UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
PADUCAH DIVISION

COMMONWEALTH OF KENTUCKY, *et al.*,

Plaintiffs

v.

FEDERAL HIGHWAY ADMINISTRATION, *et al.*,

Defendants

Electronically filed

Civil Action No.
5:23-cv-162

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

The U.S. Constitution intentionally divides power among the branches of the federal government, as well as between the federal government and the States. These divisions of power are not mere suggestions that can be ignored when one branch perceives a crisis. *See New York v. United States*, 505 U.S. 144, 187 (1992). Yet, in an attempt to implement the Biden Administration's "whole-of-government" approach to dealing with the purported climate crisis,[1] the United States Department of Transportation ("U.S. DOT") and the Federal Highway Administration ("FHWA") flout these divisions of power. The final rule, *National Performance Management Measures; Assessing Performance of the National Highway System, Greenhouse Gas*

[1] Executive Order No. 14008, "Tackling the Climate Crisis at Home and Abroad", Doc. 1-3, PageID.109 ("Together, we must combat the climate crisis with bold, progressive action that combines the full capacity of the Federal Government with efforts from every corner of our Nation, every level of government, and every sector of our economy."). Here, of course, the President must mean only the "whole of the Executive Branch," because Congress has been entirely left out.

Emissions Measure, 88 Fed. Reg. 85364 (Dec. 7, 2023) ("Emissions Rule") imposes on the States a mandate to establish declining targets for mobile greenhouse gas emissions, specifically CO_2. Doc. 1-1, PageID.94. The unmistakable purpose is to pursue the Biden Administration's declared goal of a 50% reduction from 2005 levels in just six years and "net-zero" carbon dioxide emissions across the entire economy of the United States by 2050.[2] As a result, the Emissions Rule demands a fundamental change to how billions of dollars in transportation funds are allocated. By forcing States to make particular policy choices—choices that will have a far-reaching impact on the transportation systems and economies in the States—the Emissions Rule effects a fundamental change to the power structure between the federal government and the States. And because the U.S. DOT and FHWA (collectively, "the Agencies") seek to impose these fundamental changes without clear authorization from Congress, the Emissions Rule also represents a fundamental arrogation by the Executive Branch of the power to make federal policy decisions.

Twenty-one States challenge the Emissions Rule as a violation of the Constitution by usurping the role both of Congress and of the States and as arbitrary and capricious agency action in violation of the Administrative Procedure Act. As a matter of law, it is clear the Plaintiff States are entitled to judgment in their favor. The Court should grant the Plaintiff States' motion for summary judgment and declare the Emissions Rule unlawful.

[2] *President Biden's Actions to Tackle the Climate Crisis,* THE WHITE HOUSE, https://www.whitehouse.gov/climate/ (last visited Jan. 8, 2024).

INTRODUCTION

The Emissions Rule represents yet another unlawful attempt by the Biden Administration to use its limited regulatory authority as a means of circumventing Congress to achieve its policy goals. *See, e.g., W. Va. v. EPA*, 597 U.S. 697, 735 (2022) (finding EPA did not have authority to cap "carbon dioxide emissions at a level that will force a nationwide transition away from the use of coal"); *NFIB v. OSHA*, 595 U.S. 109, 117 (2022) (invalidating a vaccine mandate because it exceeded OSHA's authority); *W. Va. v. EPA*, No. 3:23-cv-032, 2023 WL 2914389 (D.N.D. Apr. 12, 2023) (granting a preliminary injunction against the 2023 WOTUS Rule after finding there were serious questions about whether Congress intended to allow EPA to make such major policy decisions); *Kentucky v. EPA*, No. 23-5343 (6th Cir. May 10, 2023) (granting Kentucky's motion for an injunction pending appeal and noting plaintiffs were likely to prevail in their challenge to the validity of EPA's 2023 WOTUS Rule); *Biden v. Nebraska*, 143 S.Ct. 2355, 2375 (2023) (holding the Secretary of Education did not have authority to release borrowers from their obligations to repay student loans); *Louisiana v. DOE*, No. 22-60146 (5th Cir. Jan. 8, 2024) (finding DOE's regulation of dishwashers and laundry machines arbitrary and capricious).

