[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 REPLY BRIEF OF PETITIONER TRUCK TRAILER MANUFACTURERS ASSOCIATION, INC.

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GLOSSARY

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

INTRODUCTION AND SUMMARY OF ARGUMENT

The plain text resolves this appeal. Rather than indulge respondents' contorted efforts to transform a statute regulating manufacturers of "self-propelled" vehicles into a statute regulating manufacturers of products that must be propelled by something else, this Court should simply apply the statute Congress wrote and vacate EPA's portion of the Final Rule. That resolves this petition for review because the Agencies declared that their standards were "unified," because NHTSA's standards quite literally depend on the existence of EPA's, and because this Court's longstanding precedent forbids it from rewriting NHTSA's standards to eliminate reliance on EPA's unlawful standards. Regardless, NHTSA's standards are unlawful in their own right, because a statute authorizing regulation of "fuel economy" does not apply to products that consume no fuel.

The Agencies and Intervenors alike argue that trailers contribute to emissions of hauling vehicles; that trailer manufacturers are "well-positioned" to account for that contribution; and that interpreting the statutes to exclude direct regulation of trailers would therefore decrease "emissions reductions opportunities." *E.g.*, Orgs.1, 8, 14, 29; Resp.33.[1] To be clear, TTMA's members support efforts to reduce drag to increase the fuel efficiency of tractors and have

[1] "Resp." refers to the Agencies' brief; "Orgs." to the environmental organization-intervenors' brief; "States" to the state-intervenors' brief; and "Br." to TTMA's opening brief.

long participated in EPA's voluntary SmartWay program to reduce the environmental impacts of trailers. They regularly install aerodynamic and other technologies where motor carrier customers request such equipment because, for the loads carried and distances and speeds they travel, these customers have determined that the added equipment will in fact save fuel.

The Agencies and Intervenors apparently prefer a top-down, forced-purchase approach. But their arguments must be directed to Congress, not this Court. "[N]o legislation pursues its purposes at all costs." *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2185 (2014). "Congressional intent is discerned primarily from the statutory text," *id.*, and here the text excludes trailers.

ARGUMENT

I. EPA Lacks Statutory Authority To Regulate Emissions From Trailers

A. "Tractor-Trailers" Are Not Self-Propelled Motor Vehicles

EPA lacks authority to regulate trailers, and EPA's and Intervenors' contrary argument reads the word "self-propelled" out of the statute. 42 U.S.C. § 7550(2). Anything that transports property on a street or highway moves, either by itself or because something else pulls it. Congress's manifest goal in using the term "*self*-propelled" was to distinguish trailers from the tractors that pull them, and to exclude trailers from EPA's regulatory reach. EPA identifies no alternative products, other than trailers, "designed for transporting … property on a street or highway" that the term "self-propelled" was plausibly intended to exclude. The

many contrasting statutes using the phrase "self-propelled *or drawn by mechanical power*" confirm this obvious point. Br.20. That these statutes were enacted at "different times and for different purposes" (Resp.36-37) is irrelevant. *See Dole Food Co. v. Patrickson*, 538 U.S. 468, 476 (2003).

Respondents devote many pages to a convoluted effort to rewrite a simple statute and evade Congress's manifest intent. When Congress excluded trailers from the definition of "motor vehicle," Respondents contend, what Congress really meant was that EPA *could* regulate trailers if it just called them something else, namely "tractor-trailers." Respondents thus argue that a "tractor-trailer" is a motor vehicle, and that manufacturers of trailers are also manufacturers of "tractor-trailers." Resp.28-29; Orgs.11-29.

This is nonsense. EPA cannot circumvent an express limitation on its authority by engaging in word games. Because Congress used the term "self-propelled" to distinguish tractors from the trailers they pull, EPA cannot interpret the statute to permit regulation of trailers as "self-propelled motor vehicles" simply because they may be pulled by a tractor.

In any event, EPA's approach fails on its own terms. When a trailer is attached to a tractor, the combination is a self-propelled vehicle pulling a trailer; the combination does not transform a trailer *into* a self-propelled vehicle. EPA forthrightly acknowledged this fact just one month ago in a major rule. *See* EPA &

NHTSA, Final Rule, *The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks*, 85 Fed. Reg. 24,174, 24,525 n.1325 (Apr. 30, 2020) (describing a tractor-trailer combination as a "vehicle and a trailer attached to the vehicle"); *id.* at 24,408 (similar).

A "tractor-trailer" as a whole is not self-propelled; it contains a portion that is self-propelled (the tractor) and a portion that is not (the trailer).[2] Suppose a statute authorized an agency to regulate "bread"—defined as baked dough made of flour and water—but not peanut butter. The fact that peanut butter may be combined with bread to form a sandwich does not mean the whole sandwich is "bread." Nor does it mean that the agency may prescribe standards for peanut butter. The agency gets to regulate the bread, not the sandwich, just like EPA gets to regulate the motor vehicle, not the "tractor-trailer." Or suppose a statute authorized an agency to regulate guns, defined as weapons designed to discharge projectiles. The agency could not bootstrap its way around the definition's facial exclusion of bullets by arguing that a gun-bullet combination called a "loaded gun" satisfies the statutory definition. Likewise, a statute regulating refrigerators—defined as a "self-cooled apparatus designed to store food"—does not cover

[2] EPA misrepresents TTMA's rulemaking comments. Resp.28. TTMA stated that "the tractor and trailer cannot be considered a single motor vehicle." J.A.##. In the passage EPA quotes, TTMA simply acknowledged EPA's contrary theory, explaining that "[i]f the Agency wants to claim" that tractor-trailers are motor vehicles, EPA still couldn't regulate the trailer manufacturer. J.A.##-##.

