UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

TRUCK TRAILER MANUFACTURERS ASSOCIATION, INC., Petitioner, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*, Respondents, and CALIFORNIA AIR RESOURCES BOARD, *et al.*, Intervenors.	No. 16-1430

PETITIONER TRUCK TRAILER MANUFACTURERS ASSOCIATION, INC.'S MOTION TO STAY NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION RULES RELATING TO TRAILERS

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Movant 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
GVWR	Gross Vehicle Weight Rating
NHTSA	National Highway Traffic Safety Administration
TTMA	Truck Trailer Manufacturers Association, Inc.

INTRODUCTION AND BACKGROUND

In 2016, the National Highway Traffic Safety Administration (NHTSA) for the first time in its history promulgated fuel economy standards for heavy-duty trailers. NHTSA acted in a combined, unified rulemaking with the Environmental Protection Agency (EPA), which also imposed emissions standards for those trailers. 81 Fed. Reg. 73,478 (Oct. 25, 2016). Petitioner Truck Trailer Manufacturers Association (TTMA)'s petition for review of the NHTSA and EPA trailer standards is pending before this Court and is scheduled for argument on September 15, 2020. EPA's trailer rules, which had been set to take effect in January 2018, were stayed by this Court in October 2017. Absent judicial intervention, NHTSA's trailer rules will take effect January 1, 2021, and TTMA now seeks a similar stay pending resolution of this litigation.

Like EPA's rules, NHTSA's would require installation of various combinations of EPA-certified aerodynamic side skirts, trailer tails, low-rolling resistance tires, and tire-pressure monitoring equipment on newly manufactured trailers. Both agencies are currently reconsidering the legality and desirability of their respective trailer rules in response to TTMA's challenge, but they have proposed no action and are unlikely to complete that review by January 2021.

This Court should issue an immediate stay of NHTSA's trailer rules. TTMA is likely to succeed on the merits for the reasons outlined below and presented

more fully in TTMA's merits briefs. This Court has already concluded that TTMA's challenge to EPA's rules is likely to succeed, and NHTSA's trailer rules cannot function without EPA's. Severability aside, NHTSA's rules are unlawful: NHTSA lacks authority to regulate the "fuel economy" of trailers, which do not consume fuel.

TTMA's members, who manufacture approximately 90% of the heavy-duty trailers operated in the United States, will suffer immediate and irreparable harm absent a stay. Given the September 15 argument date, this Court will not likely issue a merits decision in time to allow manufacturers to avoid these irreparable harms. TTMA's members are beginning to take orders for trailer sales in 2021. But EPA is not currently issuing the certificates of conformity that are required for compliance with NHTSA's rules, meaning TTMA's members are in a Catch-22: stop taking orders, or risk taking orders for trailers they will be unable to legally sell in 2021 because EPA will not issue certificates for the manufacturers. Either is irreparable harm. In addition, EPA is no longer certifying the aerodynamic equipment that manufacturers need to comply with NHTSA's rules.

Moreover, to prepare to sell trailers in 2021 that could be compliant if EPA starts issuing certifications, TTMA's members will begin imminently to incur substantial and unrecoverable compliance costs. These include the cost of securing compliant equipment, constructing storage for that equipment and training

personnel to install it, reconfiguring assembly lines, creating labels and manuals, and managing inventory records to comply with reporting requirements for the trailers and equipment that, without a stay, they will have to install on trailers starting January 1.

NHTSA states that it will provide a position on this stay motion after reviewing it. (NHTSA previously advised TTMA that the agency itself lacked authority to issue an administrative stay.) The various Intervenors oppose the stay, except that Iowa could not be reached for its position before this motion was filed.

STANDARD FOR GRANTING STAY

This Court considers four factors in ruling on a motion for a stay: (1) likelihood of success on the merits; (2) the prospect of irreparable injury to the moving party; (3) the possibility of harm to other parties if relief is granted; and (4) the public interest. *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977). The final two factors "merge when the Government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435 (2009).

REASONS FOR GRANTING STAY

I. TTMA Is Likely To Prevail on the Merits

As explained more fully in TTMA's merits briefing, NHTSA's trailer provisions are likely invalid on two independent bases: They cannot be severed from EPA's invalid trailer provisions and, even if they could, they exceed NHTSA's statutory authority.

