[SCHEDULED FOR ARGUMENT SEPTEMBER 15, 2020]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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

RESPONDENT NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION'S OPPOSITION TO PETITIONER'S MOTION TO STAY THE CHALLENGED FUEL EFFICIENCY REGULATIONS

INTRODUCTON AND SUMMARY OF ARGUMENT

In this case, which has been fully briefed, Petitioner Truck Trailer Manufacturers Association (Association) challenges a 2016 rulemaking jointly conducted by the National Highway Traffic Safety Administration (NHTSA) and the United States Environmental Protection Agency (EPA). 81 Fed. Reg. 73,479, 73,479 (Oct. 25, 2016). The challenged rule promulgates consistent, but separate, standards by each agency designed to provide for the development and deployment of aerodynamic devices and other technologies that have a demonstrated ability to improve overall greenhouse gas emissions and fuel consumption on new medium- and heavy-duty vehicles, including tractor-trailers. EPA's greenhouse gas emissions standards had a compliance deadline effective beginning January 2018, but that rule has been stayed by this Court since October 2017. After briefing had been completed and this case was scheduled for oral argument, the Association moved for a stay of NHTSA's fuel efficiency standards on the theory that this Court likely will not issue a final decision until after the compliance deadline for NHTSA's standards on January 1, 2021.

The Association argues that it is entitled to a stay, claiming that it "is likely to succeed on the merits." *Nken v. Holder*, 556 U.S. 418, 433 (2009); *see also Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 24 (2008). We disagree entirely. The Association's sole argument in this petition for review is that NHTSA and EPA lack statutory authority to promulgate fuel efficiency or greenhouse gas emissions

standards for trailers, and that, if either agency lacks authority, the entire rule must be vacated. As we explained at length in the government's response brief, the Association is wrong on the merits of the challenge, and the challenged rules should be upheld. The Association's stay motion reiterates in cursory form merits arguments that are fully developed in its briefs—and fully answered in the government's brief—and that will be before this Court at oral argument on September 15, 2020. Because this case has been fully briefed and set for argument one week from the date of this filing, the government respectfully submits that this Court will be in the best position to resolve this stay motion after considering the merits of this case at argument.

Because the Association has failed to demonstrate a likelihood of success on the merits, for all the reasons amply demonstrated in the government's brief, it is not entitled to a stay of NHTSA's fuel efficiency standards. *See, e.g.*, *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 920 F.3d 1, 10 (D.C. Cir. 2019) ("A foundational requirement for obtaining preliminary injunctive relief is that the plaintiffs demonstrate a likelihood of success on the merits."); *Sherley v. Sebelius*, 644 F.3d 388, 393 (D.C. Cir. 2011) ("[W]e read *Winter* at least to suggest if not hold that a likelihood of success is an independent, free-standing requirement for a preliminary injunction."); *see also Nken*, 556 U.S. at 434-35 ("There is substantial overlap between [the stay] factors and the factors governing preliminary injunctions."). While the government acknowledges that Association members face uncertainty and costs in complying with the NHTSA fuel efficiency standards in light of this pending litigation

and the stay of EPA's rule, these burdens do not justify a stay in the absence of a strong showing of a likelihood of success on the merits—a showing the Association has not made. The Association thus has not demonstrated that it is entitled to a stay.

ARGUMENT

"A stay is not a matter of right, even if irreparable injury might otherwise result." *Nken*, 556 U.S. at 433. Instead, the party requesting a stay "bears the burden of showing that the circumstances justify an exercise of [judicial] discretion." *Id.* And in determining whether a movant justified this exercise of discretion, courts look to four factors: (i) whether the movant "has made a strong showing that he is likely to succeed on the merits," (ii) whether the movant "will be irreparably injured absent a stay," (iii) "whether issuance of the stay will substantially injure the other parties interested in the proceeding," and (iv) "where the public interest lies." *Id.* at 434. Of these factors, the first two are "the most critical." *Id.* Here, the Association has not established that it is entitled to a stay because the Association has not shown a likelihood of success on the merits, and the failure to meet this threshold requirement outweighs any other equitable concerns.

I. The Association Has Not Established a Likelihood of Success on the Merits

The Association's sole argument in this petition for review is that EPA and NHTSA do not have the statutory authority to promulgate fuel efficiency or greenhouse gas emissions standards for tractor-trailers. As discussed at length in the

government's response brief—and as discussed in a more summary fashion here—that argument is without merit.

A. The Energy Independence and Security Act broadly authorizes NHTSA to create a "fuel efficiency improvement program" for "commercial medium- and heavy-duty on-highway vehicles." 49 U.S.C. § 32902(k). In promulgating the final rule here, NHTSA determined that this statutory directive is silent on the question whether NHTSA may regulate trailers. As the agency noted, the Act defines a "commercial medium- and heavy-duty on-highway vehicle" as an "on-highway vehicle with a gross vehicle weight rating of 10,000 pounds or more," but the statute does not expressly define the term "vehicle" or otherwise speak to the question whether the term encompasses trailers. 81 Fed. Reg. at 73,521 (citing 49 U.S.C. § 32901(a)(7)). In the face of this statutory ambiguity, NHTSA determined that the term "vehicle" was sufficiently broad to permit the agency to regulate trailers as part of a comprehensive regulatory program to improve the fuel efficiency of commercial medium- and heavy-duty on-highway vehicles. *Id.*; *see also* Response Br. 15-18.