This time, the Administration is using the U.S. DOT and FHWA to further the President's climate policies by requiring States to set declining targets for on-road CO_2 emissions. Doc. 1-1, PageID.68. The Agencies do not have authority to force the States to implement the Biden Administration's policy preferences. Policy-making authority in the federal government belongs only to Congress. The Agencies cannot ignore this constitutionally-mandated division of power. Nor may the Executive

branch flout the allocation of power between the federal government and the States established in the Constitution. The Agencies cannot compel the States to administer a federal regulatory program in service to Executive branch policy wishes absent some statutory authority to do so—and no statute authorizes the Emissions Rule. Furthermore, the Emissions Rule is arbitrary and capricious because the Agencies considered issues they had no authority to address, entirely failed to consider an important aspect of the problem, failed to provide an explanation that rationally connects the evidence before them with the mandate imposed by the rule, and neglected to consider the full cost of implementing the rule.

BACKGROUND

I. The National Highway System / Highway Performance Program

The National Highway System Designation Act of 1995 designated over 160,000 miles of roads as the National Highway System ("NHS").[3] The NHS includes roads that make up the Interstate Highway System, "as well as other roads important to the nation's economy, defense, and mobility."[4] While the NHS encompasses only 4% of the nation's roads, "more than 40 percent of all highway traffic, 75 percent of heavy truck traffic, and 90 percent of tourist traffic" occurs on NHS roads.[5] Every State has NHS roads, as do the District of Columbia and Puerto Rico.[6]

The National Highway Performance Program ("NHPP") was originally created

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[3] *The National Highway System Designation Act of 1995* (1996), *available at* https://perma.cc/EM97-9KPC.

[4] *Id.*

[5] Rodney E. Slater, *The National Highway System: A Commitment to America's Future* (1996), *available at* https://perma.cc/YZB8-XA53.

[6] *See, e.g.*, *Highway Statistics 2017*, U.S. DEPARTMENT OF TRANSPORTATION FEDERAL HIGHWAY ADMINISTRATION (Aug. 2018), https://perma.cc/W3A7-7TSL.

by the Moving Ahead for Progress in the 21st Century Act, which was signed into law in 2012.[7] "The NHPP provides support for the condition and performance of the National Highway System, for the construction of new facilities on the NHS, and to ensure that investments of Federal-aid funds in highway construction are directed to support progress toward the achievement of performance targets established in a State's asset management plan for the NHS."[8] The program has been continued by both the Fixing America's Surface Transportation Act ("FAST Act"), Pub. L. 114-94 (Dec. 4, 2015), and the Bipartisan Infrastructure Law, which was enacted as the Infrastructure Investment and Jobs Act ("IIJA"), Pub. L. 117-58 (Nov. 15, 2021).

The "NHPP is the largest of the federal-aid highway programs."[9] For each of the fiscal years 2023 through 2026, Congress has provided roughly $29 billion for the program.[10] Funding for the NHS under the NHPP is state-focused. The NHPP determines each state's funding based on a percentage established by statute.[11] Each state can then use the funds for purposes eligible under the program to achieve national goals established by Congress in 23 U.S.C. § 150 in a manner that is "consistent with state and metropolitan planning."[12] Congress has delineated specific

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[7] *MAP-21 – Moving Ahead for Progress in the 21st Century Act*, U.S. DEPARTMENT OF TRANSPORTATION FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION (last updated Jan. 17, 2023), https://perma.cc/DL9F-75VS; Sec. 1106 of PL 112-141 (2012), *available at* https://perma.cc/F9LT-7M5N.

[8] *Fixing America's Surface Transportation Act or "FAST Act*," U.S. DEPARTMENT OF TRANSPORTATION FEDERAL HIGHWAY ADMINISTRATION, https://perma.cc/Q6W3-6PCF.

