

1 UNITED STATES COURT OF APPEALS
2 FOR THE DISTRICT OF COLUMBIA CIRCUIT

3 - - - - - X
4 TRUCK TRAILER MANUFACTURERS :
ASSOCIATION, INC., :
5 Petitioner, :
6 v. : No. 16-1430
7 ENVIRONMENTAL PROTECTION :
8 AGENCY, ET AL., :
9 Respondents. :
10 - - - - - X

11 Tuesday, September 15, 2020
12 Washington, D.C.

13 The above-entitled matter came on for oral
14 argument pursuant to notice.

15 BEFORE:

16 CIRCUIT JUDGES GARLAND, MILLETT, AND WALKER

17 APPEARANCES:

18 ON BEHALF OF THE PETITIONER:

19 ELISABETH S. THEODORE, ESQ.

20 ON BEHALF OF THE RESPONDENTS:

21 H. THOMAS BYRON, III (DOJ), ESQ.

22 ON BEHALF OF THE RESPONDENT-INTERVENORS:

23 ALICE HENDERSON, ESQ.
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P R O C E E D I N G S

1
2 THE CLERK: Case No. 16-1430, Truck Trailer
3 Manufacturers Association, Inc., petitioner, versus
4 Environmental Protection Agency, et al. Ms. Theodore for
5 the petitioner. Mr. Byron for the respondents. Ms.
6 Henderson for the respondent-intervenors.

7 JUDGE GARLAND: Ms. Theodore.

8 ORAL ARGUMENT OF ELISABETH S. THEODORE, ESQ.

9 ON BEHALF OF THE PETITIONER

10 MS. THEODORE: Good morning. Elisabeth Theodore
11 on behalf of petitioner Truck Trailer Manufacturers
12 Association. I'd like to reserve five minutes for rebuttal,
13 and I'll start with the EPA regulations and then turn to
14 NHTSA.

15 So the Clean Air Act speaks directly to the
16 question whether the EPA can regulate trailers. It makes
17 clear that it cannot. Section 7521 authorizes the EPA to
18 regulate motor vehicles, and Section 7550 defines a motor
19 vehicle as a self-propelled vehicle designed for
20 transporting persons or property on a street or highway.
21 And since trailers are not self-propelled, that is game over
22 for the EPA. And if the Court had a chance to look at the
23 28(j) letter that we filed yesterday, the IRS just reached
24 the exact opposite conclusion from the EPA and said that
25 that same language unambiguously excludes trailers. So one

1 of these two rules violates the EPA, and it's clearly the
2 EPA's rule.

3 The self-propelled limitation also precludes EPA's
4 theory that it can regulate trailers as part of a quote-
5 unquote tractor trailer vehicle. Trailers are the only
6 thing designed to transport people or property on the road
7 or highway, those pulled by something else. And the term
8 self-propelled had to have been designed to exclude
9 trailers. EPA doesn't speak to this and has no alternative
10 explanation for this language, and that text would be
11 completely meaningless and ineffective if the EPA could just
12 regulate trailers on the ground that they are pulled by
13 tractors and tractors are self-propelled. Congress
14 obviously knew that trailers were hooked up to self-
15 propelled vehicles when it chose to exclude them.

16 The tractor trailer theory fails for multiple
17 other reasons. There's no such thing as a unitary tractor
18 trailer vehicle. Tractors and trailers are never
19 permanently married to each other. They are separately
20 regulated under federal law. They have separate vehicle
21 identification numbers under federal law. Many shippers own
22 six trailers per tractor. And --

23 JUDGE MILLETT: Why do they have to be permanently
24 married, as you said? You know, the question is what is
25 their status on roads and highways. And on roads and

1 highways, when they're traveling on roads and highways, they
2 are a single unit. That's how they transport property.

3 MS. THEODORE: So there's no one tractor and one
4 trailer that's a single unit. And I mean, the proof is in
5 the pudding. So the EPA claimed --

6 JUDGE MILLETT: But I'm asking why you asserted,
7 there's not one as in permanence. Maybe there's one
8 somewhere in the country that I don't know of. But if
9 there, I guess if there were, that would, would that count
10 if there were actually someone who owned both a tractor and
11 a trailer and at least, you know, rented his or her services
12 out for moving stuff? Would that person then, would that
13 vehicle then, the trailer and tractor combined count?

14 MS. THEODORE: That still would not be a motor
15 vehicle under --

16 JUDGE MILLETT: So it doesn't matter whether it's
17 permanent or not in your view. But then why isn't it when
18 it's on the road together? That's what the statute is
19 looking at is on the road and on the highway for the EPA, on
20 the road and on the highway. And that's how they function
21 together. If I'm driving by a semi-truck, I don't think I'm
22 going just by the tractor. I'm going by the combination of
23 the two. And if I feel like I'm hit by a semi-truck, It's
24 got to be the two of them together that's going to be causing
25 the terrible harm to me.

1 MS. THEODORE: Well --

2 JUDGE MILLETT: And my understanding is that when
3 you get to weigh stations, they weigh it together as a
4 single unitary. I mean, that's what the gross vehicle
5 weight at a weigh station measures is the single, unitary
6 weight of the thing, of the tractor and its trailer and
7 contents together.

8 MS. THEODORE: Well, so in the context of the
9 Clean Air Act, Cuban Adjustment Act, it's very clear that
10 the motor vehicle can't be the joined tractor and trailer.
11 And just look at the rule itself --

12 JUDGE MILLETT: How is it very clear? It's not so
13 very clear to me.

14 MS. THEODORE: And I'll explain. So there's not a
15 single aspect of this rule that actually regulates a joined
16 tractor and trailer, and that's because it's impossible
17 under the statute. So just one example is this certificate
18 of conformity requirement in Section 7522. That requires a
19 certificate of conformity for a motor vehicle before it's
20 sold. But you can't get a certificate of conformity for a
21 joined tractor trailer because they're always sold
22 separately, and that's uncontested. So that provision would
23 be impossible to apply if the quote-unquote regulable motor
24 vehicle was the tractor trailer. And the regulation, in
25 fact, requires a separate certificate of conformity for the

1 tractor and for the trailer. It's not treating them as a
2 single motor vehicle.

3 And similarly, so the EPA can only regulate
4 vehicle manufacturers under the statute. That's also
5 uncontested. Trailer manufacturers don't manufacture
6 tractor trailers. They only manufacture the trailer. And
7 just in, you know, so the Government relies on this engaged
8 in language. But, you know, no one would say that Goodyear
9 Tire Company is engaged in manufacturing vehicles just
10 because it makes tires and tires go on vehicles. And
11 similarly, the warranty provisions in Section 7541 are
12 incoherent if the vehicle is the tractor trailer.

13 So that provision requires the manufacturer to
14 warrant the motor vehicle to the so-called ultimate
15 purchaser before it's sold. And, first of all, there is no
16 ultimate purchaser of a tractor trailer because, again,
17 they're always sold separately. And second of all, EPA's
18 theory would mean that the trailer manufacturer has to
19 warrant that the entire tractor trailer complies, which is
20 impossible because the trailer manufacturer has nothing to
21 do with the tractor.

22 And EPA's theory also, so it says that it can
23 regulate trailers as like a quote-unquote integral component
24 of a tractor trailer. That makes the authorization of Clean
25 Air Act's authorization of motor vehicle engines and engine

1 manufacturers utterly superfluous since engines are
2 obviously an integral component of a vehicle. And so for
3 all of those reasons, but again, I would return just to the
4 use of the word self-propelled in the statute, which is
5 obviously intended to exclude trailers. EPA has no
6 authority to regulate trailers.

7 JUDGE MILLETT: Why isn't the tractor, for all
8 intents and purposes, the engine that gets attached to the
9 trailer and then makes the trailer move? Right? That's
10 really what the function of the tractor is, is to haul the
11 trailer around, and to make the trailer mobile and able to
12 be moved to different places.

13 MS. THEODORE: Correct, but that doesn't make the
14 trailer self-propelled. It means the trailer is propelled
15 by something else. And that's --

16 JUDGE MILLETT: It essentially does talk about
17 regulating. It does talk about regulating both engines and
18 vehicles, that both can be regulated.