Tupperware; the Tupperware does not *become* self-cooled (or become a refrigerator) once it's in the refrigerator. And a trailer may be attached to a self-propelled motor vehicle; that does not mean the trailer *is* a self-propelled motor vehicle.

EPA's interpretation renders anything and everything "self-propelled"—confirming that EPA's interpretation is wrong. A car-top carrier is "self-propelled," because when it's put on top of a car, the "entire vehicle propels down the highway," including the car-top carrier. Resp.28. So is a bicycle rack, on EPA's theory, because when the driver "hits the accelerator," Resp.28, the bicycle-rack/vehicle combination travels too. Of course, in both cases, the product is not *self*-propelled; it is propelled by the motor vehicle. EPA's argument that a product that cannot propel itself nonetheless becomes "*self*-propelled" by virtue of being attached to and propelled by *something else* makes a mockery of the statutory language. The fact that EPA can regulate motor vehicles that are not designed as "complete systems," Resp.29, does not change the fact that the object of the regulation must be a "motor vehicle." Br.18-19.

EPA also argues that § 7550(2)'s limitation of "motor vehicles" to vehicles "designed for transporting persons or property" indicates that Congress focused on "use," and observes that a trailer aids a vehicle in transporting property. Resp.29; *see* Orgs.16. But the "designed for" language is an *additional* criterion limiting

what qualifies as a motor vehicle, not an alternative definition that overrides the "self-propelled" limitation. Nor would applying the plain text somehow prohibit EPA from regulating tractors, as Intervenors inexplicably argue. Tractors satisfy both components of § 7550(2) because they are self-propelled and "designed for" transporting people and property, and tractor manufacturers incorporate the means of propulsion (the engine) before selling the tractor. *Cf.* Orgs.16-17. And EPA's hypothetical (at 31) about evading the rule by failing to include an ignition switch is silly. Customers wouldn't buy ignition-less tractors.

Nor can EPA reconcile its interpretation with § 7521(a)(1)'s express authorization to regulate "motor vehicle engines" in addition to "motor vehicles." If EPA were correct that the term "motor vehicle" itself includes anything necessary for the vehicle to "accomplish its intended purpose" (Resp. 29), the express authorization to regulate engines would be unnecessary. EPA appears to suggest that the engine provision isn't superfluous because its interpretation of "motor vehicle" would not cover "every component of a motor vehicle, no matter how insignificant." Resp.35-36. But an engine is hardly "insignificant"; it is the very component responsible for self-propulsion and for emissions. Intervenors vaguely argue that "the separate authorization of standards for engines reflects their distinct function and influence on emissions." Orgs.19. But the very reason EPA tried to regulate trailers is that they too influence emissions.

B. Trailer Manufacturers Do Not Manufacture "Tractor-Trailers"

Even if a "tractor-trailer" were a motor vehicle, EPA's rule would still be invalid. EPA undisputedly may only require motor vehicle "manufacturer[s]" to comply with emissions standards. 42 U.S.C. § 7522(a)(1). Trailer manufacturers do not manufacture "tractor-trailers" any more than Jif manufactures peanut-butter sandwiches. Br.24-26.

EPA does not dispute that a third-party purchaser attaches a trailer to a tractor, or that a particular trailer does not stay attached to one tractor. Br.24-25. Instead, EPA argues that TTMA's members are "tractor-trailer" "manufacturers" because that term includes companies "engaged in the manufacturing … of new motor vehicles." Resp.32 (quoting 42 U.S.C. § 7550(1)).

This argument, like EPA's argument that the "tractor-trailer" combination is the "motor vehicle," renders significant statutory language superfluous. Under EPA's theory, every engine manufacturer is "engaged" in manufacturing the "overall vehicle" itself because the engine goes in the vehicle, Resp.32; *accord* Orgs.23, rendering § 7550(1)'s separate coverage of engine manufacturers superfluous. Likewise, § 7550(1)'s separate coverage of persons engaged in "assembling of new motor vehicles" is superfluous under EPA's theory, since every assembler is "engaged" in "manufacturing" what EPA terms the "overall vehicle."

In fact, there is no such thing as the "overall vehicle." There are simply different trailers (manufactured by one set of entities) attached to different tractors (manufactured by a different set of entities) at various times. To accept EPA's logic would be to believe that bullet manufacturers are actually engaged in the manufacturing of guns, because a gun "cannot accomplish its intended purpose" (Resp.29) without a bullet, the bullet is loaded into a gun, and the bullet is "an entire, complete section" of the combination (Resp.34). But no one manufactures a single "tractor-trailer" any more than anyone manufactures a "loaded gun."