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

This Court's conclusion in October 2017 that EPA likely lacks statutory authority to regulate trailer "emissions" requires staying NHTSA's "fuel economy" standards, too. When this Court invalidates a regulatory provision, its default remedy is to vacate the entire rule absent an indication that the invalid provision is "severable." *See, e.g.*, *Fin. Planning Ass'n v. SEC*, 482 F.3d 481, 493 (D.C. Cir. 2007). This Court holds provisions nonseverable if there is "'substantial doubt' that the agency would have adopted the severed portion on its own," *Davis Cty. Solid Waste Mgmt. v. EPA*, 108 F.3d 1454, 1459 (D.C. Cir. 1997), or if "the remainder of the regulation [cannot] function sensibly without the stricken provision," regardless of the agency's expressed intent, *MD/DC/DE Broadcasters Ass'n v. FCC*, 236 F.3d 13, 22 (D.C. Cir. 2001). NHTSA's trailer provisions are nonseverable on both grounds.

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

It is impossible to apply NHTSA's trailer standards without EPA's. The equation NHTSA uses to evaluate fuel consumption takes the EPA-generated compliance value and divides it by a constant coefficient. *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."

81 Fed. Reg. at 74,274; 49 C.F.R. §535.10(c)(4). Invalidating EPA's standards requires rewriting NHTSA's standards.

Even if NHTSA had independent substantive standards, manufacturers' ability to comply with and NHTSA's ability to enforce those standards also depend on EPA. NHTSA's rules provide that "[m]anufacturers *may not introduce new vehicles into commerce* without a certificate of conformity *from EPA*," 49 C.F.R. § 535.10(a)(5) (emphasis added), which "must be renewed annually," *id.* § 535.4 (citing 40 C.F.R. § 1037.205). Manufacturers without EPA certificates "do not comply with the NHTSA fuel consumption standards." *Id.* § 535.10(a)(5).

When one portion of a rule cannot function sensibly without the other, this Court has refused to treat the invalid portion as severable even where the agency "clearly intend[ed]" that the "regulation be treated as severable, to the extent possible." *MD/DC/DE Broadcasters*, 236 F.3d at 22. The FCC rule in *MD/DC/DE Broadcasters* regulated hiring practices of FCC's licensees with respect to two groups. *Id.* at 16-17. The rule gave broadcasters two options for meeting its regulatory requirements, but the Court held that one option was unconstitutional with respect to one of the groups. *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, finding that "the balance of the rule [could not] function independently if shorn of its

unconstitutional aspects." *Id.* at 22. Here, excising EPA's emissions standards and enforcement provisions renders NHTSA's provisions literally impossible to satisfy or enforce by their plain terms.

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

Even if NHTSA's trailer provisions could function without EPA's, there is at least "substantial doubt" that NHTSA would have enacted its trailer provisions alone. *Davis Cty.*, 108 F.3d at 1459. Applying that standard, this Court holds portions of agency actions nonseverable when they are part of "a single, integrated proposal"—for example, where an environmental impact statement consistently described multiple pipelines as "separate but connected." *Sierra Club v. FERC*, 867 F.3d 1357, 1366 (D.C. Cir. 2017); *see also Epsilon Elecs., Inc. v. U.S. Dep't of Treasury, Office of Foreign Assets Control*, 857 F.3d 913, 929 (D.C. Cir. 2017) ("intertwined"); *North Carolina v. FERC*, 730 F.2d 790, 795 (D.C. Cir. 1984) ("unitary").

Like in these cases, the Final Rule contains a set of interdependent standards that the Agencies clearly designed to rise and fall together. Beyond the two standards being inextricably intertwined, 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; *see id.* at 73,487 ("closely coordinated,

harmonized national program"). The Notice of Proposed Rulemaking set forth a "joint proposal" and identified "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. 381, that indicated that all decisions and responses were combined, *e.g.*, J.A. 399-400. 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. *E.g.*, 81 Fed. Reg. at 73,644-45.