In arguing against the challenged rule both in its briefs and its stay motion, the Association principally argues that trailers should not be considered "vehicles" in this context because they do not consume fuel. As the government's brief details at length, however, the statute does not define "vehicles" in this narrow manner, and the Association fails to identify clear evidence that Congress sought to preclude NHTSA from exercising discretion to interpret the statute to permit the agency to regulate

trailers. *See* Response Br. 15-27. Furthermore, contrary to the Association's claim that regulation of trailers would be contrary to the purpose of the statute, trailers are a vital component of tractor-trailers and the design and performance of these trailers has a significant effect on the overall fuel consumption of these vehicles. *See* Response Br. 17-18. NHTSA thus permissibly exercised discretion in determining that regulation of trailers was an appropriate component of a fuel efficiency improvement program for medium- and heavy-duty vehicles. This issue has already been fully briefed, and will be considered by a merits panel of this Court at oral argument on September 15, 2020. Accordingly, the government will not reiterate the statutory interpretation arguments at any length here.

B. In both its briefs on the merits of this case and its argument in support of a stay, the Association asserts that, even if NHTSA has statutory authority to create fuel efficiency standards for trailers, NHTSA's rule must fail because this Court has already concluded "that EPA likely lacks statutory authority to regulate trailer 'emissions.'" Motion to Stay at 4. The Association claims that this is sufficient to show a likelihood of success on the merits because NHTSA's fuel efficiency standards are not severable from EPA's standards. That argument is incorrect on both counts.

1. As an initial matter, the Association overstates the effect of this Court's October 2017 decision to stay EPA's rule. The Court's stay order did not directly opine on the likelihood of success on the merits, and importantly, the government's position on the merits was not before the Court at the time of that order. This case

had not yet been fully briefed, and EPA's response to the stay motion did not address the likelihood of success on the merits.

Furthermore, the Association is wrong to suggest that it is likely to succeed on its argument that NHTSA's fuel efficiency standards are not severable from EPA's greenhouse gas emissions standards. This Court has consistently explained that "[t]he question whether an agency order is severable depends on the agency's intent." *Sierra Club v. FERC*, 867 F.3d 1357, 1366 (D.C. Cir. 2017); *see also, e.g.*, *Davis Cty. Solid Waste Mgmt. v. EPA*, 108 F.3d 1454, 1459-60 (D.C. Cir. 1997). "Severance and affirmance of a portion of an agency regulation" is proper unless there is "'substantial doubt' that the agency would have adopted the severed portion on its own." *Davis Cty.*, 108 F.3d at 1459.

Here, there can be no doubt that the agencies intended for NHTSA's fuel efficiency standards to be separate, and be legally severable, from EPA's greenhouse gas emissions standards. The agencies expressly stated in the Response to Comments document—which was incorporated by reference into the preamble of the final rule—that NHTSA's "fuel consumption standards are independent of the EPA greenhouse gas standards and vice versa." Response to Comments at 486 (JA421). "Each standard implements, and is justified by, each agency's respective and distinct statutory authority." *Id.* And the agencies "regard each of these standards as legally severable." *Id.*

The agencies' conclusion that the emissions standards and fuel efficiency rules could function independently is well supported. The final rule promulgates standards for trailers based on the trailer's overall contribution to greenhouse gas emissions and fuel consumption when attached as an "integral part of the tractor-trailer vehicle." 81 Fed. Reg. at 73,539-40, 73,644; *see also* 49 C.F.R. § 535.5(e). For certain types of trailers—specifically, flatbeds, tankers, and container chassis—the standards require only that the trailer use either low rolling resistance tires or have a tire pressure monitoring system. 49 C.F.R. § 535.5(e)(2); 40 C.F.R. § 1037.107(a)(4). Although both agencies adopted identical requirements, each agency's requirements are independent of the existence of the other's rule. In the absence of EPA's standards, for example, manufacturers of flatbed trailers can adopt automatic tire inflation systems or monitoring systems to comply with NHTSA's fuel efficiency standards.

Other trailers—specifically, regulated box trailers—must meet certain fuel efficiency standards by incorporating "better tires (including tire pressure management)" and "aerodynamic improvements" to the "trailer's aerodynamic drag, tire rolling resistance, and weight." 81 Fed. Reg. at 73,640, 73,650; *see also* 49 C.F.R. § 535.5(e)(1); 40 C.F.R. § 1037.107(a)(1). The agencies did not require manufacturers of these regulated box trailers to adopt specific technologies in order to meet these performance standards. Instead, the agencies developed a standard formula that trailer manufacturers could use to determine whether the particular technology or combination of technologies they elect to use meets the regulations' requirements. 81

Fed. Reg. at 73,665-66; 49 C.F.R. § 535.6(e). Again, although NHTSA adopted the same standard as EPA, its standard is not dependent on the existence of EPA's rule. In the absence of EPA's rule, manufacturers of regulated box trailers can adopt aerodynamic improvements judged against the performance formula in order to comply with NHTSA's separate fuel efficiency standards.