That is especially so because trailers are sold separately from tractors and because, despite Intervenors' strenuous assertions otherwise, trailers have extensive commercial uses beyond attachment to the tractor. In particular, they are increasingly used for storage, to replace warehouses. J.A.##. The Agencies' own admission that some shippers own *six* trailers per tractor confirms that trailer manufacturers don't manufacture "tractor-trailers." Br.25; J.A.##.

Moreover, when Congress intended to allow EPA to regulate component manufacturers, it said so explicitly, Br.25—undermining EPA's contention that a trailer manufacturer is actually a vehicle manufacturer because trailers are "principal components of tractor-trailer vehicles." Resp.32. As EPA concedes (at 34 n.6), 42 U.S.C. § 7522(a)(3)(B) authorizes certain "limited" regulation (not including independent emissions standards) of "manufacture[rs]" of "any part or

component intended for use with, or as part of, any motor vehicle." In other words, Congress expressly distinguished between component manufacturers and vehicle manufacturers. Likewise, 42 U.S.C. § 7541(a) distinguishes between the "manufacturer" of a "motor vehicle" and a "motor vehicle part." *Compare* § 7541(a)(1), *with* (a)(2). EPA says these provisions (and others pertaining to component manufacturers) are "not relevant" because they do not authorize emissions standards under § 7521 and EPA did not "rely" on them. Resp.34 n.6. But that is the whole point. That the component-manufacturer provisions convey only limited regulatory authority overwhelmingly signals that a component manufacturer is *not* a vehicle manufacturer within the meaning of the statute.[3]

Moreover, the statutory structure depends on the notion that there is *one* manufacturer per motor vehicle, not the infinite number EPA's interpretation permits. Br.25. EPA issues a certificate of emissions conformity after "the manufacturer" satisfies certain conditions. 42 U.S.C. § 7525(a)(3)(A). "[T]he manufacturer" of "each new motor vehicle" must "warrant" to purchasers that the vehicle complies with § 7521's emissions standards and is free from defects. *Id.* § 7541(a)(1). EPA may require "the manufacturer" to recall and remedy "nonconforming vehicles." *Id.* § 7541(c)(1). EPA has no response to these and

[3] Intervenors, disagreeing with EPA, state that a trailer is *not* a "part" or "component" of a so-called tractor-trailer. Orgs.18-19. And whether trailers could be regulated under 42 U.S.C. §§ 7541 or 7542 is irrelevant to this case. Orgs. 28.

countless other statutory references to "the" manufacturer. Br.25; 42 U.S.C. §§ 7522(a), 7545(c)(3)(A), 7549(a)-(b). And EPA does not explain how, for example, a trailer manufacturer can ensure that the so-called "tractor-trailer vehicle" is "covered by a certificate of [emissions] conformity" *before* it is sold, *id.* § 7522(a)(1), when the "tractor-trailer" only comes into existence *after* the trailer manufacturer makes a sale. Nor does EPA explain how a trailer manufacturer could recall and "remed[y]" an entire offending "tractor-trailer vehicle." *Id.* § 7541(c)(1). That the statute covers "any person" who makes vehicles (Resp.35; Orgs.22) does not mean that trailer manufacturer makes vehicles.

Intervenors, for their part, argue that a motor vehicle must have multiple manufacturers because the actual vehicle manufacturer isn't competent to test or warrant the trailer. Orgs.26-27. But that is question-begging—it assumes that Congress intended to regulate trailers. In any event, even if a "tractor-trailer" is a motor vehicle (it is not) and if a motor vehicle may have more than one manufacturer (it may not), the entity that manufactures the *non-self-propelled* part of the "tractor-trailer" still would not qualify as a motor vehicle manufacturer.

Finally, accepting EPA's interpretation would violate the nondelegation doctrine because EPA would enjoy unfettered discretion to regulate anything that might touch a vehicle. Br.24. EPA says its discretion is cabined because EPA "considers the significance of a vehicle component." Resp.34. But "[t]he

constitutional question is whether *Congress* has supplied an intelligible principle to guide the delegee's use of discretion." *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) (plurality) (emphasis added). The statutory definition of "motor vehicle" contains no "significance" standard; "significance" is just something EPA has made up in an effort to avoid the fact that, under its interpretation, the statute authorizes limitless regulation of anything that adds to drag when used with a vehicle.

C. *Chevron* Does Not Apply, But the Rule Fails Regardless

The Agencies do not cite a single decision of this Court or any court deferring under *Chevron* to an interpretation the agency is actively reconsidering. And *Global Tel*Link v. FCC*, 866 F.3d 397, 407-08 (D.C. Cir. 2017), states that no deference is warranted. Br.26. That was an alternative holding, not *dicta*. *Cf.* Resp.25-26. The Agencies reference *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 920 F.3d 1 (D.C. Cir. 2019), and *SoundExchange, Inc. v. Copyright Royalty Bd.*, 904 F.3d 41 (D.C. Cir. 2018), but neither decision even cites *Global Tel*Link*, much less "reject[s]" TTMA's interpretation. *Cf.* Resp.26. Those decisions simply say that a DOJ lawyer cannot waive *Chevron*. 920 F.3d at 21-23; 904 F.3d at 54-55. Here, the Agencies admit (at 25) that they themselves are reconsidering whether their past interpretations should have the force of law. *See* J.A.##, ##.