The interwovenness is also evident in the cost-benefit analysis, with the Agencies regularly treating "emissions and fuel consumption" as a unitary concept, *e.g.*, *id.* at 73,639, and even aggregating the "maximum vehicle fuel savings and tailpipe GHG reduction" into a single percentage value, *id.* at 73,482. Even the Agencies' defenses of their statutory authority to regulate trailers was co-dependent. 81 Fed. Reg. at 73,521.

Holding that NHTSA intended its trailer provisions to survive without EPA's would require not just "speculat[ing]" about the Agencies' intent, *Epsilon*, 857 F.3d at 930, but also rewriting the Final Rule and its stated rationale. Given this Court's conclusion that EPA likely lacks authority to regulate trailers, the proper remedy is a stay of all portions of the Final Rule regulating trailers.

B. 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 invalid because they exceed NHTSA's authority under the Energy Independence and Security Act of 2007 (EISA).

1. 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 EISA's overall structure, compels the conclusion that NHTSA has no authority to regulate the "fuel economy" of trailers, which consume no fuel.

a. Trailers Have No "Fuel Economy"

The relevant EISA provision—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 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 (2007), 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). Trailers do not "use[]" fuel. The statutory definition captures the commonsense understanding of "fuel economy" as synonymous with "gas mileage." It is a measure of how efficiently the vehicle's engine converts energy into distance.

Trying to apply the well-defined concept of "fuel economy" or "gas mileage" to a trailer 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 same trailer could be hitched to either an extremely fuel-efficient tractor or a gas-guzzling one, and its fictitious "fuel economy" would vary wildly. If a trailer had "fuel economy" merely because a trailer *affects* the mileage of a vehicle that hauls it, then so would all manner of objects that people place in their trunks or tie to their roofs. Dep't of Energy & EPA, *Fuel Economy Guide:*

Model Year 2019, at 5 (Jan. 7, 2020), https://bit.ly/2O1LAz9 (warning that "[a]n extra 100 pounds can decrease fuel economy by about 1%," and "[a] large, blunt rooftop cargo box" can do so by up to 25% at highway speeds).

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. But NHTSA does not have freestanding authority to regulate anything that might affect "fuel efficiency." NHTSA's statutory authority is limited to "prescrib[ing] … average *fuel economy standards*" for certain vehicles, 49 U.S.C. §32902(b)(1). To effectuate that authority, Congress in subsection (k) directed NHTSA to initiate a "commercial medium- and heavy-duty on-highway vehicle and work truck fuel efficiency improvement program" by adopting "fuel economy standards." *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 lack "fuel efficiency" for the same reason that they lack "fuel economy." NHTSA's conception of fuel efficiency would authorize 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. Congress did not share this limitless vision; when it wanted NHTSA to consider how products that do not consume fuel affect vehicles' fuel efficiency, it did so expressly. *See* 49 U.S.C. § 32304A (program for rating fuel-efficiency "effect[s] of tires").

b. Trailers Are Not "Vehicles"

Even if trailers had "fuel economy" or "fuel efficiency" that NHTSA could regulate, trailers still lie outside NHTSA's authority because trailers are not "vehicles." 49 U.S.C. § 32902(b)(1). The term vehicle as commonly understood does not include items without engines. 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 v. United States*, 872 F.2d 376, 377 (11th Cir. 1989).

In any event, "vehicle" does not stand alone. The "context" in which the term appears in the EISA and its "place in the overall statutory scheme," *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989), make crystal clear that Congress was referring to vehicles that *use fuel*.

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 former as covering things "similar in nature" to the latter. *McDonnell v. United States*, 136 S. Ct. 2355, 2368 (2016). 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.

