconsidering "EPA's authority to regulate trailers." J.A.## (Letter from E. Scott Pruitt, EPA Administrator, to J. Martel and J. Sims, at 2 (Aug. 17, 2017)). This Court must therefore decide whether EPA's unilateral expansion of its authority over "motor vehicles" to cover trailers is the "'the best reading' of the statutory provision[] at issue." *Glob. Tel*Link*, 397 F.3d at 408 (quoting *Miller v. Clinton*, 687 F.3d 1332, 1342 (D.C. Cir. 2012)). For the reasons explained, it plainly is not. *Supra* pp. 17-26.

Regardless, EPA's portion of the Final Rule is invalid even under *Chevron*. As explained, the Clean Air Act directly addresses EPA's authority to regulate trailers, including by defining the term "motor vehicle" to require self-propulsion, and makes clear that EPA lacks such authority. The Final Rule therefore fails at *Chevron* step one. Alternatively, for the reasons explained, the agency's interpretation "is unreasonable in light of the statute's text, history, structure, and

context," and thus the Final Rule would fail at *Chevron* step two. *Loving v. IRS*, 742 F.3d 1013, 1022 (D.C. Cir. 2014).[2]

II. The Final Rule's Trailer Standards Are Not Severable

Because the EPA exceeded its statutory authority in attempting to regulate trailers, all portions of the Final Rule pertaining to trailers—including NHTSA's "fuel economy" standards—must be vacated.

A. The Agencies Would Not Have Adopted the Trailer Standards on Their Own

When this Court finds a provision of a rule invalid, its default remedy is to vacate the entire rule absent an indication that the invalid portion is "severable." *See, e.g.*, *Fin. Planning Ass'n v. SEC*, 482 F.3d 481, 493 (D.C. Cir. 2007). Specifically, "[s]everance and affirmance of a portion of an administrative

[2] Applying *Chevron* in a way that permits EPA's redefinition of "motor vehicles" would be inconsistent with the Administrative Procedure Act and the separation of powers. To the extent that the *Chevron* doctrine provides for such deference, it should be reconsidered, and TTMA preserves the argument that *Chevron* should be reconsidered for further appeal. *See Pereira v. Sessions*, 138 S. Ct. 2105, 2121 (2018) (Kennedy, J., concurring) ("[I]t seems necessary and appropriate to reconsider, in an appropriate case, the premises that underlie *Chevron* and how courts have implemented that decision."); *Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring) ("I write separately to note that [EPA's] request for deference raises serious questions about the constitutionality of our broader practice of deferring to agency interpretations of federal statutes."); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring) (*Chevron* "permit[s] executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design. Maybe the time has come to face the behemoth.").

regulation is improper if there is 'substantial doubt' that the agency would have adopted the severed portion on its own." *Davis Cty. Solid Waste Mgmt.*, 108 F.3d at 1459. When that "doubt" is present, the Court will not "attempt, even with the assistance of agency counsel, to fashion a valid regulation from the remnants of the old rule." *Nat'l Treasury Employees Union v. Chertoff*, 452 F.3d 839, 867 (D.C. Cir. 2006) (quotation marks omitted).

Applying these standards, this Court holds regulatory provisions non-severable when they are part of "a single, integrated proposal," *Sierra Club v. FERC*, 867 F.3d 1357, 1366 (D.C. Cir. 2017); or when the agency's action was "unitary," *North Carolina v. FERC*, 730 F.2d 790, 795 (D.C. Cir. 1984); or when the remaining portions of an agency action are "intertwined" with those that the Court has stricken, *Epsilon Elecs., Inc. v. U.S. Dep't of Treasury, Office of Foreign Assets Control*, 857 F.3d 913, 929 (D.C. Cir. 2017). In *Sierra Club*, for example, the agency prepared a single environmental impact statement for three proposed pipelines and described the pipelines as "separate but connected"—a "characterization [that] carried through" to its final order. 867 F.3d at 1366-67. Based on those indicia of "the agency's intent," the Court held that the portions of the agency's order directed at one of the three pipelines were not severable from the rest of the order. *Id.* at 1366.

Like the agency actions in this Court's cases, the Final Rule here contains a set of interdependent standards that the Agencies clearly designed to rise and fall together, and that are inextricably linked and rise and fall together in fact. For one thing, the Final Rule contains no severability clause—a well-established method for agencies to express their intent that a rule's provisions be treated as severable. *See* Admin. Conf. of U.S., *Administrative Conference Recommendation 2018-2* (June 15, 2018), https://bit.ly/2TESwpN. This Court properly treats the absence of a severability clause as good evidence that the agencies did not intend severability. *See, e.g.*, *Financial Planning Ass'n*, 482 F.3d at 493; *Nat'l Ass'n of Mfrs. v. NLRB*, 717 F.3d 947, 963 & n.28 (D.C. Cir. 2013), *overruled on other grounds by Am. Meat Inst. v. USDA*, 760 F.3d 18 (D.C. Cir. 2014). That practice accords with this Court's refusal to "speculate" about how an agency would have proceeded in the absence of the stricken provisions. *Epsilon*, 857 F.3d at 930. Indeed, the absence of a severability provision here is especially telling because, in another recent joint rulemaking between EPA and NHTSA, both Agencies included express severability clauses. *See* EPA & NHTSA, *The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One*, 84 Fed. Reg. 51,320, 51,314, 51,351 (Sept. 27, 2019).

And the lack of a severability provision aside, the Final Rule at every turn indicates that EPA and NHTSA viewed their joint effort to regulate trailers as "a

single, integrated proposal." *Sierra Club*, 867 F.3d at 1366. The Agencies explained that "[t]hroughout every stage of development for these programs," they had "worked in close partnership … with one another" to "create a *single*, effective set of national standards." 81 Fed. Reg. at 73,479 (emphasis added); *see also id.* at 73,487 (referring to a "closely coordinated, harmonized national program"); *id.* at 73,484 ("EPA and NHTSA staff … participated in a large number of technical and policy conferences over the past three years related to the … heavy-duty trucking industry.").