Regardless, the word "self-propelled" in the Clean Air Act speaks directly and unambiguously to the question whether EPA can regulate trailers and trailer manufacturers, and answers that question "no." Even if the statute were ambiguous, EPA's interpretation is unreasonable. *Chevron* "does not license interpretative gerrymanders," *Michigan v. EPA*, 135 S. Ct. 2699, 2708 (2015), but EPA's "tractor-trailer" theory is precisely that.

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

EPA's trailer regulations are not severable from NHTSA's. The Court may sever a rule only if the agency intended severability "*and* … the remainder of the regulation could function sensibly without the stricken provision." *MD/DC/DE Broadcasters Ass'n v. FCC*, 236 F.3d 13, 22 (D.C. Cir. 2001) (emphasis added). Here, neither precondition is met, much less both. Br.27-36. The Agencies claim to have "specifically expressed their intent" favoring severability, Resp.42, but the language they point to does not appear in the Final Rule and did not concern trailers. But it is academic in any event because NHTSA's trailer regulation cannot "function"—let alone "sensibly" so—without EPA's regulation.

A. NHTSA's Regulations Cannot Function Without EPA's

It is quite literally impossible to apply NHTSA's standards if EPA's are vacated. The operational portions of NHTSA's regulations depend on EPA's regulatory authority as a necessary ingredient. Br.31-32. Chief among these

integrations, the rule requires NHTSA to use "EPA final verified values … for making final determinations on whether vehicles [including trailers, according to NHTSA] and engines comply with fuel consumption standards." 49 C.F.R. § 535.10(c)(4). The Agencies indeed *concede* that they devised a "jointly adopted formula" for measuring compliance and that the formula "refer[s] to EPA's codified regulations." Resp.47. They cryptically suggest that the "formula would continue to apply even in the absence of EPA's rule" (*id.*), but do not say how. The formula tells manufacturers to start by calculating their compliance with EPA's standards, 49 C.F.R. § 535.6(e)(3); to divide the EPA-generated value by a static coefficient to get a NHTSA compliance value, *id.* § 535.6(e)(4); and then to send that resulting value back to both agencies, *id.* § 535.8(a)(2), at which point EPA verifies it and reports back to NHTSA, *id.* § 535.8(h)-(j). It is hard to imagine a more "intertwined" process—or to imagine how the process could possibly work if the EPA regulations are vacated. *Epsilon Elecs., Inc. v. U.S. Dep't of Treasury, Office of Foreign Assets Control*, 857 F.3d 913, 929 (D.C. Cir. 2017).

The Agencies state that 49 C.F.R. § 535.6(e)(2)'s provision for "preliminary" review by EPA is a voluntary interim requirement. Resp.50. But they have no response to the fact that the *actual* process of calculating NHTSA compliance begins with and depends on EPA's compliance value, such that trailer manufacturers "*must use EPA emissions test results* for deriving NHTSA's fuel

consumption performance rates." 49 C.F.R. § 535.6 (emphasis added); Br.31. Those are permanent, mandatory requirements. The entire measurement and calculation process *begins with an EPA compliance value* that is derived *from EPA's standards*, regardless of whether the Agencies have authority to "*verify*" submissions "separately or in coordination" (49 C.F.R. §535.6; States.24), or whether the regulations allow for backup submission of certain information through NHTSA's portal if the preferred "single point of entry" through "the EPA database" is unavailable (49 C.F.R. § 535.8(a)(2); Resp.47-48).

And besides citing irrelevant provisions indicating that manufacturers can submit certain data to either agency, *see id.*, the Agencies do not explain how the compliance formula could work without EPA's initial compliance value. The entire point of NHTSA's trailer regulation is to evaluate the supposed fuel economy of trailers. It literally cannot do so unless EPA has set emissions standards. This inextricable link alone is enough to hold the trailer rule non-severable. At minimum, striking down EPA's trailer standards would "impair the function" of NHTSA's regulations, which the Agencies concede renders them non-severable. Resp.42 (quoting *Davis Cty. Solid Waste Mgmt. v. EPA*, 108 F.3d 1454, 1460 (D.C. Cir. 1997)).

There is more: obtaining an EPA certificate of emissions conformity is an absolute requirement under NHTSA's regulations. "Manufacturers may not

introduce new vehicles into commerce without a certificate of conformity from EPA," 49 C.F.R. § 535.10(a)(5), which "must be renewed annually," *id.* § 535.4. Manufacturers who fail to do so "*do not comply* with the NHTSA fuel consumption standards." *Id.* § 535.10(a)(5) (emphasis added). A certificate of conformity is "an approval document granted by EPA to a manufacturer that submits an application" under the applicable EPA regulations. *Id.* § 535.4 (citing 40 C.F.R. § 1037.205). NHTSA's regulations thus cannot function, and its requirements cannot be satisfied, if EPA's regulations are vacated. The Agencies say EPA's revocation of a certificate is just "one of ten listed standards for enforcement" in § 535.9, but that simply reaffirms that EPA's authority to issue certificates of conformity for trailers is *necessary* to NHTSA's "ability to enforce its fuel efficiency standards" for trailers. Resp.51.