19 MS. THEODORE: Yes.

20 JUDGE MILLETT: And so it suggests to me that
21 there is some regulation of vehicles that's distinct from
22 regulation of an engine.

23 MS. THEODORE: So I think the goal of the separate
24 authorization to regulate engines or vehicles just
25 authorizes EPA to regulate engine manufacturers separately

1 so that they don't just have to apply regulations to engines
2 in the context of regulating the motor vehicle after the
3 engine has been incorporated. I think that's the real goal
4 there.

5 JUDGE GARLAND: Well, why isn't this the
6 incorporation when it becomes a tractor trailer? Why isn't
7 that the incorporation of the engine into the vehicle?

8 MS. THEODORE: So I think if the EPA wanted to
9 regulate, you know, a motor carrier that assembles a tractor
10 to a trailer, maybe they could do that. But they certainly
11 can't regulate the trailer manufacturer.

12 JUDGE GARLAND: So the statute says manufacturer
13 includes manufacturing or assembling of a new motor vehicle.
14 So when you say maybe, it seems like it's not a maybe. It
15 definitely could regulate an assembler. Isn't that right?

16 MS. THEODORE: It definitely can regulate an
17 assembler. I think there's a question whether putting the
18 trailer to the tractor creates a motor vehicle for all the
19 reasons I explained, that like the certificate of conformity
20 and warranty requirements --

21 JUDGE GARLAND: That's with respect to this
22 regulation. And just to be hypothetical for a moment and
23 picking up on Judge Millett's questions, so the term motor
24 vehicle means any self-propelled vehicle designed for
25 transporting persons or property on a street or highway.

1 When it's assembled, it is self-propelled, and it is
2 designed for transportation on a highway. So that would
3 seem to be able to regulate assemblers and require an
4 assembler to only assemble a vehicle that meets the
5 emissions standards as an assembled vehicle.

6 MS. THEODORE: Potentially. Potentially. And,
7 you know, we said in the regulatory comments, if the EPA's
8 theory that a tractor trailer is a motor vehicle under the
9 statute has any legs, then the only thing they could do is
10 regulate the assemblers. But there's no dispute that the
11 trailer manufacturers, which is who was being regulated in
12 this regulation, are not manufacturers and are not
13 assemblers. And let me turn to --

14 JUDGE MILLETT: But could I ask -- sorry. I don't
15 want to keep you from getting to what you want to get to,
16 but could EPA pass a regulation that says tractors are
17 banned, these types of tractors, are banned from traveling
18 on roads and highways if they're pulling loads that cause
19 the tractor's emissions to increase by XX amount, and that
20 XX is some fancy computation of sort of on average how much
21 trailers cause tractor emissions to increase?

22 MS. THEODORE: Possibly. And --

23 JUDGE MILLETT: It could do that. Which, it could
24 do that, right? I don't see why it couldn't. That's a
25 direct regulation of tractors and their emissions.

1 MS. THEODORE: I think probably, yes. And the
2 current --

3 JUDGE MILLETT: But isn't that getting to the --
4 I'm sorry. Go ahead and finish.

5 MS. THEODORE: The current tractor regulations do
6 sort of assume a hypothetical trailer load as well. But
7 it's not the same thing as regulating trailer manufacturers.

8 JUDGE MILLETT: But wouldn't that be, I mean, I
9 guess it seems like it's, you're saying that they can do
10 indirect, that they can't do it directly, but they can do it
11 indirectly. Because if they were to pass something that
12 said no tractors can go on the road if their emissions are
13 up at the level they would be if a trailer were attached.
14 Everyone knows what's going to happen. Every trailer
15 manufacturer is going to have to put on some, you know, the
16 things here, the aerodynamic curtains and the backing and
17 the tires and everything to get themselves under that limit,
18 otherwise no one's going to be able to pull their trailers.

19 MS. THEODORE: Well, so the members of the TTMA
20 are actually totally fine with attaching equipment that
21 their customers demand. But, you know, it does make a
22 difference who a regulation regulates. Right? So, motor
23 vehicle manufacturers, like, they're billion-dollar
24 organizations. Trailer manufacturers, the overwhelming
25 majority are small businesses. And this regulation imposes

1 huge compliance costs. And Congress didn't intend for
2 trailer manufacturers to bear those costs, and it's clear
3 that it didn't because they used the word self-propelled.

4 Let me turn to the NHTSA rules. So the EPA's
5 clear lack of statutory authority means that the Court
6 should vacate the entire portion of the rule because NHTSA's
7 rules are non-severable from EPA's. And under the
8 Broadcasters case, a rule is non-severable if the agency
9 didn't intend severability or if the remainder of the
10 regulation couldn't function sensibly without the stricken
11 provision. Similarly, the Supreme Court said in K-Mart that
12 it's non-severable if striking the invalid parts would
13 impair the function of the regulation as a whole.

14 JUDGE MILLETT: Have those rules ever been applied
15 when you're dealing not with a single set of regulations but
16 separate regulations issued by two different agencies? Is
17 severability even the analysis to determine whether those
18 regulatory schemes function?

19 MS. THEODORE: Yes, Your Honor, for a couple of
20 reasons. First of all, I mean, all of this Court's
21 discussion and the Supreme Court's discussion of the rule is
22 it takes the text, which is the rule, and it looks at, and
23 looks at each part. But more specifically in the Delta
24 case, which is this Court's case, the Court did essentially
25 apply a severability analysis to a joint EPA and NHTSA rule,

1 and it said that they were severable because in that case,
2 NHTSA's rules weren't dependent on EPA's, and that's just
3 the severability analysis. So --

4 JUDGE WALKER: But you wanted them to be not
5 severable, right?

6 MS. THEODORE: I'm sorry?

7 JUDGE WALKER: I thought you wanted them to be not
8 severable, and in Delta they were severable.

9 MS. THEODORE: In Delta, they were severable. And
10 Delta is just an example of the Court applying the
11 severability analysis in the same way to a joint agency
12 rule. Here, of course, the rules are, the NHTSA rules are
13 very clearly dependent on the EPA's rules. And so they're
14 not --

15 JUDGE WALKER: Can you elaborate on that a little
16 bit? Because --

17 MS. THEODORE: Yes. And --

18 JUDGE WALKER: I took your reply brief to focus in
19 particular on three aspects of the regulation that would not
20 work if you took the EPA out of it. And hopefully I can
21 remember all three right here. One was the compliance
22 certificate, certificate of conformity. Only EPA can issue
23 that. Another was the setting of the standards. Under the
24 regulations, EPA sets the standards. And then the third was
25 the testing, so to see whether or not a particular trailer

1 would satisfy the standards that EPA sets, the regulation
2 imagines that the EPA will do the testing.

3 The Government says that that will all basically
4 work even if you take EPA out of the equation. Can you go
5 through each of those three and explain why you think that's
6 wrong?

7 MS. THEODORE: Sure. And let me start with the
8 certificate of conformity. So there's no dispute that the
9 EPA is not issuing certificates of conformity because this
10 Court stayed its rules and held that it doesn't have
11 authority to regulate trailers. And the NHTSA standards, in
12 particular Section 535.10, state that manufacturers may not
13 introduce vehicles into commerce without a certificate of
14 conformity from EPA, and that manufacturers not completing
15 these steps do not comply with the NHTSA fuel consumption
16 standards. And you obviously can't --

17 JUDGE WALKER: If the Government -- I'm sorry to
18 interrupt, but the Government says we just scratch that part
19 out. So now the trailer manufacturers don't ever have to
20 get a certificate of conformity. Problem solved.

21 MS. THEODORE: Right. So, and there's sort of two
22 responses to that, Your Honor. The first is, that's not the
23 way severability analysis works, right? The question isn't
24 could the rules be rewritten in a way that would allow them
25 the function. The question is whether the rules as written

1 can function without the stricken provisions. And that's
2 very clear.

3 And second, we can't strike the certificate of
4 conformity requirement. I mean, it's the core part, it's a
5 core regulatory requirement, and it's the only way that
6 trailer manufacturers can even be assured that their
7 vehicles are, in fact, compliant with the substantive
8 standards. So, I mean, you can ask the Government, but I
9 just don't know how this, the regulation could possibly
10 function.