[9] *Surface Transportation Funding and Programs Under the Fixing America's Surface Transportation Act (FAST Act; P.L. 114-94)*, CONGRESSIONAL RESEARCH SERVICE (Feb. 2016), https://perma.cc/ATA3-GRLD.

[10] *National Highway Performance Program (NHPP) Fact Sheet*, U.S. DEPARTMENT OF TRANSPORTATION FEDERAL HIGHWAY ADMINISTRATION, https://perma.cc/K8DQ-F58Z.

[11] *See id.*

[12] *See Federal Highway Programs: In Brief*, CONGRESSIONAL RESEARCH SERVICE (Feb. 2022), https://crsreports.congress.gov/product/pdf/R/R47022.

goals for the NHPP and specified what makes a facility or project eligible for funding. *See* 23 U.S.C. §§ 119, 150.

The Secretary of U.S. DOT must establish standards for the performance of the NHS "for the purpose of carrying out Section 119." 23 U.S.C. § 150(c)(3). Section 119 specifies that the purposes of the national highway performance program are: to provide support for (1) "the condition and performance of the [NHS]," (2) "the construction of new facilities on the [NHS]," (3) "activities to increase the resiliency of the [NHS] to mitigate the cost of damages from sea level rise, extreme weather events, flooding, wildfires, or other natural disasters," and (4) to ensure that Federal-aid funds in highway construction are directed toward the achievement of performance targets established in a State's asset management plan. 23 U.S.C. § 119(b). The performance measures to be established by the Agencies in furtherance of these purposes are limited to those described in 23 U.S.C. § 150(c). 23 U.S.C. § 150(c)(2) ("[T]he Secretary shall . . . limit performance measures only to those described in this subsection."). Targets for performance measures shall be set by "each State." 23 U.S.C. § 150(d).

II. The Final GHG Emissions Rule

On December 7, 2023, the Agencies published the Emissions Rule. The Emissions Rule adds a greenhouse gas performance measure to the existing FHWA national performance measures to be used by States to assess performance of the National Highway System. Under the Emissions Rule, State Departments of Transportation ("DOTs") and metropolitan planning organizations ("MPOs") must "establish declining targets for reducing CO_2 emissions generated by on-road mobile

sources." Doc. 1-1, PageID.68. The States' first targets must be established and reported to FHWA no later than March 29, 2024. *Id.* at 76; Doc. 60, PageID.540.

Despite the Agencies asserting that the Emissions Rule "does not set any specific targets or require any GHG reductions," Doc. 1-1, PageID.81, the form made available by the Agencies for States to use to report their initial target mandates that the targets "shall be a negative value, and be reported to the nearest tenth of a percent."[13] Specifically, according to the form, "[t]o meet the declining requirement, the target must represent an anticipated decline of -0.1% or more."[14]

The Agencies assert they have authority to require States to set declining targets for on-road CO_2 emissions under 23 U.S.C. §§ 150, 119, 101, 134, 135. Doc. 1-1, PageID.69, 71–73. The Agencies contend that the term "performance" in 23 U.S.C. § 150(c)(3) can include "environmental performance." *Id.* at 68. They assert the other provisions "support FHWA's authority" for the Emissions Rule. *Id.* at 72. None of these provisions grant the Agencies authority to take the action demanded by the Emissions Rule.

III. This action

After the Agencies published the Emissions Rule, the Plaintiff States immediately assessed the rule's adverse implications for their sovereign interests and the interests of their citizens. To protect those interests, the States sued, alleging the Emissions Rule is unlawful and should be set aside. Doc. 1. After the Plaintiff States moved for a preliminary injunction to avoid irreparable harm and to protect the

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13 State Initial GHG Report Form, Exhibit 15.

14 *Id.*

public interest, the Defendant Agencies agreed to delay enforcement of the Emissions Rule until March 29, 2024 to allow time for consideration of the merits. Doc. 60. In response, the Plaintiff States withdrew their motion for preliminary injunction, Doc. 69, and now file a motion for summary judgment.