The Final Rule was indeed unified at its inception: the Agencies' Notice of Proposed Rulemaking set forth a "joint proposal," and in soliciting comments the Notice explained that there were "many issues common to both EPA's and NHTSA's proposals." 80 Fed. Reg. 40,140, 40,140 (July 13, 2015). The Agencies responded to comments on the proposed rule in a single "joint Response to Comments," J.A.## (Response to Comments, *supra*, at i), that indicated that all decisions and responses were combined, *e.g.*, J.A.## (*id.* at 405-06) ("We appreciate [the] constructive comments" and "we adopted their recommendations . . . ."). And the Final Rule contains literally thousands of references to what "the agencies" *together* believed or determined—with virtually no countervailing indications that either agency made any relevant determination without consulting the other agency. *E.g.*, 81 Fed. Reg. at 73,644-45.

The Agencies' unified approach is manifest in the actual operation of the regulations, which inextricably link EPA's and NHTSA's standards. The Agencies "designed th[e] [trailer] program to be a *unified* national program, so that when a trailer model complies with EPA's standards it will also comply with NHTSA's standards, and vice versa." 81 Fed. Reg. at 73,640 (emphasis added). For example, to "determin[e] the fuel consumption performance rates" for trailers under NHTSA's standards—which "correspond to the same requirements for EPA"—manufacturers must engage in a multi-step process that depends on the existence of both standards. *Id.* at 74,259. Manufacturers must first "[o]btain preliminary approvals for trailer aerodynamic devices *from EPA*," then "determine the CO_2 emissions and fuel consumption results" based on those devices, and finally "[c]alculate equivalent fuel consumption … values for trailer families." *Id.* at 74,259 (codified at 49 C.F.R. § 535.6(e)) (emphasis added). In other words, "[m]anufacturers must use EPA emissions test results for deriving NHTSA's fuel consumption performance rates." *Id.* at 74,257.

If EPA lacks statutory authority to prescribe emissions standards for trailers, it is not even possible to comply with NHTSA's fuel consumption standards. Indeed, it is not even possible to *calculate* a NHTSA compliance figure without first calculating EPA compliance, since the NHTSA compliance equation simply applies a constant coefficient to the EPA compliance equation. A trailer's fuel

consumption rating for NHTSA purposes is its emissions rating for EPA purposes divided by $10{,}180 \times 10^3$. *See* 81 Fed. Reg. at 73,666; 49 C.F.R. § 535.6(e)(3), (4). "NHTSA will use the EPA final verified values … for making final determinations on whether vehicles [which NHTSA believes include trailers] and engines comply with fuel consumption standards." *Id.* at 74,274 (codified at 49 C.F.R. § 535.10(c)(4)). The Agencies in fact specifically rejected an alternative approach that would have "disharmonize[d] the program" by unlinking the greenhouse gas standards from the fuel economy standards. *Id.* at 73,500.

Not only are the standards inextricably intertwined, NHTSA's ability to enforce the fuel consumption standards depends on the participation of the EPA. "NHTSA will conduct audits and inspections in the same manner and, when possible, in conjunction with EPA." *Id.* at 74,271 (codified at 49 C.F.R. § 535.9). "If EPA suspends or revoke[s] a certificate of conformity … and a manufacturer is unable to take a corrective action allowed by EPA, noncompliance will be assumed, and NHTSA may initiate civil penalty proceedings or revoke fuel consumption credits." *Id.* at 74,271 (codified at 49 C.F.R. § 535.9(a)(10)). It is simply impossible to make sense of the regulatory scheme without the involvement of both EPA and NHTSA, and specifically without the existence of both agencies' standards.

The intertwined nature of the Agencies' regulation is also evident in their cost-benefit analysis. In predicting the Final Rule's economic effects, the Agencies specifically flagged as "important" that "NHTSA's fuel consumption standards and EPA's GHG standards will *both* be in effect, and each will lead to average fuel efficiency increases and GHG emission reductions." 81 Fed. Reg. at 73,857 (emphasis added); *see also id.* at 73,894 (similar). To that end, in evaluating costs and benefits, the Agencies regularly treated "emissions and fuel consumption" as a unitary concept. *E.g.*, *id.* at 73,639. The Agencies in several instances even aggregated the regulations' "maximum vehicle fuel savings and tailpipe GHG reduction" into a single percentage value and compared that percentage to the increase in cost per trailer. *Id.* at 73,482; *see also id.* at 73,505 (estimating a single value for "[p]er vehicle fuel consumption and CO_2 improvement"); *id.* at 73,648 ("The agencies project that the standards for the entire class of regulated trailers, when fully implemented in [model year] 2027, will achieve fuel consumption and CO_2 emissions reductions of two to nine percent.").

Even the Agencies' defenses of their statutory authority to regulate trailers was co-dependent: NHTSA relied on EPA's conclusion that "the tractor and trailer are both incomplete without the other" in concluding that it could regulate the "fuel efficiency of the tractor-trailer as a whole." 81 Fed. Reg. at 73,521.

In short, NHTSA would not have undertaken to regulate the fuel economy of trailers unless EPA were also regulating emissions from trailers. NHTSA's standards are inextricably "intertwined" with EPA's; holding that NHTSA intended its standards to survive without EPA's could rest only on "speculat[ion]." *Epsilon*, 857 F.3d at 929. Under this Court's cases, the proper remedy upon a finding that EPA lacks authority to regulate trailers is vacatur of all portions of the Final Rule regulating trailers.

B. NHTSA's Rules Cannot Function Without EPA's

Even if the Agencies had manifested any intent that NHTSA's trailer provisions stand alone, NHTSA's provisions would still be non-severable because they could not "function sensibly without the stricken [EPA] provision[s]." *MD/DC/DE Broadcasters Ass'n v. FCC*, 236 F.3d 13, 22 (D.C. Cir. 2001). As explained, EPA's emissions regulations for trailers cannot be excised from the Final Rule without leaving incomprehensible gaps in the resulting regulatory scheme. *See supra* pp.31-32. Among other things, the calculations necessary to verify trailers' compliance depend on the existence of *both* EPA's and NHTSA's standards for emissions and fuel consumption. 49 C.F.R. § 535.6(e).