The Agencies point out discrete, limited provisions that might be salvageable without EPA's involvement. Resp.48. But the severability question is not whether, without EPA, each and every provision becomes unworkable; it is whether excising EPA would "undercut the whole structure of the rule" and make enforcement of its "core" provisions impossible. *MD/DC/DE Broadcasters*, 236 F.3d at 22. The emissions compliance formula and the certificate of conformity requirement are "core" provisions.

The Agencies also seem to argue that NHTSA might have been able to write different regulations that do not require EPA's involvement, Resp.43-44, *i.e.*, regulations that do not require use of "EPA emissions test results" or a "certificate of conformity from EPA," 49 C.F.R. §§ 535.6, 535.10(a)(5). But this Court must evaluate the rule the Agencies wrote, not some hypothetical rule. "[A]gency policy is to be made, in the first instance, by the agency itself—not by courts, and not by agency counsel." *Harmon v. Thornburgh*, 878 F.2d 484, 494 (D.C. Cir. 1989); Br.28.

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

Consistent with the intertwined nature of the NHTSA and EPA portions of the rule, there is pervasive evidence that the Agencies intended the standards to be "a single, integrated proposal," *Sierra Club v. FERC*, 867 F.3d 1357, 1366 (D.C. Cir. 2017); Br.27-34. At minimum, there is "substantial doubt" that the Agencies would have acted alone. *Davis Cty.*, 108 F.3d at 1459. That too renders the trailer standards non-severable.

1. The Agencies claim to have "specifically expressed their intent" for the standards to be severable, and that this expression is "dispositive evidence." Resp.42-43. That is triply wrong: The Agencies did not state that they intended their trailer standards to be severable; even if they had, this Court's cases hold that

such statements are not dispositive; and every indication in the rulemaking is that the Agencies designed their standards as unitary.

The Agencies' purported statement of "intent" is not in the Final Rule itself, which, unlike other NHTSA-EPA rules, contains no severability clause or even a preamble statement concerning severability. Br.29. The statement the Agencies cite is instead buried in the middle of a 2,217-page Response to Comments—a document the Agencies produced jointly in response to a jointly initiated and jointly executed rulemaking. Resp.42; *see* Br.30.

More important, however, the Agencies' supposedly express statement of intent does not actually deal with the severability of NHTSA's and EPA's trailer standards at all. Rather, the statement they quote is contained in a portion of the Response to Comments dedicated exclusively to "*separate engine standards*," not to trailers. J.A.##, ##. The Agencies were not declaring each and every portion of the rule severable. They were discussing NHTSA's and EPA's separate engine standards, and how they interact with other product categories—"for example, the standard for tractors is not dependent on the engine standards." J.A.##. The portion of the Response to Comments dedicated to trailer standards says nothing about severability. *See* EPA & NHTSA, *Response to Comments for Joint Rulemaking* pp.960-1101 (Aug. 2016), https://bit.ly/2BrUJOe.

2. Nor could such a statement be "dispositive." Resp.43. Indeed, the whole point of *MD/DC/DE Broadcasters* is that even an "express[] contemplat[ion]" (Resp.49) of severability in the rule itself is *not* dispositive. Br.34-35. The rule there was non-severable even though the agency had "clearly intend[ed] that the regulation be treated as severable, to the extent possible, for it said so in adopting the regulation." 236 F.3d at 22. Not only does an agency's statement of intent have no bearing on whether severance "would leave a sensible regulation in place," *MD/DC/DE Broadcasters Ass'n v. FCC*, 253 F.3d 732, 735 (opinion respecting denial of rehearing), it is not even dispositive evidence of the agency's actual intent. Nothing in the Response to Comments indicates that the Agencies gave any serious consideration to whether or how the trailer regulations would operate independently.

3. Beyond their irrelevant statement about engine standards, the Agencies offer no response to a wide range of indications that NHTSA would not have enacted its trailer standards without EPA's and vice-versa. *Supra* § II.A; Br.29-33. They cannot explain why, if they truly viewed the provisions as severable, they would have crafted the "structure of the rule" to be so intensely co-dependent, *MD/DC/DE Broadcasters*, 236 F.3d at 22. And they accept that the Final Rule is replete with the hallmark language that has driven this Court's decisions finding agency actions non-severable: the Agencies concede, as they must, that they sought

to craft a "single 'closely coordinated, harmonized national program.'" Resp.45 (quoting 81 Fed. Reg. at 73,487); *see Sierra Club*, 867 F.3d at 1366 (agencies' references to "single, integrated proposal" established non-severability); Br.30.