STANDING

To establish standing, the Plaintiff States must show an injury that is "concrete and particularized," "actual or imminent," "fairly traceable" to the Emissions Rule, and "likely" to be "redressed by a favorable decision" from this Court. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). As "the object of" the Emissions Rule's requirements, "there can be little question that the rule [injures] the States." *W. Va. v. EPA*, 597 U.S. at 719 (internal citation omitted). Specifically, the Emissions Rule injures the Plaintiff States by imposing unrecoverable compliance costs and by infringing on State sovereignty.[15]

I. Unrecoverable Compliance Costs

The Plaintiff States and their related agencies will be harmed because they must take action to meet the requirements of the Emissions Rule. Time and effort must be devoted to setting the targets and complying with the reporting requirements imposed by the rule. The Agencies estimate the initial reporting period will require 208 hours of manpower, costing each State $636,708. Doc. 62-2, PageID.629–30, at Tables 4 and 5. They anticipate that over the ten-year study period, the aggregate

[15] The Complaint includes paragraphs specific to each of the Plaintiff States. *See* Doc. 1, PageID.3–22. To offer additional details about the irreparable harm the Plaintiff States are likely to suffer, thirteen States have submitted declarations. *See* Exhibits 1–14.

costs for all of the States together will be over $12 million (discounted at 3 percent). Doc. 1-1, PageID.69.[16] Several of the Plaintiff States have multiple MPOs—all of which must set targets as well. *See, e.g.*, Doc. 1, PageID.39; Declaration of Holland of Florida DOT, Exhibit 5. The cost to establish and report the emissions targets is a certain and imminent harm. *See Kentucky v. Yellen*, 54 F.4th 325, 342 (6th Cir. 2022); *Commonwealth v. Biden*, 57 F.4th 545, 556 (6th Cir. 2023) (recognizing compliance costs may be unrecoverable).

II. Infringement on State Sovereignty

The greater injury caused by the Emissions Rule is the infringement on state sovereignty. "[S]tates have a variety of sovereign and quasi-sovereign interests that they validly may seek to vindicate in litigation." *Kentucky v. Biden,* 23 F.4th 585, 598 (6th Cir. 2022). States have "sovereign interests to sue when they believe that the federal government has intruded upon areas traditionally within states' control." *Id.* When asserting injuries to these interests, the State's injury, "while possibly overlapping with individual citizens' injuries, is really an additional injury to the state *itself*." *Id.* at 599.

Under the Emissions Rule, each State would be subject to the continually constricting force of the Agencies' diktat. As the Agencies themselves explain, "The

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[16] This number only considers administrative costs. *See* Doc. 62-2, PageID.735 (calculating only "costs for State DOTs and MPOs related to establishing and reporting targets for the GHG measure, calculating the performance metric and measure, reporting progress, and reporting on actions to be taken by those States that do not make significant progress toward the achievement of their targets"). This does not include the costs the States will certainly incur as a result of taking whatever action is necessary to achieve any declining target—including, for example, loss of economic growth because of forced diversion from certain transportation projects. Moreover, even what it does include may be an underestimate. For example, Florida estimates 10-year costs for it and its MPOs *alone* will be $21,538,709. *See* Declaration of Holland of Florida DOT, Exhibit 5.

GHG measure requires State DOTs and MPOs that have NHS mileage within their . . . boundaries . . . to establish declining targets for reducing CO_2 emissions generated by on-road mobile sources." Doc. 1-1, PageID.68. This diktat[17] infringes on state sovereignty in a number of ways.