In similar circumstances, this Court has refused to treat the remainder of a rule as severable even where the agency expressly indicated that the "regulation be treated as severable, to the extent possible." *MD/DC/DE Broadcasters*, 236 F.3d

at 22. The FCC in *MD/DC/DE Broadcasters* had created a rule aimed to regulate the hiring practices of its broadcast licensees with respect to women and minorities. *Id.* at 16-17. The rule gave broadcasters two alternative options for meeting its regulatory requirements, but the Court held that one of the options was unconstitutional with respect to minorities. *Id.* at 16-17, 22. Although the agency had explicitly "request[ed] that [the Court] sever the unconstitutional aspects and leave the rest of the new rule … in place," the Court declined to do so, finding that "the balance of the rule [could not] function independently if shorn of its unconstitutional aspects." *Id.* at 22. "The core of the rule," the Court explained, was "to provide broadcasters with two alternatives," and thus "severing one alternative [to] make the other mandatory" would "undercut the whole structure of the rule." *Id.* Likewise, the Court could not "simply cut out all references to 'minorities' in the regulation, thereby leaving the regulation intact with respect to women." *Id.* at 22-23. "Nothing in the rule" indicated that the agency "would or sensibly could" have wanted that uneven result; to the contrary, "[a]t every turn" the agency had "treat[ed] women and minorities identically." *Id.* at 23.

Here, not only have the Agencies expressed no intent that their standards be treated as severable, their standards are knotted together and cannot function independently. NHTSA's standards depend on the existence of EPA's standards—EPA's emissions values dictate whether the regulated vehicles comply with

NHTSA's fuel consumption standards. 81 Fed. Reg. at 74,274 (codified at 49 C.F.R. § 535.10(c)(4)). Excising EPA's standards would thus "undercut the whole structure of the rule." *MD/DC/DE Broadcasters*, 236 F.3d at 22. Because the EPA's trailer regulations are invalid, NHTSA's trailer regulations must also be vacated.[3]

III. NHTSA Lacks Statutory Authority To Regulate the Fuel Economy of Trailers

Even if NHTSA's trailer standards were severable from EPA's, they still would be unlawful and invalid. Like EPA, NHTSA independently exceeded its statutory authority when it purported to impose fuel economy standards on trailers. NHTSA asserts that the Energy Independence and Security Act of 2007 (EISA), which authorizes the creation of certain "fuel economy" standards for "vehicles," confers authority to regulate trailers. 81 Fed. Reg. at 73,519. But the EISA does not permit NHTSA to regulate the "fuel economy" of trailers, which are not vehicles and which consume no fuel.

[3] Although the Court has already concluded in its stay order that TTMA is likely to succeed on the merits of its challenge to EPA's effort to regulate trailers, EPA's standards are intertwined with and non-severable from NHTSA's for the reasons outlined in Section II. In other words, if the Court holds that NHTSA lacks authority to regulate trailers, all trailer-related portions of the Final Rule must be vacated regardless of whether EPA has authority to regulate trailers.

A. The EISA's Text and Structure Make Clear that It Does Not Authorize Regulation of Trailers

NHTSA participated in the rulemaking under Section 102 of the EISA, which directs the Secretary to "prescribe separate average fuel economy standards" for "passenger automobiles," "non-passenger automobiles," and "work trucks and commercial medium-duty and heavy-duty on-highway vehicles." 49 U.S.C. § 32902(b)(1). A "medium- and heavy-duty on-highway vehicle" means an "on-highway vehicle with a gross vehicle weight rating of 10,000 pounds or more." *Id.* § 32901(a)(7). The plain text of these provisions, particularly viewed within the overall structure of the EISA, compels the conclusion that NHTSA has no authority to regulate the "fuel economy" of trailers, which consume no fuel.

1. Trailers Have No "Fuel Economy"

The section of the EISA that launched NHTSA's rulemaking here—titled "Average Fuel Economy Standards for Automobiles and Certain Other Vehicles"—directs the Secretary of Transportation to "prescribe separate average fuel economy standards" for three categories of vehicles. 42 U.S.C. § 32902(b)(1). This text alone precludes NHTSA's statutory authority over trailers; it is simply impossible to impose a "fuel economy standard[]" on something that does not consume fuel.

Congress's definition of "fuel economy," which the EISA incorporated and left in place, *see* Pub. L. No. 110-140, § 103(a), 121 Stat. 1501, expressly

contemplates that fuel economy will be measured and regulated with respect to a vehicle that actually *uses* fuel. Fuel economy means "the average number of miles traveled by an automobile for each gallon of gasoline (or equivalent amount of other fuel) used." 49 U.S.C. § 32901(a)(11). Of course, trailers do not "use[]" fuel. The statutory definition captures the commonsense understanding of "fuel economy" as synonymous with "gas mileage." *See, e.g.*, Dep't of Energy & EPA, *Fuel Economy Guide: Model Year 2019* (Jan. 7, 2020), https://bit.ly/2O1LAz9 (comparing the fuel economy of various automobiles measured in miles per gallon). It is a measure of how efficiently the vehicle's engine converts power into distance—one that can of course vary across driving conditions and drivers, but that depends significantly on the inherent characteristics of the vehicle combusting the fuel. Dep't of Energy & EPA, *Choosing a More Efficient Vehicle*, https://bit.ly/36xtETn ("Selecting which vehicle to purchase is the most important fuel economy decision you'll make.").

Trying to apply the well-defined concept of "fuel economy" or "gas mileage" to a trailer is nonsensical. Because trailers do not actually consume or "use" any fuel, it requires contorting what is typically a simple metric (average miles per gallon of fuel consumed) into a convoluted, meaningless equation (average miles the trailer travels per gallon of fuel that the hypothetical hauling tractor consumes). The very same trailer could be hitched to either an extremely

fuel-efficient tractor or a gas-guzzling one, and its fictitious "fuel economy" would accordingly vary wildly. If NHTSA's idea is that a trailer has "fuel economy" merely because a trailer *affects* the mileage of a vehicle that hauls it, then so do all manner of objects that people place in their trunks or tie to their roofs. *Fuel Economy Guide* at 5 (warning that "[a]n extra 100 pounds can decrease fuel economy by about 1%," and "[a] large, blunt rooftop cargo box … can reduce fuel economy by 2%–8% in city driving, 6%–17% on the highway, and 10%–25% at interstate speeds"). Heavy suitcases and car-top carriers do not have fuel economy; neither do trailers.