The Agencies' suggestion that NHTSA's regulations make "passing" references to EPA's only a "handful" of times (Resp.49) is perplexing. NHTSA's operative provisions of the Final Rule reference EPA or EPA regulations over 400 times. *See* 49 C.F.R. pt. 535. Just the provision governing "measurement and calculation procedures" contains 75 such references. *See* 49 C.F.R. § 535.6. Nor are these references hortatory remarks about "cooperat[ion]" (Resp.49)—though the pervasive evidence of the Agencies' "consistent, harmonized, and streamlined" efforts (Resp.6) *also* casts serious doubt on whether each "agency would have adopted the severed portion on its own." Br.28 (quoting *Davis Cty.*, 108 F.3d at 1459).

4. The Agencies' attempts to distinguish this Court's cases only confirm non-severability here. They describe *Sierra Club* and *North Carolina v. FERC*, 730 F.2d 790 (D.C. Cir. 1984), as involving express agency acknowledgements "that the rule was a 'single, integrated proposal.'" Resp. 48 (quoting *Sierra Club*, 867 F.3d 1366). Under that standard, this case is over: the Final Rule consistently uses almost identical phrasing—for example, stating that "[t]hroughout every stage of development for these programs," the Agencies "worked in close partnership …

with one another" to "create a single, effective set of national standards." 81 Fed. Reg. at 73,479; *see* Br.29-30.

The Agencies (at 1, 40, 47) and State Intervenors (at 19, 20, 25) rely extensively on *Delta Construction Co. v. EPA*, 783 F.3d 1291 (D.C. Cir. 2015), which does not support severability. That decision explains why NHTSA and EPA proceed jointly to create one unified emissions regulatory scheme: "any rule that limits tailpipe … emissions is effectively identical to a rule that limits fuel consumption." Resp.45 (quoting 783 F.3d at 1294). But the question for severability is not whether the Agencies *could* have created independent regulations and done separate cost-benefit analyses. The question is whether the Agencies *did*.

State Intervenors suggest that all of this Court's severability cases are "inapposite" because they deal with actions by a single agency rather than multiple agencies. States.18. But they do not explain why that matters. They concede that the two key questions for severability are whether an agency "'would have adopted' the remaining provisions absent the invalid rules," and whether the remainder can "function sensibly" alone. States.20 (quoting *Verizon v. FCC*, 740 F.3d 623, 659 (D.C. Cir. 2014)). Neither of those questions depends on whether one, two, or fifty agencies participated in the agency action. If two agencies craft a single "final rule," *see* 81 Fed. Reg. at 73478, but (as here) the rule is impossible to

apply without one of the agency's provisions, the rule cannot stand. Br.34-36; *supra* § II.A.

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

Even if NHTSA's standards were severable, they independently fail because they exceed NHTSA's statutory authority. Br.36-49. Indeed, the fact that EPA so plainly lacks authority to regulate trailers is "persuasive evidence that Congress intended [NHTSA] to also [lack] this authority" in the emissions context. Resp.41.

A. NHTSA's Regulations Are Unlawful Because Trailers Lack "Fuel Economy"

NHTSA jumps straight to whether a trailer is a "vehicle." But it offers no response to TTMA's primary textual argument for why NHTSA lacks statutory authority: that NHTSA cannot create "fuel economy standards" for trailers because trailers have no "fuel economy." Br.37-41; 49 U.S.C. § 32902(b)(1).

NHTSA's failure to rebut this argument should be dispositive. The requirement that the regulation be a "fuel economy standard[]"—just like the requirement that the standard regulate a "vehicle"—is an explicit, textual limitation on the agency's authority. NHTSA does not dispute that the statutory provision authorizing its rulemaking, titled "average fuel economy standards," directs NHTSA to "prescribe separate average fuel economy standards" for three categories of vehicles, including "work trucks and commercial medium-duty or

heavy-duty on-highway vehicles in accordance with subsection (k)." 49 U.S.C. § 32902(b)(1). And the statute defines "fuel economy" to mean gas mileage, *i.e.*, "miles traveled" per "gallon of gasoline … *used*." *Id.* § 32901(a)(11) (emphasis added); *see* Br.38. NHTSA admits that trailers have no fuel economy because they do not "consume" (*i.e.*, use) fuel. Resp.17. That means it is impossible to create a "fuel economy standard" for trailers, and that § 32902(b)(1) does not authorize regulation of trailers.

As in the Final Rule, the Agencies consistently reference NHTSA's authority in § 32902(k)(2) to create a "fuel efficiency improvement program." Resp.15-16. But § 32902(k)(2) does not somehow rewrite § 32902(b)(1), which limits NHTSA's authority to "prescribe … average *fuel economy standards*" for certain vehicles. *See* Br.39-40. Quite the contrary; the relevant sentence in § 32902(k)(2) reiterates that the way NHTSA improves "fuel efficiency" is by imposing "fuel economy standards" on vehicles and trucks that use fuel. If there were any doubt, § 32902(k)(3) states that the "standard[s]" for vehicles and work trucks "adopted pursuant to this subsection," *i.e.*, subsection (k), must be "fuel economy standard[s]." *Id.* § 32902(k)(3); *see also id.* § 32902(b)(1)(C) (directing NHTSA to "prescribe … average fuel economy standards … in accordance with subsection (k)"). In any event, trailers have no fuel efficiency, either. Br.40.