The EISA, moreover, is a statute about fuel economy. Title I is called "Energy Security Through Improved Fuel Economy"; the relevant subtitle is the "Ten-in-Ten Fuel Economy Act." Other key provisions reinforce this fuel-oriented focus. *E.g.*, Pub. L. No. 110-140, §§ 131, 202, 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 id.* §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 further confirm that Congress did not contemplate trailers as within the scope of NHTSA's authority. As a strict

precondition to NHTSA's rulemaking, Congress required the development of reports on vehicle fuel economy standards by the National Academy of Sciences. *Id.* §32902(k)(1), (2). In defining the scope of these reports, Congress made no reference to trailers. Quite the contrary, it 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." Pub. L. No. 110-140, §108(a)(1)-(3) (emphases added). 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 requires assuming Congress wanted the Academy to study all vehicles that NHTSA would ultimately regulate except 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. As noted, NHTSA contended in the Final Rule that it can regulate trailers 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 in this rulemaking

and prior ones, the Agencies made clear that 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. 57,106, 57,114 (Sept. 15, 2011) (same). GVWR is distinct, the Final Rule explains, from the "gross *combined* weight rating," 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); NHTSA, *Towing a Trailer: Being Equipped for Safety* at 4-5 (Apr. 2002), https://bit.ly/2GpsMFZ (distinguishing GVWR, which refers to the "tow vehicle," from gross combined weight rating, which refers to the "permissible combined weight of the tow vehicle, trailer, passengers, equipment, fuel, etc., that the vehicle can handle"). 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*, 566 U.S. 284, 292 (2012).

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

NHTSA has asserted authority to regulate trailers by pointing to a *different* statute it 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).

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. *See* 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 v. KFC Western, Inc.*, 516 U.S. 479, 485 (1996). 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).

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

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). Here, NHTSA is actively reconsidering its rules. J.A.487. This Court must therefore decide whether NHTSA's unilateral expansion of its authority to regulate vehicles' fuel

economy to cover trailers, which consume no fuel, 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. But even if *Chevron* applied, the EISA's "text, structure, purpose, and legislative history" unambiguously foreclose NHTSA's exercise of authority over trailers at *Chevron* step one. *Loving v. IRS*, 742 F.3d 1013, 1022 (D.C. Cir. 2014) (quotation marks omitted). Alternatively, the agency's interpretation is unreasonable for the reasons explained, and the Final Rule thus fails at *Chevron* step two. *Id.*

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

TTMA's members will suffer irreparable harm absent a stay. EPA's lack of statutory authority to regulate trailers, which prompted this Court to stay EPA's trailer rules, has placed trailer manufacturers is an impossible Catch-22, with both choices triggering immediate, irreparable consequences.

In light of this Court's stay, EPA has not issued any certificates of conformity to manufacturers seeking to comply with EPA's standards, and has "no plan to begin issuing certificates or accepting applications." Harris ¶15; Hoover ¶3.[1] As explained, NHTSA's standards require manufacturers to obtain EPA

[1] TTMA has attached representative declarations from several of its members, cited by the last name of the declarant, to demonstrate the irreparable harm they will suffer absent a stay of the NHTSA rules.

certificates of conformity; a manufacturer is in *per se* violation of NHTSA's trailer rules if it does not obtain an EPA certificate, starkly illustrating the standards' inextricable intertwinedness. *Supra* pp.4-6. Thus, no matter what steps TTMA's members take to comply with these standards unilaterally, they cannot assure that they are in compliance with the law when NHTSA's rules take effect in January 2021. Customers are beginning to order trailers for delivery in 2021. TTMA's members either must refuse to sell trailers or take orders for trailers they cannot certify, risking noncompliance and associated penalties. That alone is paradigmatic irreparable harm.

Meanwhile, to account for the potential that these rules will take effect, TTMA's members would need to make efforts to ramp up production of trailers that they *believe* will comply with NHTSA's standards. These efforts will cause a substantial loss of business and market share and significant, unrecoverable compliance costs. This Court stayed EPA's rules based on these very injuries.

Trailers are highly customized and they are ordered months in advance because they are built to order. Even with a slowdown in trailer orders due to the Covid-19 pandemic, TTMA's members have either begun taking orders or must begin doing so in the next few weeks for January 1, 2021 and beyond. Carter ¶2; Harris ¶¶8, 11; Hoover ¶2; Gauntt ¶2; Kenney ¶3. Many trailer customers do not want the equipment that the trailer rules require manufacturers to sell, and have

told TTMA's members as much. Sims ¶¶5, 11; Harris ¶¶17-20; Carter ¶5; Gauntt ¶5. That is especially true for motor carrier companies specializing in short-distance, lower-speed deliveries on city streets, where equipment like low-rolling-resistance tires and side-skirts is not cost effective and provides little or no aerodynamic benefit. Harris ¶19.