11 JUDGE WALKER: On the other two, the setting of
12 the standards and the testing, couldn't EPA just continue to
13 set standards that on their own do not have force of law,
14 but NHTSA could take the standards that EPA sets and apply
15 them to trailers with the force of law. And same with the
16 testing. EPA could still do the testing. You wouldn't get
17 fined by EPA if you violate EPA's test, but you would get
18 fined by NHTSA.

19 MS. THEODORE: So I don't think so, Your Honor.
20 And I'll provide the same response, which is that the
21 regulations as written just don't make any sense. They
22 can't function if you strike the EPA regulations because
23 they would be cross-referenced as to, to nothing, to invalid
24 provisions. But also, EPA can't regulate without
25 congressional authority. I mean, NHTSA can't outsource its

1 authority to another agency without congressional authority
2 to do that.

3 And, look, I mean, the agencies don't even really
4 believe what they're saying because the fact of the matter
5 is, EPA is not conducting the testing right now. It's not
6 issuing certificates of conformity, and that's because this
7 Court said it didn't have authority to do so. And --

8 JUDGE WALKER: One last question, Ms. Theodore.

9 MS. THEODORE: Sure.

10 JUDGE WALKER: Do you have a sense of what this
11 costs, this regulation of trailers?

12 MS. THEODORE: For the trailer manufacturers?

13 JUDGE WALKER: For the economy, yes, for the
14 trailer manufacturers.

15 MS. THEODORE: I don't know for the economy, but
16 for the trailer manufacturers, you know, it depends on the
17 manufacturer. But for some of them, you know, the
18 compliance will cost millions of dollars, and again, these
19 are small businesses. This is a big deal for them.

20 JUDGE WALKER: I mean nationwide, do you have a
21 sense? Are we talking about a billion-dollar impact on the
22 industry, more than a billion? It's okay if you don't know.
23 I'll ask the Government the same question.

24 MS. THEODORE: Yes, I don't know the answer to
25 that. Okay. So, I think, you know, the NHTSA rules are way

1 more intertwined than other rules that this Court has held
2 non-severable before. And I don't think it's really, I
3 don't think this is really subject to reasonable dispute.
4 There's no way that NHTSA would have adopted this exact same
5 regulation cross-referencing the EPA's rules 400 times if
6 the EPA --

7 JUDGE GARLAND: May I ask, is that the question?
8 Is the question about function a question of NHTSA's intent
9 or just a question of whether it's arbitrary and capricious
10 if we sever a part and leave the rest? I mean, the intent
11 is clear. They've said what their intent is. We want it to
12 stand alone. It could still be arbitrary and capricious.
13 And that, I think, is what the function test goes to. I
14 don't see --

15 MS. THEODORE: Yes.

16 JUDGE GARLAND: Or in a circumstance where the
17 agency hasn't told us what their intent is. Then, of
18 course, you would look at that. Do you think that's the
19 right kind of analysis?

20 MS. THEODORE: I think the function test is
21 independent of the intent test, and that's what the Court
22 said in Broadcasters.

23 JUDGE GARLAND: Independent because, what are we
24 relying on for it? What authorizes the Court to make a
25 function test? Is it the arbitrary and capricious standard?

1 MS. THEODORE: I don't think so because, I mean,
2 it applies to, the same analysis applies to statutes as
3 well.

4 JUDGE GARLAND: There, in the case that you cite,
5 there it's used to determine intent where intent isn't
6 clear. I'm asking you, I mean, where would we get the
7 authority to simply say that this doesn't function unless
8 it's because it's arbitrary and capricious without the other
9 part of it?

10 MS. THEODORE: I mean, I suppose, I suppose you
11 could say that. I don't know, but it's clear the Court does
12 have the authority because, I mean, the Supreme Court has
13 the K-Mart decision which says that the question is whether
14 the reg, whether striking one part of the regulation would
15 invalidate the, would impair the function of the regulation
16 as a whole. So, it may be that --

17 JUDGE GARLAND: Can you remind me, in that case
18 was, did Congress express its intent?

19 MS. THEODORE: In the K-Mart case?

20 JUDGE GARLAND: Yes.

21 MS. THEODORE: That was the regulatory case.

22 JUDGE GARLAND: Okay. Then, in that case, did
23 they express --

24 MS. THEODORE: I'm not sure, but I can tell you
25 that in the Broadcasters case from this Court, the agency

1 dis have a severability clause and nonetheless held that the
2 regulations were non-severable because they couldn't
3 function independently.

4 JUDGE GARLAND: Which sounds like because they
5 were arbitrary and capricious, that it wouldn't --

6 MS. THEODORE: Perhaps, Your Honor.

7 JUDGE GARLAND: At least they have a rule but it
8 doesn't function.

9 MS. THEODORE: And I think that makes a lot of
10 sense as the explanation for the analysis.

11 JUDGE GARLAND: Okay, thank you.

12 MS. THEODORE: So, let me turn quickly to the
13 NHTSA question. Even if their rules were severable, NHTSA
14 lacks authority to regulate the quote-unquote fuel economy
15 of trailers. And that's because trailers don't have fuel
16 economy under the definition in the EISA. NHTSA agrees that
17 trailers don't consume fuel, and so the standards that are
18 being issued here are not fuel economy standards within that
19 definition.

20 And second, trailers aren't vehicles within the
21 meaning of EISA either. Vehicle in this context clearly
22 means fuel-consuming vehicles. That's what all the other
23 vehicles from the list are. And Section 108 of the EISA
24 refers interchangeably to this category of vehicles as
25 trucks, which under the statute and under NHTSA's long-

1 standing regulatory definition does not include trailers.

2 And I'd like to reserve the remainder of my --

3 JUDGE GARLAND: Well, can I ask the, NHTSA's
4 organic act says a motor vehicle means a vehicle driven or
5 drawn by mechanical power. So if you're looking anywhere
6 for the closest definition, you would look at this agency's
7 own statute. And this is clearly a vehicle driven by or
8 drawn by mechanical power. In fact, it is a vehicle drawn
9 by mechanical power.

10 MS. THEODORE: Well, Congress did not of course
11 incorporate those provisions into the EISA, did not
12 incorporate that definition.

13 JUDGE GARLAND: That's true, but they also didn't
14 incorporate the EPA's definition of vehicle.

15 MS. THEODORE: That's true. And we're not relying
16 on EPA's definition to analyze the meaning of vehicle in
17 EISA, but there are a number of other textual clues,
18 including the statute's focus on fuel, the definition of
19 fuel economy, the fact that the statute refers
20 interchangeably to trucks when it's describing this category
21 of vehicle. And trucks, of course, are vehicles that have
22 motor power.

23 The fact that the one provision of the EISA which
24 refers to trailers also distinguishes between trailers and
25 trucks, and the fact, so, I mean all of those are very

1 strong textual clues that what Congress meant here did not
2 include trailers.

3 JUDGE GARLAND: All right. Further questions from
4 the bench? If not, we'll go to Mr. Byron.

5 ORAL ARGUMENT OF H. THOMAS BYRON, III, ESQ.

6 ON BEHALF OF THE RESPONDENTS

7 MR. BYRON: Thank you, Judge Garland. May it
8 please the Court. Thomas Byron from the Department of
9 Justice here on behalf of the federal government agencies.

10 Both NHTSA and EPA independently exercised their
11 authority under their respective statutes and interpreted
12 ambiguities in those statutes to permit the agencies to
13 regulate tractor trailers as the relevant vehicles subject
14 to fuel efficiency and greenhouse gas emissions regulations.

15 The statutes themselves do not address Congress,
16 that is to say did not specifically preclude the agencies
17 from regulating tractor trailers as motor vehicles in this
18 way. So this question comes down to step 2 of Chevron and
19 the reasonableness of each agency's explanation for its
20 statutory interpretation. And here, the agencies --

21 JUDGE WALKER: Mr. Byron, NHTSA just recently, I'm
22 going to try to find this, issued a regulation in 2020 that
23 said, it talks about a vehicle and a trailer attached to the
24 vehicle. And that is cited in the manufacturers' brief.
25 It's from April 30th, 2020. If NHTSA itself talks about a

1 trailer as recently as this year as not being a vehicle but
2 rather being something that is attached to a vehicle, what
3 do I do with that?