State Intervenors incorrectly assert that, for medium- and heavy-duty vehicles described in subsection (k), "Congress rejected the incorporation of the existing measure of 'fuel economy.'" States.12. As just noted, subsection (k) repeatedly refers to "fuel economy standard[s]." Section 32902(k)'s requirement that NHTSA *study* things like vehicles' "work performed" and their "functionality" does not change the fact that, ultimately, any standards issued under subsection (k) must be "fuel economy standards." 49 U.S.C. § 32902(b), (k). And the statutory definition of fuel economy—miles traveled per gallon of fuel consumed—applies across § 32902. Not a word of that definition "tak[es] into consideration the 'work performed' by tractor-trailers." States.13.

State Intervenors alternatively assert (at 15-16) that trailers "use fuel" just like tractors because both "require connection to an engine that then allows them to move on the highway with the use of fuel." Beyond resting on an erroneous factual premise (trailers routinely function as non-mobile storage containers, Br.25), the theory is circular. If everything that moves down the highway "uses fuel" and thus has "fuel economy," then drivers have fuel economy. It is no answer that drivers are not "vehicles." *Contra* States.16. As with TTMA's invocation of wheelbarrows, car-top carriers, and bicycle racks, the point is not that NHTSA could regulate these things under § 32902; it is that NHTSA's limitless theory would assign each of them "fuel economy," flatly contradicting the term's

meaning. Moreover, not only does NHTSA's theory assign "fuel economy" to trailers used exclusively for non-mobile storage, it assigns "fuel economy" to trailers that might be connected to electric tractors—which *themselves* have no "fuel economy" defined as "miles traveled" per "gallon of fuel."

Respondents also misunderstand the significance of Congress's express inclusion of a tire provision. Br.40-41. For one thing, § 32304A is no mere "educational program" (Resp.22); it establishes a comprehensive "fuel efficiency rating system" for replacement tires and mandates "test methods for manufacturers to use in assessing and rating tires." 49 U.S.C. § 32304A(a)(2)(A), (C). Regardless, the point is that, if respondents are correct that regulation of a trailer's effect on fuel consumption qualifies as a "fuel economy standard[ ]," § 32304A is surplusage, because regulation of a tire's effect would qualify too. Br.40-41.

B. Trailers Are Not "Vehicles"

Because the regulations here are not "fuel economy standards," the scope of the term "vehicles" is irrelevant. As explained, Congress did not give NHTSA authority to regulate the "unadorned statutory term 'vehicles,'" as NHTSA wrongly contends. Resp.20. Nor did it define the scope of NHTSA's authority solely with reference to a vehicle's "purpose" and "weight rating." Resp.21; States.9. Rather, it required that any regulated "vehicle" consume fuel. *Supra* § III.A.

Regardless, the term "vehicles" as used in the EISA unambiguously excludes trailers. Br.41-48. NHTSA tellingly disclaims any argument that its reading of the statute is the "best interpretation." Resp.20. That should resolve the question: for the reasons already explained, NHTSA is not entitled to *Chevron* deference. Br.48-49; *supra* § I.C.

Even if NHTSA could invoke *Chevron*, the meaning of "vehicles" here is unambiguous. NHTSA's theory is that, because Congress did not define the term, it is necessarily ambiguous. That is not how *Chevron* Step 1 works. "If the text clearly requires a particular outcome, then the mere fact that it does so implicitly rather than expressly does not mean that it is 'silent' in the *Chevron* sense." *Eagle Pharm., Inc. v. Azar*, 952 F.3d 323, 331 (D.C. Cir. 2020). Rather, before concluding that a provision is ambiguous, "a court must exhaust all the 'traditional tools' of construction,'" including "text, structure, history, and purpose." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019) (quoting *Chevron*, 467 U.S. at 843 n.9).

Here, each traditional interpretive tool leads to a single conclusion: "vehicles" means *fuel-consuming* vehicles. Br.41-46. The term appears in subsection (k) alongside the more specific terms "automobiles" and "work trucks," showing that Congress was contemplating vehicles that, like automobiles and work trucks, use fuel. Br.42. That "vehicles" is broader than "automobiles" (Resp.21) does not prove otherwise; the whole purpose of this canon of construction is to

help interpret terms that are broader than those that surround them. Br.42. And the statute as a whole consistently focuses on fuel, further confirming that "vehicles" means fuel-consuming vehicles. Br.43. The fact that some dictionaries define the standalone term vehicle to potentially capture trailers (Resp.16) does not gin up ambiguity given the statute's pervasive, textual focus on fuel consumption. *See New York v. EPA*, 443 F.3d 880, 884 (D.C. Cir. 2006) (no ambiguity even where parties agreed phrase was "susceptible to multiple meanings, each citing dictionary definitions," because "the sort of ambiguity giving rise to *Chevron* deference is a creature not of definitional possibilities, but of statutory context.").