Moreover, just as EPA is not issuing certificates of conformity to trailer manufacturers, it also not certifying new aerodynamic equipment, tires, or tire-pressure monitoring equipment—equipment necessary to satisfy the joint standards—and TTMA's members have been unable to locate vendors who can provide reliable supplies of this equipment certified before EPA ceased certification. *See* 40 C.F.R. § 1037.150(u); Sims ¶ 10; Harris ¶¶ 13-15; Carter ¶ 2; Gauntt ¶ 4. This problem is particularly acute for certified small-diameter low-rolling resistance tires, which are in extremely short supply. Gauntt ¶¶ 5-6; Kenney ¶ 4.

TTMA members therefore currently cannot accept orders to sell new trailers for delivery after January 1, 2020 that comply with NHTSA's rules—even if NHTSA compliance were theoretically possible absent EPA's certifications. Hoover ¶ 4; Gauntt ¶ 6; Harris ¶ 16; Sims ¶ 10. If there is no stay of NHTSA's trailer rules, TTMA members will encounter major customer dissatisfaction and damage to goodwill that has been established over many years of supplying their

customers with new trailers. Sims ¶¶ 11-12, Harris ¶¶ 17-18; Hoover ¶ 4; Carter ¶ 5; Gauntt ¶ 8; Kenney ¶ 8. Loss of sales and customers is classic irreparable harm. Preventing companies from delivering their products to customers "almost inevitably creates irreparable damage to … good will." *Reuters Ltd. v. UPI, Inc.*, 903 F.2d 904, 908 (2d Cir. 1990); *see also Stuhlbarg Int'l Sales Co., Inc. v. John D. Brush & Co.*, 240 F.3d 832, 841 (9th Cir. 2001) ("Evidence of threatened loss of prospective customers or goodwill certainly supports a finding of the possibility of irreparable harm."); *Estate of Coll-Monge v. Inner Peace Movement*, 524 F.3d 1341, 1350 (D.C. Cir. 2008) ("disruption of corporate business" constitutes irreparable harm).

TTMA's members also face substantial, irreparable compliance costs. Most of TTMA's members are closely-held, family-run businesses. Sims ¶2. To produce compliant trailers by January—even assuming they can get EPA-certified equipment—TTMA's members must make far-reaching and costly changes to their businesses, beginning now. Sims ¶ 5, 10-12; Harris ¶¶ 6, 23-27; Carter ¶ 6; Gauntt ¶¶ 7-8. These include redesigning trailer frames and rear doors to accommodate aerodynamic equipment, using designs that customers do not want. Gauntt ¶ 5. Other costly changes include restructuring manufacturing facilities to enable installation of the required equipment, building new warehouse space, hiring new employees to design various compliant configurations and install the equipment,

and developing data collection and reporting systems to comply with the new regulations. Harris ¶¶ 6, 21-27; Gauntt ¶ 7; Carter ¶ 6; Kenney ¶ 4.

One manufacturer estimates that it will need to construct additional storage buildings for bulky equipment at four of its factories, for a total cost exceeding $3.5 million, and that construction will need to proceed in the next two months if the NHTSA rules take effect in January. Harris ¶ 23; *see* Carter ¶ 6. Some manufacturers will need to modify their assembly lines to permit installation of the new equipment, and anticipate significant production delays. Harris ¶ 26. And many manufacturers will need to hire new employees—in some cases dozens—to install this equipment, design new customized trailer packages that comply with regulations, and comply with the rules' extensive certification, tracking, and reporting requirements, at a cost ranging from hundreds of thousands to millions of dollars depending on the manufacturer. Harris ¶24; Gauntt ¶ 7; Carter ¶ 3; Sims ¶ 12.

Because TTMA's members will be unable to recover these substantial costs from the government if the rules are later withdrawn or held unlawful, these costs qualify as irreparable harm. This Court has recognized as much, staying a portion of an EPA rule during the agency's reconsideration because the "industry should not have to build expensive new containment structures until the standard is finally determined." *Portland Cement Ass'n v. EPA*, 665 F.3d 177, 189 (D.C. Cir. 2011).