4 MR. BYRON: Judge Walker, I think you're referring
5 to what the agencies call the SAFE rule, which is --

6 JUDGE WALKER: That's right.

7 MR. BYRON: -- under the, under NHTSA's CAFE
8 authority, that is the Corporate Average Fuel Economy,
9 governing automobiles and light trucks, does not, of course
10 cover or even in any way turn on any other regulation that
11 does affect tractor trailers. So there's no doubt we would
12 have to --

13 JUDGE WALKER: So it's not talking about tractors
14 and trailers. And it's talking about a regular car and
15 something you might hitch to the back of a regular car?

16 MR. BYRON: That's exactly the --

17 JUDGE WALKER: Okay. That's helpful.

18 MR. BYRON: -- focus of the SAFE rule and the CAFE
19 scheme as a whole, which does not cover tractor trailers.

20 JUDGE WALKER: And before I forget, do you have a
21 sense of the question I asked Ms. Theodore about what this
22 costs the industry?

23 MR. BYRON: Your Honor, I don't recall the
24 specifics, but I can point you to the part of the record
25 that does address that, and that is the impact analysis and

1 the regulatory impact analysis. So the RIA, the regulatory
2 impact analysis begins at JA-429. The impact assessment by
3 the agencies in the final rule, and this is not specifically
4 the economic impact on the industry, but that section begins
5 at JA-135. And within that section, my memory is that the
6 agencies did address the economic impact on trailer
7 manufacturers specifically. I apologize, I don't have the
8 specific pages.

9 JUDGE WALKER: I'll stop interrupting you, at
10 least for now.

11 MR. BYRON: Not at all, Your Honor. So I do want
12 to link the question you asked about the CAFE regulations to
13 EPA's analysis of its statutory authority here, which I
14 think confirms the point that Judge Millett was getting at
15 in one of her questions, which is how, the agencies here
16 undertook a real world analysis, a practical analysis of how
17 tractor trailers as motor vehicles are perceived as a single
18 vehicle proceeding down the highway by other vehicle
19 operators. That's important here, and it does reflect as
20 well the room that Congress left within both statutes.

21 But when EPA was interpreting its authority under
22 the Clean Air Act to regulate tractor trailers as motor
23 vehicles, one thing they made very clear is that the tractor
24 without the trailer or the trailer without the tractor is
25 not itself a single vehicle. Only because the two are

1 designed to work together are they a single motor vehicle.
2 That's quite different, the agency explained, from an
3 automobile or a light truck pulling a separate trailer,
4 which is what, you know, I think you were referring to in
5 the SAFE rule, if I recall correctly. And unfortunately, I
6 don't have the SAFE rule in front of me. The agency
7 explained that that significant difference is what underlies
8 its statutory interpretation here. The tractor trailer is
9 the vehicle subject to regulation.

10 JUDGE MILLETT: I guess I'm a little confused
11 about that because surely you regulate the, if you had
12 someone who had one of these tractors and just liked driving
13 this great, big thing down the road, never attached trailers
14 to it, that tractor would be completely regulated by,
15 whether it's attached or not to trailers, that tractor is,
16 itself, regulated by these provisions because it's
17 transporting a person.

18 MR. BYRON: Your Honor, the question isn't whether
19 any individual driver intends to use it. The question is
20 whether the vehicle under 7521(2) is designed for
21 transporting persons or property. And that tractor is
22 designed for transporting property in the --

23 JUDGE MILLETT: But it's also designed for
24 transporting the driver.

25 MR. BYRON: I don't think that's an accurate

1 understanding, and that's certainly not the interpretation
2 that EPA has given to that provision, and that
3 interpretation is a reasonable one, Your Honor. The tractor
4 is designed to function as part of the tractor trailer
5 vehicle.

6 JUDGE MILLETT: I guess I'm having a little
7 trouble understanding that because, one, I've seen these
8 tractors going down the road by themselves. Presumably
9 they've dropped off a load, don't have another one to take
10 back, or they're driving to the next place to pick up a
11 load. And it's definitely designed to transport the person
12 to and from shall we say work where they pick up trailers.
13 It has, a lot of them have little cabs in the back with
14 little bedrooms and everything. They're definitely designed
15 to carry that person to and from hauling assignments. And
16 then through the, carries that person through the hauling
17 assignment. And you have, you know, are you saying you
18 can't regulate the emissions of the tractor itself?

19 MR. BYRON: Judge Millett, the agency has not said
20 that.

21 JUDGE MILLETT: Right.

22 MR. BYRON: And I'm not taking that position here.
23 What we are saying, what the agency has said and what we are
24 defending here is the proposition that these tractor
25 trailers operate as single vehicles on the highway. They're

1 designed to operate that way as single vehicles. And each
2 part of the tractor trailer is subject to the requirement
3 that EPA imposes that any manufacturer of a motor vehicle,
4 and that includes both the tractor manufacturer and the
5 trailer manufacturer here, can be required to obtain a
6 certificate of conformity under the Clean Air Act
7 regulations.

8 The any manufacturer language is what really does
9 a lot of the work here. And I don't think that petitioner's
10 argument fairly addresses the statutory scheme as a whole by
11 focusing solely on the motor vehicle because here the motor
12 vehicle is the tractor trailer as a single vehicle. Both
13 manufacturers are within the statutory requirement of any
14 manufacturer that can be required by EPA to obtain their
15 certificate of conformity.

16 All of that is to say --

17 JUDGE MILLETT: Well, it's not a vehicle even
18 under your view. It's not a covered vehicle until the two
19 are put together.

20 MR. BYRON: No, I don't think that's right, Judge
21 Millett. It certainly is a motor vehicle when the two are
22 put together. And, by the way, I think you asked about, you
23 know, whether there are some operators, and again, it
24 doesn't matter whether an individual operator does anything.
25 It's how they're designed. But it's certainly true as well,

1 and the record reflects that some operators do keep their
2 tractor and their trailer combined fulltime, essentially.

3 JUDGE MILLETT: Yes.

4 MR. BYRON: But that's not essential here. And
5 the key point is that the agency understood its authority to
6 cover the tractor trailer when both parts are designed to
7 work together, and that both manufacturers can be subject to
8 those regulations.

9 JUDGE MILLETT: Is there any manufacturer that
10 manufactures both the tractor and the trailer?

11 MR. BYRON: I'm not aware of any, Your Honor.

12 JUDGE MILLETT: Okay.

13 MR. BYRON: So, but again, the whole idea of any
14 manufacturer is an expansive concept, the word an expansive
15 as this Court and the Supreme Court recognized. But
16 fundamentally, it doesn't matter whether the Clean Air Act
17 or EPCA, as modified by EISA, authorizes the agency, as long
18 as, it authorizes an agency to regulate tractor trailers as
19 long as the other statute does. And here, no matter what
20 the Court thinks about one authority, the other authority,
21 in this case NHTSA's authority under EPCA, is ample to
22 support the regulations of NHTSA to post fuel efficiency
23 requirements on --

24 JUDGE WALKER: So, Mr. Byron, on that point, can
25 you walk through the three things that I was asking Ms.

1 Theodore about? Let's say that we find the EPA didn't have
2 the authority to do this. Let's say we find that NHTSA did.
3 NHTSA's regulation mentions EPA, I think 400 times. And in
4 particular, there are at least three things that the
5 manufacturers argue just don't work in this regulatory
6 scheme. But when you take EPA out of it, one is the
7 compliance certificate, one is that only EPA issues, one is
8 the standards that only EPA sets, and one is the testing
9 that only EPA does. Can you talk about how each one of
10 those things, what would happen to each of those things if
11 we strike down the EPA's authority but we find that NHTSA
12 did have authority?