NHTSA asserted that its statutory authority to improve the "fuel efficiency" of heavy-duty vehicles like tractors extends to "all of a tractor-trailer's parts—the engine, the cab-chassis, and the trailer—as parts of a whole." 81 Fed. Reg. at 73,521. For one thing, NHTSA does not have freestanding authority to regulate anything that might affect a vehicle's "fuel efficiency." Under § 32902(b)(1), NHTSA's statutory authority is limited to "prescrib[ing] … average *fuel economy standards*" for certain vehicles, 49 U.S.C. § 32902(b)(1). Pursuant to that direction, Congress authorized, in subsection (k), a "commercial medium- and heavy-duty on-highway vehicle and work truck fuel efficiency improvement program." *Id.* § 32902(k)(2); *see id.* § 32902(b)(1)(C) (directing NHTSA to "prescribe . . . average fuel economy standards … in accordance with subsection

(k)"). Subsection (k) does not expand NHTSA's authority or allow NHTSA to regulate items that, like trailers, fall outside of § 32902(b)(1) because they have no "fuel economy."

In any event, trailers do not have "fuel efficiency" either, for the same reason that they do not have "fuel economy." NHTSA's reference to the "fuel efficiency of the tractor-trailer as a whole," 81 Fed. Reg. at 73,521, is an implicit acknowledgment of the obvious fact that a trailer itself has no "fuel efficiency" because it does not use fuel.

NHTSA's limitless conception of fuel efficiency would authorize it to impose fuel-efficiency requirements on the manufacturers of car-top carriers, or air conditioners, or bicycle racks, which surely are also "parts of a whole" that can affect vehicles' fuel economy or efficiency. But Congress did not share this limitless vision of § 32902(k)(2). In the limited instances where Congress wanted to authorize NHTSA to consider how products that do not consume fuel affect a vehicle's fuel efficiency, Congress did so expressly. The EISA separately authorizes a program for rating the fuel-efficiency "effect[s] of tires," 49 U.S.C. § 32304A, signaling that the general authority in § 32902(k)(2) concerning the fuel efficiency of "vehicles" does not include the authority to impose stand-alone regulations on manufacturers of accessories that may affect the fuel efficiency of the vehicle. Under NHTSA's reading, however, § 32304A was wholly

unnecessary because tires, like trailers, are "parts of a whole" tractor-trailer vehicle, 81 Fed. Reg. at 73,521, and their manufacturers may be regulated directly under § 32902(k).

2. Trailers Are Not "Vehicles"

Even if trailers had "fuel economy" or "fuel efficiency" that NHTSA could regulate, trailers *still* lie outside the agency's statutory authority because trailers are not "vehicles." 49 U.S.C. § 32902(b)(1). The statute does not define the term "vehicle," so it takes on its "ordinary or natural meaning." *FDIC v. Meyer*, 510 U.S. 471, 476 (1994). And while some dictionaries contain capacious definitions of "vehicle" that arguably capture trailers, *e.g.*, Merriam-Webster Online Dictionary, https://bit.ly/31JuD2e ("a means of carrying or transporting something"), the term "vehicle" as commonly understood is not nearly so broad. The EISA does not authorize NHTSA to regulate wheelbarrows, for example. And when a person steals a truck with a trailer attached, he "violate[s] two separate statutes; one relating to self-propelled 'vehicles' and another relating to non-self-propelled 'goods.'" *Bernard*, 872 F.2d at 377; *see also United States v. Kelly*, 435 F.2d 1288 (9th Cir. 1970) (similar).

In any event, this Court's task is not to construe "vehicle" standing alone; it must read the term "in [its] context and with a view to [its] place in the overall statutory scheme." *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809

(1989); *see Sturgeon v. Frost*, 136 S. Ct. 1061, 1070 (2016). And the context in which the term "vehicle" appears in the EISA, along with several features of the EISA's structure, make crystal clear that Congress was referring to vehicles that *use fuel*.

Start with the text. It is axiomatic that the meaning of a term like "vehicle" depends on "the company it keeps." *McDonnell v. United States*, 136 S. Ct. 2355, 2368 (2016). Congress directed the Secretary to prescribe standards for three specific 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)(1). Because the broader term ("vehicles") is accompanied by more specific items that share key attributes ("automobiles" and "work trucks"), the Court must read the broader term as covering things "similar in nature" to the other items. *McDonnell*, 136 S. Ct. at 2368 ("[A]lthough the word 'communication' could in the abstract mean any type of communication, it is apparent that the list refers to documents of wide dissemination.") (quotation marks omitted)). Trailers bear no meaningful similarity to cars and trucks—they have no motor, they are not driven, and they do not use fuel. If trailers are vehicles, then trailers are the *only* non-motorized vehicle covered by the statute. This Court should not assume that Congress

intended to capture one item categorically unlike every other item, absent some affirmative indication that Congress intended that result.

The EISA, moreover, is a statute about fuel economy. *Supra* pp. 37-39. Title I of the EISA is called "Energy Security Through Improved Fuel Economy"; the relevant subtitle is the "Ten-in-Ten Fuel Economy Act." Other key provisions of the EISA reinforce this fuel-oriented focus: The law encourages the adoption of electric-powered vehicles, Pub. L. No. 110-140, § 131; increases the minimum amount of renewable fuel in gas sold in the United States, *id.* § 202; and establishes grants for biofuel research, *id.* § 223. Consistent with this overriding purpose, and as noted, Section 102 directs NHTSA to regulate the "fuel economy" of certain "vehicle[s]." 49 U.S.C. § 32902(b)(1), (k); *see also* 49 U.S.C. § 32901(a)(11) (defining "fuel economy" with reference to "automobile[s]"). Given Congress's consistent, explicit focus on fuel, it would be strange if Congress intended to silently sweep in fuel-less contraptions like trailers or car-top carriers or bicycle racks.