2. The Association is simply wrong to suggest that NHTSA's separate standards cannot function in the absence of EPA's authority to promulgate greenhouse gas emissions standards.

In support of this argument, the Association asserts that the jointly promulgated regulations contemplate a joint compliance regime in which the agencies cooperate to establish and verify compliance with both EPA's greenhouse gas emissions standards and NHTSA's separate fuel efficiency standards. *See, e.g.*, Motion to Stay at 4 ("The equation NHTSA uses to evaluate fuel consumption takes the EPA-generated compliance value and divides it by a constant coefficient."); Reply Br. at 13-14 ("The entire measurement and calculation process begins with an EPA compliance value."). In other words, the Association's primary argument regarding severability is based upon an assumption that EPA may not cooperate with NHTSA to establish and verify compliance with NHTSA's fuel efficiency standards in the absence of independent authority to promulgate regulations for trailers under the Clean Air Act. But the Association has not presented any argument—whether in this motion to stay, its briefing, or in its motion to stay EPA's greenhouse gas emissions

standards for trailers—explaining why this is so. The Association thus has not carried its burden on this score.

Further, as the government's brief explained, *see* Response Br. 49-50, EPA has a long history of cooperation with NHTSA in the implementation of fuel economy regulations, and this cooperation is separate and distinct from EPA's independent authority to promulgate greenhouse gas standards. The Energy Independence and Security Act specifically contemplates that—consistent with the compliance regime outlined in the joint rulemaking—EPA will be consulted in the creation of NHTSA's fuel efficiency improvement programs for medium- and heavy- duty vehicles, including determinations of how to administer these programs. 49 U.S.C. § 32902(k)(2). And, with respect to other types of vehicles, Congress has explicitly required EPA to conduct such testing to measure vehicle performance under NHTSA's corporate average fuel economy standards. *See, e.g.*, 49 U.S.C. § 32904(a), (e); *see also id.* at § 32904(c) ("To the extent practicable, fuel economy tests shall be carried out with emissions tests under section 206 of the Clean Air Act."); *Delta Const. Co., Inc. v. EPA*, 783 F.3d 1291 (D.C. Cir. 2015) (holding that NHTSA's and EPA's standards promulgated through a similar joint rulemaking were not dependent upon one another, even though the rulemaking created an "indivisible 'National Program,' meaning that 'the fuel economy standards cannot be bifurcated from the greenhouse gas emissions standards'").

In any event, as discussed in the government's brief, Response Br. 47-48, NHTSA's regulations contemplate that it may have to enforce its fuel efficiency standards without EPA's technical assistance. *See, e.g.*, 49 C.F.R. § 535.8(a)(2) ("In instances in which EPA has not created an electronic pathway to receive the information, the information should be sent through an electronic portal identified by NHTSA or through the NHTSA CAFE database."). This further shows that the rules are severable. And in the event that this Court is concerned that certain compliance requirements cannot be met in the absence of EPA's statutory authority to promulgate greenhouse gas emission standards, the appropriate remedy would be to stay those provisions without staying the entirety of NHTSA's separate fuel efficiency standards.[1]

The government is sympathetic to the burdens faced by the Association in light of the uncertainties presented by this pending litigation and the upcoming compliance deadline. However, this Court need not address the remaining balance of the equities in order to deny the Association's requested relief because the Association has not shown a likelihood of success on the merits. *See, e.g.*, *Guedes*, 920 F.3d at 10; *Arkansas Dairy Coop. Ass'n v. United States Dep't of Agric.*, 573 F.3d 815, 832 (D.C. Cir. 2009).

[1] The Association asserts that EPA is not currently issuing certificates of conformity for trailers because EPA's emissions standards are stayed, and thus, there are not emissions standards with which trailers need to conform. The government respectfully submits that this compliance requirement may properly be understood as having been stayed alongside the stay of any portion of the rule dependent on EPA's statutory authority to promulgate greenhouse gas standards.

CONCLUSION

For the foregoing reasons, the Court should deny petitioner's motion to stay pending resolution of the petition for review.

Respectfully submitted,

H. THOMAS BYRON III

/s/Jennifer L. Utrecht
JENNIFER L. UTRECHT
U.S. Department of Justice
Civil Division, Appellate Staff
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530
(202) 353-9039
Jennifer.l.utrecht@usdoj.gov

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing response complies with the requirements of Federal Rule of Appellate Procedure 27(d) because it has been prepared in 14-point Garamond, a proportionally spaced font. I further certify that this response complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2) because it contains 2,552 words according to the count of Microsoft Word.

s/ *Jennifer L. Utrecht*
JENNIFER L. UTRECHT

CERTIFICATE OF SERVICE

I hereby certify that on September 8, 2020, I electronically filed the foregoing with the Clerk of the Court by using the appellate CM/ECF system. Service will be accomplished by the appellate CM/ECF system.

s/ *Jennifer L. Utrecht*
Jennifer L. Utrecht