13 MR. BYRON: Certainly, Judge Walker. And if I may
14 step back just for a moment to put that in context. The key
15 point here is that all three of those are elements of the
16 compliance mechanism that each agency adopted with respect
17 to its own requirements. And so the fact that NHTSA
18 required, in order to demonstrate compliance with the fuel
19 efficiency regulation, required a manufacturer to obtain a
20 certificate of conformity from EPA, that's merely a
21 mechanism of demonstrating compliance with the fuel
22 efficiency regulation. It's not itself a predicate that
23 requires EPA to have independent regulatory authority under
24 the Clean Air Act to set its own standards.

25 JUDGE WALKER: So are you saying NHTSA would allow

1 a trailer to be manufactured even absent an EPA certificate
2 of conformity?

3 MR. BYRON: Well, I think, Judge Walker, that two
4 alternative approaches are equally available to the Court in
5 that scenario you've outlined where the --

6 JUDGE WALKER: And I do what to hear them, but can
7 you answer that one first? Would NHTSA allow a trailer to
8 be manufactured that doesn't get an EPA certificate of
9 conformity?

10 MR. BYRON: So, yes, Your Honor, if this Court
11 were to hold that the EPA regulations providing a mechanism
12 for trailer manufacturers to obtain a certificate of
13 conformity were themselves invalid, then yes, of course
14 NHTSA would permit other mechanisms to comply, demonstrate
15 compliance with the fuel efficiency regulations. This Court
16 could --

17 JUDGE WALKER: And are those mechanisms in the
18 regulations already, or would NHTSA make them up?

19 MR. BYRON: Well, Your Honor, I think they're not,
20 there's not an alternative specified to obtaining a
21 certificate of conformity. But there's also, but there are
22 other ways that NHTSA's regulation specifies that trailer
23 manufacturers can demonstrate their compliance with the fuel
24 efficiency regulations by submitting the compliance
25 information either through EPA's database or directly to

1 NHTSA to its own database, the CAFE, or to the CAFE
2 database. But let me --

3 JUDGE WALKER: I thought you just said NHTSA won't
4 allow a trailer to be manufactured if it doesn't get an EPA
5 certificate of conformity.

6 MR. BYRON: Well, Your Honor, if this Court
7 strikes down -- and this is the important point that I need
8 to return to in just a moment. But if this court were to
9 strike down the EPA regulation that permits trailer
10 manufacturers to obtain a certificate of conformity, of
11 course as a consequence of that, NHTSA could not require
12 trailer manufacturers to do something that this Court said
13 they cannot.

14 JUDGE WALKER: Okay. So that first of the three
15 things is no longer a requirement. What about the other
16 two? EPA sets the standards, and EPA tests. What happens
17 to them?

18 MR. BYRON: Judge Walker, can I just return to the
19 other aspect of this that I didn't get to, which is that
20 this Court could strike down EPA's Clean Air Act greenhouse
21 gas emission standards without striking down the provisions
22 that allow trailer manufacturers, like other heavy-duty
23 vehicle manufacturers, to obtain a certificate of
24 conformity. In other words, the certificate of conformity
25 is not available, because NHTSA has specified that the

1 certificate of conformity is required, this Court could
2 conclude that the certificate of conformity mechanism could
3 remain in place to permit compliance with NHTSA's
4 regulation. My point was that if, that both paths are
5 available --

6 JUDGE GARLAND: Sorry. Could you just say a
7 little more on that? I'm sorry to interrupt also, but as
8 long as you're on that topic. So what would be, if we were
9 to say that trailer is not a vehicle under the Clean Air
10 Act, what would be EPA's authority to issue certificates of
11 compliance?

12 MR. BYRON: Judge Garland, of course a lot would
13 depend on what this Court concluded about the scope of the
14 Clean Air Act and EPA's authority. But unless this Court
15 were to conclude that its interpretation of the Clean Air
16 Act precludes EPA from assisting NHTSA in its compliance, in
17 compliance with the fuel efficiency regulations --

18 JUDGE GARLAND: No, I'm asking what permits it to
19 assist in that way? So assume all we hold is that it's not
20 self-propelled. That means that regulation of emissions of
21 trailers isn't permitted. What authority remains for the
22 certificate of compliance?

23 MR. BYRON: Well, Your Honor, remember, the
24 certificate of compliance mechanism in the EPA regulations
25 is not directed solely to trailer manufacturers but to all

1 heavy-duty, and in fact other vehicle manufacturers as well.
2 And here, NHTSA merely adopted the existing regulatory
3 scheme. Now, it happens that the regulatory scheme at the
4 time NHTSA adopted it, and again, this was to reduce the
5 burden on manufacturers. So petitioner here is turning a
6 regulatory virtue into a vise. But the point of adopting
7 that existing framework was to minimize the burden on
8 manufacturers. In doing so, even if, you know, EPA didn't
9 have authority to adopt that framework with respect to
10 trailers on its own, the fact that it had adopted the
11 framework didn't preclude, for other manufacturers, for
12 example, wouldn't have precluded NHTSA from requiring
13 trailer manufacturers to use that existing streamlined
14 mechanism instead of adopting an entirely new, burdensome
15 requirement.

16 Now, the fact is here, of course, there is a
17 specific mechanism in the certificate of conformity
18 requirement specific to trailers. And again, that's a
19 virtue, not a vise. It actually minimizes the burden for
20 trailer manufacturers by demonstrating that they don't have
21 to do all of the same things that other vehicle
22 manufacturers do. They just have to use the formula that's
23 based on the model, the GEN (phonetic sp.) model.

24 But all of this is to say, just to go back to
25 Judge Walker's question, that this Court could, might or it

1 might not conclude that the compliance mechanism in the EPA
2 regulations is precluded by the Clean Air Act. If it does,
3 then that wipes out the need to obtain a certificate of
4 conformity to comply with NHTSA's fuel efficiency
5 regulations. The other requirements of compliance would
6 remain.

7 If it doesn't, then that leaves to the agencies
8 the available opportunities to specify the least burdensome,
9 most consistent mechanisms for compliance with NHTSA's
10 regulation.

11 Judge Walker, if I may turn --

12 JUDGE WALKER: Very briefly, Mr. Byron, standards
13 and testing, can you, as briefly as you can, explain how EPA
14 standards and EPA testing can still continue if the EPA, EPA
15 standards and EPA testing with regard to trailers can still
16 continue even if EPA does not have the authority to regulate
17 trailers?

18 MR. BYRON: Sure, Judge Walker. And standards are
19 easy, and I'll just step back and remind the Court that both
20 Delta Construction and Massachusetts v. EPA recognized that
21 there is a scientific relationship between CO2 emissions and
22 fuel consumption. So that the fact that the formula
23 measuring fuel efficiency and CO2 emissions is the same is
24 just a reflection of that scientific relationship. It's not
25 a reliance on any EPA regulatory authority.

1 And looking back as well in the context of the
2 CAFE regulations that we were discussing earlier, EPA
3 measures CAFE fuel economy compliance by measuring CO2
4 emissions from vehicles. That's how, in order to determine
5 compliance with NHTSA's CAFE regulation. So historically,
6 that's how CAFE fuel economy has always been measured for
7 compliance purposes.

8 So then with respect to testing, Your Honor, the
9 question of testing, and this is just, again, the auditing
10 function that applies to, I believe, all vehicles. Sorry,
11 all, at least all heavy-duty vehicles in this context. The
12 fact that NHTSA has adopted a mechanism that reduces the
13 burden by relying principally or initially on EPA's testing
14 mechanisms that are in place, again, with respect to the
15 broader industry, is a virtue not a vice.

16 And the fact, and the question whether there might
17 be some other way for NHTSA in the event it determines it
18 needs to audit or test a particular vehicle or a particular
19 technology is not something that requires this Court to
20 strike down the standards themselves. There's no
21 substantial doubt that NHTSA would have adopted the
22 standards irrespective of whether it could have relied on
23 EPA's testing mechanism.

24 I hope that answers the three questions you had,
25 Judge Walker.

1 I would just urge, Judge Garland, if I may turn to
2 a question that you raised in petitioner's argument briefly.
3 The question whether the function test in the severability
4 inquiry is meaningfully different from the intent test, I
5 think that a fair reading of the Maryland D.C. Delaware
6 Broadcasters case makes clear that it's not genuinely
7 independent. And it's true, of course, that the Court in
8 that case italicized the word and when it linked the two
9 inquiries.