Several features of the EISA's structure—and particularly how it set this rulemaking in motion—further confirm that Congress did not contemplate trailers as within the scope of NHTSA's authority. Again, the EISA required the Secretary of Transportation to "prescribe separate average fuel economy standards" for "work trucks and commercial medium-duty or heavy-duty on-highway vehicles *in*

accordance with subsection (k)." 49 U.S.C. § 32902(b)(1) (emphasis added). Subsection (k), in turn, provides for a multi-step sequence for regulating work trucks and medium- and heavy-duty vehicles. The first step—a strict precondition to NHTSA's rulemaking—is that the National Academy of Sciences develop reports on vehicle fuel economy standards. *Id.* § 32902(k)(1), (2); *see* Pub. L. No. 110-140, § 108, 121 Stat. 1505 (2007).

Key here, Congress directed that the Academy's report study "technologies and costs to evaluate fuel economy for medium-duty and heavy-duty *trucks*"; evaluate "technologies that may be used practically to improve … medium-duty and heavy-duty *truck* fuel economy"; and analyze "how such technologies may be practically integrated into the automotive and medium-duty and heavy-duty *truck* manufacturing process." *Id.* § 108(a)(1)-(3) (emphases added). In conditioning NHTSA's rulemaking for medium- and heavy-duty *vehicles* on the Academy's study of medium- and heavy-duty *trucks*, it is clear that Congress viewed "trucks"—the "tractor" part of a tractor-trailer combination, *see* 81 Fed. Reg. at 73,480—as synonymous with "vehicles." To hold otherwise, this Court would need to assume Congress wanted the Academy to study all of the vehicles that NHTSA would ultimately regulate *except for* one narrow category—trailers. Courts sensibly avoid these sorts of implausible readings; they instead seek to "fit,

if possible, all parts [of the statute] into an harmonious whole." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (quotation marks omitted).

The statute's interchangeable use of "trucks" and "vehicles" is entirely unsurprising given the EISA's legislative history. The very first page of the Committee Report on the Ten-in-Ten Fuel Economy Act—which ultimately became Title I of the EISA—declares that the statute "would increase fuel economy for passenger cars and light, medium, and heavy duty *trucks*," S. Rep. No. 110-278, at 1, and the report contains not a single mention of trailers.

Congress's use of the term "gross vehicle weight rating" or "GVWR" in its definition of a "medium- and heavy-duty on-highway vehicle," 49 U.S.C. § 32901(a)(7), confirms that a trailer does not qualify as an on-highway vehicle for purposes of the EISA. As noted, NHTSA contended in the Final Rule that it can regulate trailers as on-highway vehicles under § 32901(a)(7) because its authority concerning the "fuel efficiency" of vehicles like tractors extends to "all of a tractor-trailer's parts—the engine, the cab-chassis, and the trailer—as parts of a whole." 81 Fed. Reg. at 73,521. But Congress's use of the term "GVWR" is irreconcilable with the notion that a "vehicle" means a "tractor-trailer." In this rulemaking and prior ones, the Agencies have made clear that the term GVWR refers to the weight of the hauling vehicle—it is "the maximum load that can be carried by a vehicle, including the weight of the vehicle itself." 81 Fed. Reg. at

73,485 n.26; *see* 76 Fed. Reg. at 57,114 (same). GVWR is distinct, the Final Rule explains, from the "gross *combined* weight rating" or "GCWR," which is the "maximum load that the vehicle can haul, *including the weight of a loaded trailer*." 81 Fed. Reg. at 73,485 (emphasis added); *see* 76 Fed. Reg. at 57,114 (same). Likewise, NHTSA publications make clear that the term "gross vehicle weight rating" refers to the weight of the "tow vehicle," not a combination tractor-trailer. NHTSA, *Towing a Trailer: Being Equipped for Safety* at 4-5 (Apr. 2002), https://bit.ly/2GpsMFZ. The "gross combination weight rating," by contrast, is the "permissible combined weight of the tow vehicle, trailer, passengers, equipment, fuel, etc., that the vehicle can handle." *Id.* at 5.

This Court looks to "an agency's use of a term" for "valuable information not only about ordinary usage but also about any specialized meaning that people in the field attach to that term." *Loving*, 742 F.3d at 1017. Congress, surely aware of the distinction between these two terms of art, chose to define and confine NHTSA's regulatory authority by reference to vehicles with a "gross vehicle weight rating." *See FAA v. Cooper*, 556 U.S. 284, 292 (2012) ("[W]hen Congress employs a term of art, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken."). It would have chosen the other term—gross combined weight rating—had it wanted to refer to the combined vehicle and trailer.

B. When Congress Intends to Permit NHTSA To Regulate Trailers, It Does So Expressly

In the Final Rule, NHTSA asserted authority to regulate trailers by pointing to a *different* statute that the agency administers—the Motor Vehicle Safety Act—which defines a "motor vehicle" to include "a vehicle driven or drawn by mechanical power." 49 U.S.C. § 30102(a)(7); *see* 81 Fed. Reg. at 73,521. But the fact that the Safety Act expressly covers trailers—and the EISA does not—undercuts NHTSA's reading. When Congress wants to cross-reference a definition, it does so explicitly, as it did elsewhere in the EISA. *See, e.g.*, 42 U.S.C. § 17011(a)(4)(A)(i), (b)(5). It also makes perfect sense that Congress would want to give NHTSA, a highway safety agency, authority to regulate the safety of trailers. Trailers, after all, have safety features, like lights and turn signals. But they do not use fuel. Only by inventing a regulatory scheme that depends on hypothesizing a trailer continuously attached to a fictitious tractor could NHTSA establish a "fuel economy standard" for trailers.

Moreover, several other statutes—including statutes administered by the Department of Transportation and NHTSA—expressly authorize regulation of trailers, confirming that EISA's failure to do so is significant. The National Driver Register program, for example, covers "motor vehicles," which it defines to mean "a vehicle, machine, tractor, trailer, or semitrailer propelled or drawn by mechanical power and used on public streets, roads, or highways." 49 U.S.C.

§ 30301(4). Other statutes govern objects "drawn by mechanical power" and thus clearly cover trailers. *See* 40 U.S.C. § 17101(2); 18 U.S.C. § 31(a)(6); 49 U.S.C. § 30102(a)(7); *id.* § 32101(7). Congress in the EISA could have taken the same tack by defining "vehicle" to include trailers; its failure to do so shows that trailers are not covered. *See Meghrig*, 516 U.S. at 485. Indeed, even *within* the EISA, Congress specifically called out trailers when it wanted to authorize their regulation—it authorized a demonstration program for implementing advanced insulation into "covered refrigeration units," expressly defined to include a "commercial refrigerated trailer" (as distinct from a "commercial refrigerated truck"). 42 U.S.C. § 17242(a)(2).