Likewise, being forced to undertake "difficult, time-consuming, and expensive testing regarding the safety … of their products" and to spend "more time and significantly more money" in development is irreparable harm that "can never be fully recouped." *Bracco Diagnostics, Inc. v. Shalala*, 963 F. Supp. 20, 28-29 (D.D.C. 1997). Indeed, "complying with a regulation later held invalid almost *always* produces the irreparable harm of nonrecoverable compliance costs." *Texas v. EPA*, 829 F.3d 405, 433 (5th Cir. 2016) (quoting *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 220–21 (1994) (Scalia, J., concurring in part and in the judgment)).

III. No Parties Will Be Harmed if the Court Grants the Stay, and the Public Interest Favors a Stay

Neither the public nor any party will be harmed if the Court stays NHTSA's trailer standards. This Court has already stayed the EPA rules that are necessary for NHTSA's to function, and both agencies are currently reconsidering the rules' questionable fuel economy and emissions benefits.

The public interest is not served by forcing trailer manufactures to comply with increasingly stringent regulatory requirements that NHTSA itself might withdraw or that this Court will find unlawful or unworkable alone. A stay here "allows for a more deliberate determination whether this exercise of Executive power, enabled by Congress …, is proper under the dictates of federal law." *In re EPA*, 803 F.3d 804, 808 (6th Cir. 2015), *vacated on other grounds*, 713 F. App'x

489 (6th Cir. 2018). In light of NHTSA's (and EPA's) decision to reconsider their trailer provisions, and this Court's determination that the EPA standards necessary for this scheme to function are likely unlawful, the uncertainty in this case is significant and warrants a stay.

Moreover, NHTSA's standards, even if they could meaningfully be implemented without EPA's, would have little if any impact on global climate change, especially for the limited duration of this litigation. Because trailer customers have significant incentives to save fuel costs where possible, and because trailer manufacturers install and sell aerodynamic equipment that their customers demand, manufacturers *already* install and sell the equipment where it is most likely to improve fuel economy and thereby reduce greenhouse gas emissions. Sims ¶¶7-8; Harris ¶¶ 9-10. But the aerodynamic equipment required by the trailer rules only generates significant fuel savings during high-speed, long-distance driving. J.A.483. As the agencies acknowledged in publishing the rule, trailers "used in short-haul operations (*e.g.*, local food service delivery) … travel less frequently at speeds at which aerodynamic technologies can be most beneficial." 81 Fed. Reg. at 73,645. Thus, a main consequence of NHTSA's rules is to require manufacturers to install and sell equipment on trailers designated for short-haul operations, where the equipment is not cost effective and provides little or no aerodynamic benefit. Harris ¶ 19; Sims ¶ 7.

NHTSA's standards also pose significant safety concerns. The required aerodynamic equipment is heavy, adding some 400 pounds per trailer. J.A.480. This added weight will increase emissions outside of high-speed, long-haul driving, because a tractor must consume more fuel to pull a heavier object. J.A.480-81. This added weight also will cause some trucks to exceed the trailer weight limit of 80,000 pounds, displacing cargo and causing more trips to deliver the same payload. *Id.*; Sims ¶6. TTMA estimates that these additional trips will cause an additional 184 million truck-miles per year, resulting in increased fuel consumption as well as 246 additional crashes and 7 additional fatal crashes per year. J.A.423. Even the government agrees that the additional trips could result in an increase of about three fatalities per year. 81 Fed. Reg. at 73,642.

In short, allowing NHTSA's standards to remain in effect during the pendency of judicial review would cause irreparable harm to TTMA's members without providing any material benefit to the general public or the environment.

CONCLUSION

The Court should stay NHTSA's trailer rules for the pendency of this litigation, as it has already done for EPA's rules.

Dated: August 26, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 5,182 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: August 26, 2020

/s/ Elisabeth S. Theodore
Elisabeth S. Theodore

CERTIFICATE OF SERVICE

I hereby certify that, on August 26, 2020, the foregoing motion and accompanying exhibits were 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: August 26, 2020

/s/ Elisabeth S. Theodore
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