10 But then when it applied the function test, it did
11 so in the context of assessing the agency's underlying
12 intent and emphasized, if I may, that the, that Option A
13 would not have been sufficient to achieve the Commission's
14 goals, and in fact would undercut the whole structure of the
15 rule. Those references to goals and undercutting the
16 structure seems to me turn as much on intent as on anything
17 separate from intent. In other words, it seems that the
18 Court there merely disbelieved, if I may, the Court's
19 severability expression of intent when it itself analyzed
20 the rules.

21 In doing so here, the Court can confirm readily
22 that each agency has independent authority, exercised that
23 independent authority, and validly expressed its intent that
24 each set of standards can stand on its own independently.

25 JUDGE MILLETT: I just have a question. Do you

1 then concede that when you're talking about two separate
2 regulatory systems, the analysis is severability as opposed
3 to simply determining whether the, if one were to fall and
4 one were to stand, whether the standing one's provisions
5 that refer to the other are arbitrary and capricious or
6 something? I'm just not aware of severability being used in
7 this context.

8 MR. BYRON: Judge Millett, the petitioners here
9 framed this in terms of severability, so our brief did so as
10 well in response. No party has briefed, as far as I can
11 tell, whether the arbitrary and capricious standard would
12 apply. And there's no argument that the NHTSA standards
13 would be arbitrary and capricious on their own. I think --

14 JUDGE MILLETT: Well, I'm talking about the
15 regulatory provisions that cross-reference EPA.

16 MR. BYRON: I understand.

17 JUDGE MILLETT: And you've made some arguments as
18 to why it would still make sense, or. But I'm just trying
19 to figure out why, whether, do you agree we should be using
20 the severability lens here, or simply looking at
21 regulations, cross-references, and figuring out what to do
22 with that?

23 MR. BYRON: So I think that there are good reasons
24 to look at this through the lens of severability, Judge
25 Millett. And those reasons include the fact that the

1 preamble was jointly prepared by both agencies together,
2 that they intended to create a harmonized set of regulatory
3 requirements for a single industry here, for, in order to
4 reduce the burden. In that --

5 JUDGE MILLETT: Any EPA regulations come into
6 effect three years earlier than when it was?

7 MR. BYRON: Yes, Your Honor. And that's because
8 each statute provides differently timed requirements, of
9 course. And the agencies have independent authority that
10 they exercise. Judge Millett, I don't want to preclude the
11 possibility, as you suggest, that the Court need not adopt a
12 severability analysis, but the --

13 JUDGE MILLETT: You need to tell me what the
14 Government's position is, right? If the Government agrees
15 it's severability and is not arguing otherwise, then I don't
16 know why we would spontaneously take on the issue ourselves.

17 MR. BYRON: Well not only, I think, Your Honor, is
18 it correct that you need not spontaneously take on the
19 issues yourselves, but also because petitioner has not
20 argued that the remaining NHTSA fuel efficiency regulations
21 would be arbitrary and capricious merely by referring to
22 EPA's regulations. I think they have waived that argument,
23 and so it need not be addressed by the Court in this
24 context.

25 JUDGE MILLETT: All right, thanks.

1 MR. BYRON: For those reasons, Your Honor, we'd
2 urge the Court to deny the petition for review. Thank you.

3 JUDGE GARLAND: All right, thank you, Mr. Byron.
4 Ms. Henderson for the respondent and intervenor.

5 ORAL ARGUMENT OF ALICE HENDERSON, ESQ.

6 ON BEHALF OF THE RESPONDENT-INTERVENORS

7 MS. HENDERSON: Thank you, Your Honor, and may it
8 please the Court. Alice Henderson for the respondent-
9 intervenors. I'd like to briefly address two of the issues
10 related to EPA's authority that have been discussed and then
11 turn to the joint compliance regulations. I noted, Judge
12 Millett, that you made a note of the authority that EPA
13 would have to set a tractor standard that would be at a
14 level that would require trailer improvements. And I wanted
15 to note that the reason EPA structured the regulations the
16 way it did here with obligations for both the tractor
17 manufacturers and the trailer manufacturers is because of
18 the way the industry has segmented itself. So the tractor
19 manufacturer never comes into possession of a trailer, and
20 that's why it's necessary to achieve emissions reductions
21 from the whole vehicle to create obligations for both
22 manufacturers. And TTMA doesn't deny that if a single
23 manufacturer was in charge of building both the trailer and
24 the tractor that that whole vehicle could then be subject to
25 an EPA standard. But the Clean Air Act isn't written to

1 allow manufacturers to decide which aspects of a vehicle
2 could be subject to a motor vehicle regulation by splitting
3 up the production among different entities. And I note that
4 counsel for TTMA made the point that it wouldn't make sense
5 under the Clean Air Act to require a trailer manufacturer to
6 warrant that its vehicle would not cause the motor vehicle
7 to be in noncompliance with the emissions standard. This
8 just proves that it doesn't make sense to treat a trailer as
9 a part. It is fully one-half of this very large motor
10 vehicle, the largest motor vehicle on our highways. And the
11 fact that the Act doesn't, isn't written in a way that would
12 allow treatment of the trailer as a part just goes to show
13 that it must be regulated the way that EPA has reasonably
14 done so here because otherwise you'd have to assume that
15 Congress intended to create a really large gap in the
16 regulatory structure. And it's implausible to think that
17 Congress would want to regulate other heavy duty vehicles
18 that have cargo sections, like UPS delivery trucks, but not
19 the cargo section of a tractor trailer, which serves the
20 same purpose but at a much larger scale and with greater
21 resulting emissions.

22 JUDGE WALKER: Is that argument, Ms. Henderson, a
23 little bit different than the Government's argument? I take
24 the Government to say, and I'm on page 12 of the red brief,
25 Congress did not address the question whether the agency

1 could regulate trailers. You seem to be saying that
2 Congress wanted the agency to regulate trailers.

3 MS. HENDERSON: Our position is that EPA's
4 determination that the tractor trailer is a motor vehicle is
5 a permissible interpretation of ambiguity in the statute.

6 JUDGE WALKER: Well, see, now there you sound more
7 like the Government that Congress really didn't make a
8 choice on whether EPA, and perhaps even NHTSA, actually it's
9 NHTSA here too, should regulate trailers.

10 MS. HENDERSON: Sure. So I think --

11 JUDGE WALKER: Is that your position?

12 MS. HENDERSON: No, Your Honor. These are two
13 separate rules that are operating under two distinct
14 statutory authorities. Our position is that NHTSA has
15 effectuated the unambiguous intent of EISA and should be
16 upheld at step 1 of Chevron, and that EPA has permissibly
17 interpreted ambiguity with regard to the meaning of motor
18 vehicle in the Clean Air Act.

19 JUDGE WALKER: Okay.

20 MS. HENDERSON: I'd like to address the issue
21 related to the compliance regulations. EISA creates
22 authority for EPA to promulgate the regulations that it has
23 here. And the authority that EPA has under EISA is
24 completely separate from the authority that EPA has under
25 the Clean Air Act to set an emissions standard. And so all

1 of the regulations that are necessary for a manufacturer to
2 comply with a fuel economy standard can be upheld under
3 EPA's EISA authority. So in the case, if the Court finds
4 that EPA --

5 JUDGE GARLAND: Can you say which -- I'm sorry.
6 It's hard to interrupt with a lag. Could you cite the
7 statutory provision in EISA that you're referring to?

8 MS. HENDERSON: Sure. So, 32904 of EISA directs
9 the EPA to calculate average fuel economy for a manufacturer
10 subject to a standard under 32902(b) of the fact. And the
11 state intervenors lay out the statutory structure in their
12 brief. And 32907 and 32910 of EPCA, I'm sorry, the Energy
13 Policy and Conservation Act, as amended by EISA also clearly
14 contemplates a central role for EPA in facilitating
15 implementation of fuel economy standards. And this is true
16 of all of the vehicles that are covered under this rule and
17 not just trailers.