C. *Chevron* Does Not Apply, but the Rule Fails Even if It Does

Like EPA, NHTSA is actively reconsidering its rule, and *Chevron* therefore does not apply. *See Glob. Tel*Link*, 866 F.3d at 407-08. Even if it did, the EISA's "text, structure, purpose, and legislative history" unambiguously foreclose NHTSA's exercise of authority over trailers at *Chevron* step one. *Loving*, 742 F.3d at 1016 (quoting *Pharm. Research & Mfrs. of Am. v. Thompson*, 251 F.3d 219, 224 (D.C. Cir. 2001)). Alternatively, the agency's interpretation is unreasonable for the reasons explained, and the Final Rule thus fails at *Chevron* step two. *Id.*

If NHTSA wishes to regulate fuel economy of vehicles that *actually* use fuel—the tractors and other trucks that haul trailers—it may do so. It may even

regulate those vehicles in a manner that requires their manufacturers to account for the effect of attaching a trailer. What NHTSA may not do under EISA is regulate the "fuel economy" of trailers themselves, which are not vehicles and which do not consume fuel.

CONCLUSION

The Court should grant the petition for review and vacate all portions of the Final Rule that apply to trailers.

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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 11,142 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 2010 in Times New Roman 14-point font.

Dated: February 10, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on February 10, 2020, the foregoing brief 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: February 10, 2020

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ADDENDUM

Clean Air Act

42 U.S.C. § 7521. Emission standards for new motor vehicles or new motor vehicle engines.

(a) Authority of Administrator to prescribe by regulation

Except as otherwise provided in subsection (b)—

(1) The Administrator shall by regulation prescribe (and from time to time revise) in accordance with the provisions of this section, standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare. Such standards shall be applicable to such vehicles and engines for their useful life (as determined under subsection (d), relating to useful life of vehicles for purposes of certification), whether such vehicles and engines are designed as complete systems or incorporate devices to prevent or control such pollution.

(2) Any regulation prescribed under paragraph (1) of this subsection (and any revision thereof) shall take effect after such period as the Administrator finds necessary to permit the development and application of the requisite technology, giving appropriate consideration to the cost of compliance within such period.

* * *

Clean Air Act

42 U.S.C. § 7550. Definitions.

As used in this part—

(1) The term "manufacturer" as used in sections 7521, 7522, 7525, 7541, and 7542 of this title means any person engaged in the manufacturing or assembling of new motor vehicles, new motor vehicle engines, new nonroad vehicles or new nonroad engines, or importing such vehicles or engines for resale, or who acts for and is under the control of any such person in connection with the distribution of new motor vehicles, new motor vehicle engines, new nonroad vehicles or new nonroad engines, but shall not include any dealer with respect to new motor vehicles, new motor vehicle engines, new nonroad vehicles or new nonroad engines received by him in commerce.

(2) The term "motor vehicle" means any self-propelled vehicle designed for transporting persons or property on a street or highway.

(3) Except with respect to vehicles or engines imported or offered for importation, the term "new motor vehicle" means a motor vehicle the equitable or legal title to which has never been transferred to an ultimate purchaser; and the term "new motor vehicle engine" means an engine in a new motor vehicle or a motor vehicle engine the equitable or legal title to which has never been transferred to the ultimate purchaser; and with respect to imported vehicles or engines, such terms mean a motor vehicle and engine, respectively, manufactured after the effective date of a regulation issued under section 7521 of this title which is applicable to such vehicle or engine (or which would be applicable to such vehicle or engine had it been manufactured for importation into the United States).

(4) The term "dealer" means any person who is engaged in the sale or the distribution of new motor vehicles or new motor vehicle engines to the ultimate purchaser.

(5) The term "ultimate purchaser" means, with respect to any new motor vehicle or new motor vehicle engine, the first person who in good faith purchases such new motor vehicle or new engine for purposes other than resale.

(6) The term "commerce" means (A) commerce between any place in any State and any place outside thereof; and (B) commerce wholly within the District of Columbia.

(7) Vehicle curb weight, gross vehicle weight rating, light-duty truck, light-duty vehicle, and loaded vehicle weight

The terms “vehicle curb weight”, “gross vehicle weight rating” (GVWR), “light-duty truck” (LDT), light-duty vehicle,1 and “loaded vehicle weight” (LVW) have the meaning provided in regulations promulgated by the Administrator and in effect as of November 15, 1990. The abbreviations in parentheses corresponding to any term referred to in this paragraph shall have the same meaning as the corresponding term.

(8) Test weight

The term “test weight” and the abbreviation “tw” mean the vehicle curb weight added to the gross vehicle weight rating (gvwr) and divided by 2.

(9) Motor vehicle or engine part manufacturer

The term “motor vehicle or engine part manufacturer” as used in sections 7541 and 7542 of this title means any person engaged in the manufacturing, assembling or rebuilding of any device, system, part, component or element of design which is installed in or on motor vehicles or motor vehicle engines.

(10) Nonroad engine

The term “nonroad engine” means an internal combustion engine (including the fuel system) that is not used in a motor vehicle or a vehicle used solely for competition, or that is not subject to standards promulgated under section 7411 of this title or section 7521 of this title.

(11) Nonroad vehicle

The term “nonroad vehicle” means a vehicle that is powered by a nonroad engine and that is not a motor vehicle or a vehicle used solely for competition.

Energy Independence and Security Act of 2007

49 U.S.C. § 32901. Definitions.

(a) General.--In this chapter--

(7) "commercial medium- and heavy-duty on-highway vehicle" means an on-highway vehicle with a gross vehicle weight rating of 10,000 pounds or more.

* * *

(10) "fuel" means--

(A) gasoline;

(B) diesel oil; or

(C) other liquid or gaseous fuel that the Secretary decides by regulation to include in this definition as consistent with the need of the United States to conserve energy.