Structure and context are even more fatal. NHTSA candidly admits that another statute it administers, the Motor Vehicle Safety Act, expressly authorizes regulation of trailers. Resp.16-17; *see* Br.47-48. NHTSA inexplicably concludes that this "well-established backdrop of NHTSA's regulation of trailers as 'vehicles'" *supports* reading the EISA's reference to vehicles to include trailers. Resp.16-17; *see* States.8. It does exactly the opposite: Congress knew how to define NHTSA's regulatory authority to cover trailers, and yet declined to do so in the EISA.

NHTSA seeks to minimize Congress's interchangeable use of "trucks" and "vehicles" by saying that tractor-trailers *are* trucks. Resp.23; *see* States.14-15. They are not. Consistent with the term's ordinary meaning, NHTSA's own

regulatory definition of a "truck" is "a motor vehicle with motive power, *except a trailer*, designed primarily for the transportation of property or special purpose equipment." 49 C.F.R. § 571.3 (emphasis added). And in quoting a National Academy of Sciences ("NAS") Report for the idea that a "tractor-trailer combination[]" is a "truck" (Resp.23), the Agencies omit a key sentence squarely undercutting that theory and showing that NAS, like everyone else, understands "trucks" as vehicles *with engines*. J.A.## (describing a "truck configuration" as containing a "*chassis and power train*" (emphasis added)). Unsurprisingly, NAS throughout its reports commissioned under the statute used the term "truck" consistently to mean a self-propelled vehicle, and often expressly distinguished between trucks and trailers. *E.g.*, J.A.## tbl. 2-7 (listing "truck sales, by manufacturer" and including only tractor manufacturers).

Likewise, NHTSA attacks straw men in trying to downplay Congress's use of "gross vehicle weight rating." Resp.23-24; States.9-10. The point is not that Congress used that term of art with the overt purpose of "prohibit[ing]" the regulation of trailers. *Contra* Resp.24. It is that Congress's decision to use that term (which *excludes* combination tractor-trailers) rather than "gross combination weight rating" (which all admit would have neatly captured the concept of a tractor-trailer, *see* States.10) makes even less plausible the Agencies' strained

theory that combination "tractor-trailers" are "vehicles" subject to regulation. Br.45-46.

NHTSA (at 17) falls back on its generalized sense of Congress's "overall purpose of improving … fuel efficiency." But, once more, "no legislation pursues its purposes at all costs." *CTS Corp.*, 134 S. Ct. at 2185. "Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates the legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 526 (1987). And "under *Chevron*," an agency cannot "avoid the Congressional intent clearly expressed in the text simply by asserting that its preferred approach would be better policy." *Eagle Pharm.*, 952 F.3d at 337. Environmental regulation involves complex cost-benefit tradeoffs. Even the Agencies acknowledged that the trailer regulations would cause about three additional fatalities per year. 81 Fed. Reg. at 73,642. And many things contribute to fuel efficiency (including speed limits and driving patterns). Congress's intent to authorize certain emissions limitations does not mean it intended to authorize restrictions on all possible parties. *See* Br.11. Subjecting a new industry to a complex set of certification, warranty, recall, and other regulatory burdens has

significant policy implications; the Court cannot just assume that Congress intended that result.[4]

NHTSA's final plea (at 24) that TTMA's arguments are better "directed to the agency, not to this Court," is rich. Over the past three years, the agencies filed boilerplate status report after boilerplate status report stating, without elaboration, that they were "assess[ing] next steps" in the reconsideration process. Br.13. That the Agencies have focused on other priorities does not mean their statutes are ambiguous or that their interpretations are reasonable.

IV. Vacatur Is the Proper Remedy

The Agencies accept that if the Final Rule's trailer regulations are invalid, they should be vacated. That is correct: "The ordinary practice is to vacate unlawful agency action." *United Steel v. Mine Safety & Health Admin.*, 925 F.3d 1279, 1287 (D.C. Cir. 2019). The State Intervenors request the "rare" remedy, *id.*, of remand without vacatur, but given that the Agencies do not ask for it, this Court should decline to consider it.

[4] TTMA has not pressed its arbitrary-and-capricious arguments in this Court because the Agencies so clearly lack legal authority. But TTMA notes that the Agencies both overestimated the benefits of the trailer regulations, including by relying on assumptions their own data contradicted, and underestimated the costs. Br.10-11. The Agencies are currently reconsidering the cost-benefit analysis, too. J.A.##-##.

Regardless, this case does not warrant remand without vacatur. Intervenors concede (at 28) both that a critical factor supporting remand is that the "agency may be able readily to cure a defect," and that all of the cases they cite involved procedural failures or lack of adequate explanation. The Agencies here cannot cure a lack of statutory authority; and, to the extent that NHTSA might someday remedy a lack of severability, it would need to develop an entirely new measurement and compliance process from the ground up, *supra* § II.A.

CONCLUSION

The Court should vacate all portions of the Final Rule that apply to trailers.

Dated: June 2, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 6,495 words, excluding the parts of the filing exempted by Fed. R. App. P. 32(f). The filing complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) and 32(a)(6), respectively, because it was prepared in a proportionately spaced typeface using Microsoft Word in Times New Roman 14-point font.

Dated: June 2, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on June 2, 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.

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