18 JUDGE GARLAND: Just pause. Just pause for a
19 moment. I may not have all the necessary statutory
20 provisions in front of me, but 32904 says EPA shall
21 calculate the average fuel economy of a manufacturer subject
22 to, now which of the provisions that follow, what's the
23 definition of manufacturer for purposes of that, of that
24 section?

25 MS. HENDERSON: So that 32904 which references

1 manufacturers subject to a standard under 32902(b)
2 unambiguously includes manufacturers subject to a heavy-duty
3 standard under 32902(b)(1)(C). And that's what the state
4 intervenors argued in their brief.

5 JUDGE GARLAND: Okay, thank you.

6 MS. HENDERSON: Sure. And so, just going back to
7 the functionality of the compliance regulations. If this
8 Court were to find that EPA lacks Clean Air Act authority,
9 the remedy for that finding would not be to invalidate all
10 of the regulations that could be upheld under EPA's EISA
11 authority. And everything that a manufacturer would need to
12 comply with a fuel economy standard is written in those
13 regulations that EPA has clear authority to promulgate under
14 EISA.

15 JUDGE WALKER: Ms. Henderson, could your argument
16 with regard to the role of EPA under EISA cut against you?
17 And here's why I'm wondering that. If EISA imagines a
18 regulatory role for EPA, and if the EPA doesn't have
19 authority under the Clean Air Act to regulate trailers, then
20 it seems like maybe we should interpret EISA to not cover
21 trailers.

22 MS. HENDERSON: I wouldn't say that's true, Your
23 Honor. These are two separate and distinct statutes that
24 serve completely different purposes, and this Court in Delta
25 Construction recognized that when it held that even if an

1 EPA standard were vacated, the NHTSA standard would remain
2 because it was a separate action with independent legal
3 effect. And maybe just to clarify, EPA doesn't have
4 authority to set an emissions standard under EISA. But EISA
5 contemplates a really central role for EPA in aiding in the
6 implementation of a fuel economy standard, and that's
7 because of the expertise that EPA has in testing. And that
8 relation, that role for EPA has been understood under the
9 Energy Policy and Conservation Act as well as EISA which
10 amended it.

11 JUDGE MILLETT: And 32904(c), also it says that to
12 the extent practicable, fuel economy tests shall be carried
13 out with emissions test under the Clean Air Act. But there
14 aren't, I'm trying to figure out how that intersects with
15 the ability of NHTSA regulations to rely on EPA to do some
16 of the measuring and certifying here. Does that help or
17 hurt, because they're no longer going to be doing, if they
18 were no longer hypothetically doing emissions tests for
19 trailers, would this support or not support that cross-
20 reference to having them do the measurements and
21 calculations for NHTSA?

22 MS. HENDERSON: I think it supports the position
23 that EPA has clear authority to promulgate the regulations
24 that it has to facility implementation of fuel economy
25 standards. As you noted, it's to the extent possible to

1 align those with emissions standards. And if there aren't
2 comparable trailer greenhouse gas emission standards in
3 place, that wouldn't affect EPA's authority or ability to,
4 you know, execute its regulations that it has promulgated
5 for this rule.

6 And I guess I'll just note on that point as well
7 that the compliance process regulations that we're talking
8 about here are written as instructions to manufacturers
9 about how to generate the input values for a formula, and
10 then that formula spits out a number. And manufacturers are
11 able to compare that number to, at the CO2 level, and
12 compare that number to the actual substantive numerical EPA
13 and emissions standard. So in no way are these regulations
14 dependent on the existence of an emissions standard.
15 They're drafted to facilitate both the compliance with
16 emissions standards and fuel economy standards, but they
17 aren't intertwined with the substantive emissions standard.

18 JUDGE WALKER: We've finished that. I don't
19 pretend to understand the, to be able to do the math that is
20 in the formula. But I imagine that there's some part of the
21 formula that is a variable based on the particular
22 manufacturer. And there's some part of that variable that
23 is a number chosen by EPA. That may be the denominator is a
24 number chosen by EPA. Maybe it's, I don't know where it is
25 in the formula. But if EPA is choosing at least some of the

1 numbers that go into that formula, not a formula that's all
2 variable, but some of the numbers that go into that formula,
3 I think that's different than just saying, well, there's a
4 formula with nothing but X, Y, and Zs, and NHTSA can take
5 that mathematical formula and decide what should be Y, what
6 should be Z, and we'll make X the information we get from
7 the manufacturer. Aren't those two different things? And
8 which one are we talking about here?

9 MS. HENDERSON: That's a great question. And the,
10 I think the best way to answer it is to say their
11 regulations, as you correctly note, include values that a
12 manufacturer has to generate, either in testing as well as
13 values that are coefficients that are plugged into the
14 formula. And neither of those values requires EPA to do
15 anything other than review the application that
16 manufacturers submit, that the coefficients, the values that
17 EPA has created, as you mention, are static. And they're
18 already written into the regulation, so there's nothing new
19 being created when a manufacturer is seeking, you know,
20 confirmation of its compliance with a standard.

21 JUDGE WALKER: But if I heard there in the middle,
22 it is EPA that's picking the coefficients, not NHTSA?

23 MS. HENDERSON: So it's, the coefficients are
24 written into these compliance regulations and housed under
25 Title 40. They support both EPA's emissions standards and

1 NHTSA's fuel economy standards.

2 JUDGE WALKER: So are you saying Congress picked
3 the coefficients, or EPA picked the coefficients, or
4 something else?

5 MS. HENDERSON: Well, this is a joint rulemaking
6 between EPA and NHTSA, so, you know, I can't tell you all of
7 the process that led to the development of those numbers.
8 But I think it would be fair to say that the agencies
9 developed them together.

10 JUDGE WALKER: Okay, thanks.

11 MS. HENDERSON: I see I'm out of time. Thank you.
12 And in closing, I'll just note that, you know, these are the
13 largest, freight trailers are the largest segment of the
14 largest vehicle on our roads. They contribute substantially
15 both to the air pollution and the fuel consumption that
16 Congress designed these statutes to reduce. And I would
17 urge the Court to uphold both agency's standards.

18 JUDGE GARLAND: All right. Thank you, Ms.
19 Henderson. Ms. Theodore, you're out of time, but as we
20 generally do, we'll give you two minutes for rebuttal.

21 ORAL REBUTTAL OF ELISABETH S. THEODORE, ESQ.

22 ON BEHALF OF THE PETITIONER

23 MS. THEODORE: Thank you, Your Honor. A couple
24 quick points. So, first of all, on this notion that there's
25 some sort of gap here, the Clean Air Act has been around

1 since 1965, and trailers haven't been regulated at all
2 during that entire time. So it's completely plausible that
3 Congress did not intend the regulation of trailers.

4 On the EPA rules, I heard no response from
5 respondent or intervenors on what the word self-propelled
6 could possibly be doing in this statute if it wasn't
7 intended to exclude trailers, which also means that EPA
8 can't get around that by claiming it's regulating tractor
9 trailers.

10 And the notion that a tractor without a trailer is
11 not a vehicle, as I heard Mr. Byron say, doesn't make any
12 sense. EPA has been regulating tractors by themselves for
13 years, including in the Phase 1 standards.

14 So, let me turn to the argument that the EISA
15 gives EPA authority to do this is just completely wrong. So
16 Section 32904 only authorizes regulation of manufacturers.
17 Manufacturers is defined in Section 32901(14) to mean a
18 person engaged in manufacturing automobiles. And Section
19 32901(3) defines an automobile as something that's less than
20 10,000 gross vehicle weight, meaning not a heavy-duty
21 vehicle. And that's because 32904 actually isn't part of
22 the EISA. It was added in 1994 when NHTSA only had
23 authority to regulate light-duty vehicles. And if you look
24 at the Government's stay opposition, they admit that this
25 provision, 32904, does not authorize the regulation of

1 trailers, even under their theory that a trailer is a
2 vehicle.

3 JUDGE MILLETT: Well, 32904 just says a
4 manufacturer subject to Section 32902(b).

5 MS. THEODORE: Right.

6 JUDGE MILLETT: And so, it seems to me that just
7 the question is if they're, if trailers are included in the
8 EISA definition of motor vehicle, then they are
9 manufacturers subject to 32902(b), and therefore covered by
10 32904. Am I wrong?