(11) "fuel economy" means the average number of miles traveled by an automobile for each gallon of gasoline (or equivalent amount of other fuel) used, as determined by the Administrator under section 32904(c) of this title.

(12) "import" means to import into the customs territory of the United States.

(13) "manufacture" (except under section 32902(d) of this title) means to produce or assemble in the customs territory of the United States or to import.

(14) "manufacturer" means--

(A) a person engaged in the business of manufacturing automobiles, including a predecessor or successor of the person to the extent provided under regulations prescribed by the Secretary; and

(B) if more than one person is the manufacturer of an automobile, the person specified under regulations prescribed by the Secretary.

(15) "model" means a class of automobiles as decided by regulation by the Administrator after consulting and coordinating with the Secretary.

(16) "model year", when referring to a specific calendar year, means--

(A) the annual production period of a manufacturer, as decided by the Administrator, that includes January 1 of that calendar year; or

(B) that calendar year if the manufacturer does not have an annual production period.

(17) "non-passenger automobile" means an automobile that is not a passenger automobile or a work truck.

(18) "passenger automobile" means an automobile that the Secretary decides by regulation is manufactured primarily for transporting not more than 10 individuals, but does not include an automobile capable of off-highway operation that the Secretary decides by regulation--

(A) has a significant feature (except 4-wheel drive) designed for off-highway operation; and

(B) is a 4-wheel drive automobile or is rated at more than 6,000 pounds gross vehicle weight.

(19) "work truck" means a vehicle that--

(A) is rated at between 8,500 and 10,000 pounds gross vehicle weight; and

(B) is not a medium-duty passenger vehicle (as defined in section 86.1803-01 of title 40, Code of Federal Regulations, as in effect on the date of the enactment of the Ten-in-Ten Fuel Economy Act).

* * *

Energy Independence and Security Act of 2007

49 U.S.C. § 32902. Average fuel economy standards.

(a) Prescription of standards by regulation.—At least 18 months before the beginning of each model year, the Secretary of Transportation shall prescribe by regulation average fuel economy standards for automobiles manufactured by a manufacturer in that model year. Each standard shall be the maximum feasible average fuel economy level that the Secretary decides the manufacturers can achieve in that model year.

(b) Standards for automobiles and certain other vehicles.—

(1) In general.—The Secretary of Transportation, after consultation with the Secretary of Energy and the Administrator of the Environmental Protection Agency, shall prescribe separate average fuel economy standards for—

(A) passenger automobiles manufactured by manufacturers in each model year beginning with model year 2011 in accordance with this subsection;

(B) non-passenger automobiles manufactured by manufacturers in each model year beginning with model year 2011 in accordance with this subsection; and

(C) work trucks and commercial medium-duty or heavy-duty on-highway vehicles in accordance with subsection (k).

(2) Fuel economy standards for automobiles.—

(A) Automobile fuel economy average for model years 2011 through 2020.—The Secretary shall prescribe a separate average fuel economy standard for passenger automobiles and a separate average fuel economy standard for non-passenger automobiles for each model year beginning with model year 2011 to achieve a combined fuel economy average for model year 2020 of at least 35 miles per gallon for the total fleet of passenger and non-passenger automobiles manufactured for sale in the United States for that model year.

(B) Automobile fuel economy average for model years 2021 through 2030.—For model years 2021 through 2030, the average fuel economy required to be attained by each fleet of passenger and non-passenger automobiles manufactured for sale in the United States shall be the maximum feasible average fuel economy standard for each fleet for that model year.

(C) Progress toward standard required.—In prescribing average fuel economy standards under subparagraph (A), the Secretary shall prescribe annual fuel economy standard increases that increase the applicable average fuel economy standard ratably beginning with model year 2011 and ending with model year 2020.

(3) Authority of the Secretary.—The Secretary shall—

(A) prescribe by regulation separate average fuel economy standards for passenger and non-passenger automobiles based on 1 or more vehicle attributes related to fuel economy and express each standard in the form of a mathematical function; and

(B) issue regulations under this title prescribing average fuel economy standards for at least 1, but not more than 5, model years.

(4) Minimum standard.—In addition to any standard prescribed pursuant to paragraph (3), each manufacturer shall also meet the minimum standard for domestically manufactured passenger automobiles, which shall be the greater of—

(A) 27.5 miles per gallon; or

(B) 92 percent of the average fuel economy projected by the Secretary for the combined domestic and non-domestic passenger automobile fleets manufactured for sale in the United States by all manufacturers in the model year, which projection shall be published in the Federal Register when the standard for that model year is promulgated in accordance with this section.

(c) Amending passenger automobile standards.—The Secretary of Transportation may prescribe regulations amending the standard under subsection (b) of this section for a model year to a level that the Secretary decides is the maximum feasible average fuel economy level for that model year. Section 553 of title 5 applies to a proceeding to amend the standard. However, any interested person may make an oral presentation and a transcript shall be taken of that presentation.

(d) Exemptions.—(1) Except as provided in paragraph (3) of this subsection, on application of a manufacturer that manufactured (whether in the United States or not) fewer than 10,000 passenger automobiles in the model year 2 years before the model year for which the application is made, the Secretary of Transportation may exempt by regulation the manufacturer from a standard under subsection (b) or (c) of this section. An exemption for a model year applies only if the manufacturer manufactures (whether in the United States or not) fewer than 10,000 passenger automobiles in the model year. The Secretary may exempt a manufacturer only if the Secretary—

(A) finds that the applicable standard under those subsections is more stringent than the maximum feasible average fuel economy level that the manufacturer can achieve; and

(B) prescribes by regulation an alternative average fuel economy standard for the passenger automobiles manufactured by the exempted manufacturer that the Secretary decides is the maximum feasible average fuel economy level for the manufacturers to which the alternative standard applies.

(2) An alternative average fuel economy standard the Secretary of Transportation prescribes under paragraph (1)(B) of this subsection may apply to an individually exempted manufacturer, to all automobiles to which this subsection applies, or to classes of passenger automobiles, as defined under regulations of the Secretary, manufactured by exempted manufacturers.

(3) Notwithstanding paragraph (1) of this subsection, an importer registered under section 30141(c) of this title may not be exempted as a manufacturer under paragraph (1) for a motor vehicle that the importer—

(A) imports; or

(B) brings into compliance with applicable motor vehicle safety standards prescribed under chapter 301 of this title for an individual under section 30142 of this title.