11 MS. THEODORE: I don't think so, Your Honor,
12 because they're not a manufacturer. Manufacturer is defined
13 in the statute, and it's defined to mean someone who
14 manufactures automobiles, which is defined to exclude heavy-
15 duty vehicles.

16 JUDGE MILLETT: Well, why would they refer to
17 32902(b) through (d), which includes then both automobiles
18 and heavy truck, vehicles, and things like that?

19 MS. THEODORE: It's because 32904 was enacted in
20 1994, before that other provision was amended. And it's
21 just a cross-reference to (b) when (b) was different, before
22 EISA was enacted. But in any event, I mean, the EPA doesn't
23 rely on EISA, so it doesn't really matter because what
24 matters is what the EPA actually claimed regulatory
25 authority under. And at JA-238, they made clear that

1 they're only relying on the Clean Air Act.

2 So turning to the severability analysis very
3 quickly. The question is not whether every provision of
4 NHTSA's rules couldn't function. It's whether striking
5 EPA's would impair the function of NHTSA's rules. It's very
6 clear that it would. And I heard no explanation of how a
7 manufacturer could possibly determine whether they comply,
8 if they can't get someone to tell them that their trailers
9 comply.

10 But also, I mean, the testing regulations.
11 Trailers manufacturers, they can't simply plug numbers into
12 the equation. They have to do tests. And the regulations
13 make very clear that EPA has to preapprove those tests. And
14 so, in the absence of EPA acting to preapprove those tests,
15 you can't even figure out whether you comply with the
16 regulations in the first place, even putting aside the
17 absence of the certificate of conformity.

18 In response to the question whether severability
19 is the right analysis, I certainly think the United States
20 has waived any argument that it's not. And again, the Delta
21 case from this Court, it applied the severability analysis
22 to a joint EPA-NHTSA rule. Now --

23 JUDGE MILLETT: It talked about them being
24 bifurcated. I don't know if that's --

25 MS. THEODORE: Well --

1 JUDGE MILLETT: All it did was talk about them
2 being bifurcated.

3 MS. THEODORE: So the Delta case is a case that
4 said that the petitioners didn't have standing because --

5 JUDGE MILLETT: Right.

6 MS. THEODORE: Because they only challenged the
7 EPA portion of the rule and there's no redressability
8 because the NHTSA portion of the rule would stand in the
9 absence of the EPA portion of the rule. And the Court said
10 the question in deciding whether that was so was whether
11 NHTSA's provisions were dependent on EPA's. So that's the
12 same question that we're addressing here, and --

13 JUDGE MILLETT: Dependent is not the same thing as
14 severable. Like, it could very well be, whether they can
15 operate in a non-arbitrary way without cross-referencing it,
16 given the cross-references. That's all I'm struggling with.
17 I guess I didn't see, they talked about whether the fuel
18 economy standards cannot be bifurcated from the greenhouse
19 gas emission standards, but it wasn't clear to me that that
20 was a severability analysis, as opposed to --

21 MS. THEODORE: Well, you know, Your Honor, however
22 you want, whatever you want to call it, I think it's the
23 same functional analysis. The question is whether the NHTSA
24 rules can operate as law without the operation of the EPA's.
25 And you can call it a severability analysis. You can call

1 it an arbitrary and capricious analysis, which we certainly
2 haven't waived since we argued, that the NHTSA rules were
3 nonfunctional and made no sense without the EPA's.

4 So I think the Court can call it whatever it wants
5 to call it. But the question is really the same. You're
6 looking at the rule, and you're looking at whether, sort of
7 what the scope of the remedy is and what you have to vacate.
8 And you can't leave NHTSA's provisions out if they make zero
9 sense without the EPA's, which they do make zero sense. And
10 again, that's the world we're living in right now.

11 JUDGE GARLAND: All right. Are there further
12 questions from the bench?

13 JUDGE MILLETT: Is 32904(c), is that limited to
14 cars? Or would that also apply to cover heavy vehicles?

15 MS. THEODORE: I'm sorry. Let me just pull up
16 32904(c). I'm sorry.

17 JUDGE MILLETT: It talks about each model, so I'm
18 not sure if that means cars or not.

19 MS. THEODORE: Yes, so 32904(c) also refers to a
20 quote-unquote manufacturer.

21 JUDGE MILLETT: Yes.

22 MS. THEODORE: Manufacturer is defined in the
23 statute with reference exclusively to non-heavy vehicles.

24 JUDGE MILLETT: Okay. Thank you.

25 JUDGE GARLAND: All right.

1 MS. THEODORE: And I would just --

2 JUDGE GARLAND: We'll take the matter -- do you
3 have something more?

4 MS. THEODORE: I would just close by asking the
5 Court to act swiftly on the stay because it really is
6 creating an enormous problem for trailer manufacturers right
7 now that they can't just take orders while assuring their
8 customers that they can actually sell those trailers in
9 2020.

10 JUDGE WALKER: Can I ask one very quick question
11 on the stay thing? It seems like, has the harm already been
12 done, the irreparable harm? I mean, you all have to start
13 preparing for January 1st as if this rule is going to be in
14 effect, and I suspect you can't start doing that tomorrow,
15 September 16th.

16 MS. THEODORE: Absolutely, Your Honor. Yes. I
17 mean, there is irreparable harm going on right now every
18 day. And that's why we would ask the Court to act as
19 swiftly as it can on the stay.

20 JUDGE WALKER: But there's some irreparable harm
21 that has not yet happened?

22 MS. THEODORE: Well, for example, if a trailer
23 manufacturer could take an order tomorrow, that would be,
24 that would be very helpful. And if the Court --

25 JUDGE WALKER: Okay.

1 MS. THEODORE: -- (indiscernible) regulations,
2 then a trailer manufacturer could do that and could offer a
3 trailer for sale in 2021.

4 JUDGE MILLETT: When did the irreparable harm
5 start?

6 MS. THEODORE: I'm sorry?

7 JUDGE MILLETT: When did the irreparable harm
8 start?

9 MS. THEODORE: It's been ongoing. It depends on
10 each trailer manufacturer because, you know, they sort of --

11 JUDGE MILLETT: Give me a rough estimate.

12 MS. THEODORE: I'd say in the last, in the last
13 month or so. The trailer manufacturers are starting to take
14 orders right now. There's like a three or four month lead
15 time.

16 JUDGE MILLETT: Okay, thanks.

17 MS. THEODORE: That's why this would help.

18 JUDGE GARLAND: Wait, well so, given the stay on
19 EPA, what have the trailer manufacturers been doing with
20 respect to compliance?

21 MS. THEODORE: So the trailer manufacturers have
22 asked EPA if EPA is going to issue certificates of
23 conformity. EPA said no. The trailer manufacturers have
24 asked EPA if there's anyone in NHTSA they can talk to. EPA
25 has said it has no idea. So the trailer manufacturers are

1 sort of just planning for trying to think about, you know,
2 building warehouses to store this equipment, and, you know,
3 potentially to comply even in the absence of a certificate
4 of conformity. But basically, it's impossible. I mean,
5 that's the --

6 JUDGE MILLETT: Talked to NHTSA about? You said
7 they talked to EPA. Have they talked to NHTSA about what to
8 do?

9 MS. THEODORE: There's no one at NHTSA, there's no
10 one at NHTSA who will talk to them about what to do. The
11 trailer manufacturers have asked, and this is in the
12 declarations. They've asked the EPA like who at NHTSA will
13 implement this, and EPA says they have no idea.

14 JUDGE GARLAND: Okay. Barring further questions,
15 then, we'll take the matter under submission. Thank you,
16 and the Court will take a brief recess.

17 MS. THEODORE: Thank you.

18 (Whereupon, the proceedings were concluded.)

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DIGITALLY SIGNED CERTIFICATE

I certify that the foregoing is a correct transcription of the electronic sound recording of the proceedings in the above-entitled matter.



Mary Rettig

September 24, 2020

Date

DEPOSITION SERVICES, INC.