(4) The Secretary of Transportation may prescribe the contents of an application for an exemption.

(e) Emergency vehicles.—(1) In this subsection, "emergency vehicle" means an automobile manufactured primarily for use—

(A) as an ambulance or combination ambulance-hearse;

(B) by the United States Government or a State or local government for law enforcement; or

(C) for other emergency uses prescribed by regulation by the Secretary of Transportation.

(2) A manufacturer may elect to have the fuel economy of an emergency vehicle excluded in applying a fuel economy standard under subsection (a), (b), (c), or (d) of this section. The election is made by providing written notice to the Secretary of Transportation and to the Administrator of the Environmental Protection Agency.

(f) Considerations on decisions on maximum feasible average fuel economy.— When deciding maximum feasible average fuel economy under this section, the Secretary of Transportation shall consider technological feasibility, economic practicability, the effect of other motor vehicle standards of the Government on fuel economy, and the need of the United States to conserve energy.

(g) Requirements for other amendments.—(1) The Secretary of Transportation may prescribe regulations amending an average fuel economy standard prescribed under subsection (a) or (d) of this section if the amended standard meets the requirements of subsection (a) or (d), as appropriate.

(2) When the Secretary of Transportation prescribes an amendment under this section that makes an average fuel economy standard more stringent, the Secretary shall prescribe the amendment (and submit the amendment to Congress when required under subsection (c)(2) of this section) at least 18 months before the beginning of the model year to which the amendment applies.

(h) Limitations.—In carrying out subsections (c), (f), and (g) of this section, the Secretary of Transportation—

(1) may not consider the fuel economy of dedicated automobiles;

(2) shall consider dual fueled automobiles to be operated only on gasoline or diesel fuel; and

(3) may not consider, when prescribing a fuel economy standard, the trading, transferring, or availability of credits under section 32903.

(i) Consultation.—The Secretary of Transportation shall consult with the Secretary of Energy in carrying out this section and section 32903 of this title.

(j) Secretary of Energy comments.—(1) Before issuing a notice proposing to prescribe or amend an average fuel economy standard under subsection (a), (c), or (g) of this section, the Secretary of Transportation shall give the Secretary of Energy at least 10 days from the receipt of the notice during which the Secretary of Energy may, if the Secretary of Energy concludes that the proposed standard would adversely affect the conservation goals of the Secretary of Energy, provide written comments to the Secretary of Transportation about the impact of the standard on those goals. To the extent the Secretary of Transportation does not revise a proposed standard to take into account comments of the Secretary of Energy on any adverse impact of the standard, the Secretary of Transportation shall include those comments in the notice.

(2) Before taking final action on a standard or an exemption from a standard under this section, the Secretary of Transportation shall notify the Secretary of Energy and provide the Secretary of Energy a reasonable time to comment.

(k) Commercial medium- and heavy-duty on-highway vehicles and work trucks.—

(1) Study.—Not later than 1 year after the National Academy of Sciences publishes the results of its study under section 108 of the Ten-in-Ten Fuel Economy Act, the Secretary of Transportation, in consultation with the Secretary of Energy and the Administrator of the Environmental Protection Agency, shall examine the fuel efficiency of commercial medium- and heavy-duty on-highway vehicles and work trucks and determine—

(A) the appropriate test procedures and methodologies for measuring the fuel efficiency of such vehicles and work trucks;

(B) the appropriate metric for measuring and expressing commercial medium- and heavy-duty on-highway vehicle and work truck fuel efficiency performance, taking into consideration, among other things, the work performed by such on-highway vehicles and work trucks and types of operations in which they are used;

(C) the range of factors, including, without limitation, design, functionality, use, duty cycle, infrastructure, and total overall energy consumption and operating costs that affect commercial medium- and heavy-duty on-highway vehicle and work truck fuel efficiency; and

(D) such other factors and conditions that could have an impact on a program to improve commercial medium- and heavy-duty on-highway vehicle and work truck fuel efficiency.

(2) Rulemaking.—Not later than 24 months after completion of the study required under paragraph (1), the Secretary, in consultation with the Secretary of Energy and the Administrator of the Environmental Protection Agency, by regulation, shall determine in a rulemaking proceeding how to implement a commercial medium- and heavy-duty on-highway vehicle and work truck fuel efficiency improvement program designed to achieve the maximum feasible improvement, and shall adopt and implement appropriate test methods, measurement metrics, fuel economy standards, and compliance and enforcement protocols that are appropriate, cost-effective, and technologically feasible for commercial medium- and heavy-duty on-highway vehicles and work trucks. The Secretary may prescribe separate standards for different classes of vehicles under this subsection.

(3) Lead-time; regulatory stability.—The commercial medium- and heavy-duty on-highway vehicle and work truck fuel economy standard adopted pursuant to this subsection shall provide not less than—

(A) 4 full model years of regulatory lead-time; and

(B) 3 full model years of regulatory stability.

Energy Independence and Security Act of 2007

Pub. L. No. 110-140, § 108, 121 Stat. 1504 (Dec. 19, 2007)

(a) In General.—As soon as practicable after the date of enactment of this Act, the Secretary of Transportation shall execute an agreement with the National Academy of Sciences to develop a report evaluating medium-duty and heavy-duty truck fuel economy standards, including—

(1) an assessment of technologies and costs to evaluate fuel economy for medium-duty and heavy-duty trucks;

(2) an analysis of existing and potential technologies that may be used practically to improve medium-duty and heavy-duty truck fuel economy;

(3) an analysis of how such technologies may be practically integrated into the medium-duty and heavy-duty truck manufacturing process;

(4) an assessment of how such technologies may be used to meet fuel economy standards to be prescribed under section 32902(k) of title 49, United States Code, as amended by this subtitle; and

(5) associated costs and other impacts on the operation of medium-duty and heavy-duty trucks, including congestion.

(b) Report.—The Academy shall submit the report to the Secretary, the Committee on Commerce, Science, and Transportation of the Senate, and the Committee on Energy and Commerce of the House of Representatives, with its findings and recommendations not later than 1 year after the date on which the Secretary executes the agreement with the Academy.