First, under the Emissions Rule, the States are no longer free to debate and establish their own public policy in a host of areas, from the selection of highway projects to the promotion and use of fossil fuels for transportation to the provision of mass or public transit to whether and how to devote tax revenues to the creation and maintenance of EV charging stations. Each of these issues of public policy is a matter within the sovereign control of the elected representatives of the Plaintiff States. Yet, the Emissions Rule cuts off the States' ability to set targets for performance measures "based on [the state DOT's] review of transportation and engineering data, analysis of trends such as economic and population growth, and adoption of transportation goals." Second Declaration of Jundt of South Dakota DOT, Exhibit 2. Indeed, "[u]nder the Emissions Rule, [the State DOTs] must propose a declining target even if, based on analysis of data and trends, [the State DOT] foresees no likelihood or feasible

[17] Remarkably, despite the plain requirement of the Emissions Rule, the Agencies claim that "[t]he FHWA is not regulating GHG emissions via this measure, is not mandating any reductions, is not forcing States to select specific projects and is not asserting authority . . . over GHG emissions from the transportation sector." Doc. 1-1, PageID.78. But this claim is plainly contradicted by: (1) the language of the rule, *id*. at 94 ("Targets established for the GHG measure . . . shall be declining targets for reducing tailpipe CO_2 emissions on the NHS."), (2) the Agencies' own summary of the rule, *id*. at 68 ("[The Emissions Rule] requires State [DOTs] and [MPOs] to establish declining [CO_2] targets for the GHG measure and report on progress toward the achievement of those targets."), and (3) the form the Agencies gave the States to use for reporting, Exhibit 15 ("To meet the declining requirement, the target must represent an anticipated decline of -0.1% or more.").

means of achieving the target." *Id.*[18] This is a fundamental change from the longstanding practice for performance measure reporting, *see id.*, and from Congress' clearly-expressed intent that the States set the performance targets, *see* 23 U.S.C. § 150(d) ("[E]ach State shall set performance targets. . . .").

Second, the Emissions Rule will fundamentally change how States choose to allocate the billions of dollars in transportation funds they receive. The Emissions Rule requires the States to set declining CO_2 targets—and demonstrate to the Agencies how they will achieve them. Doc. 1-1, PageID.82, 96 ("If significant progress is not made for the target established for the GHG measure in § 490.105(c)(5), then the State DOT shall document the actions it will take to achieve the GHG performance target."). As fully detailed in the complaint, many of the Plaintiff States have already announced projects that will result in additional vehicular traffic and thus, CO_2 emissions. Doc. 1, PageID.4–22. The Emissions Rule means the Plaintiff States will have to modify current projects and may be unable to pursue some projects entirely.

This compelled reassessment of transportation project selection clearly contradicts Congress' statutory direction that the authorization of Federal funds under Chapter 1 of title 23 in the United States Code "shall in no way infringe on the sovereign rights of the States to determine which projects shall be federally financed." 23 U.S.C. § 145. The performance measure statute, 23 U.S.C. § 150, is part of Chapter

[18] While the Agencies may seek to disagree, their own language estops them. According to the Agencies, "State DOTs and MPOs have flexibility to set targets that are appropriate for their communities and that work for their respective climate change and other policy priorities, *as long as* the targets are declining." Doc. 1-1, PageID.82 (emphasis added).

1 of title 23. Moreover, Congress is explicit in section 145 that Chapter 1 of title 23 provides for "a federally assisted State program"—not a federal program implemented by the States. But that is what it would become under the Emissions Rule. The inability of the Plaintiff States to accommodate normal demographic and economic growth, as well as consider the unique characteristics of their state, including the terrain and population distribution, *see, e.g.,* Declaration of Moore of Idaho Transportation Department, Exhibit 6, that results under the Emissions Rule is an infringement on state sovereignty. *See* Doc. 1, PageID.4–22.

Third, the Emissions Rule will wreak havoc on the States' economies. Because the Emissions Rule mandates States set declining targets for on-road CO_2 emissions, States are foreclosed from making contrary choices that would be in the best interest for their economies. For example, the Declaration from Ohio's Department of Transportation explains:

> To meet requirements for declining targets, the state will need to make financial investments that facilitate the reduction of gasoline consumption or implement strategies to reduce vehicle miles traveled. There is a direct correlation between fuel consumption, vehicle miles traveled and funding availability to state DOTs. This rule impacts motor fuel revenue utilized for highway operation and construction. The Federal government has not provided the necessary means to recover the lost revenue, forcing the State of Ohio to reprioritize investments.

Declaration of Hill of Ohio DOT, Exhibit 10.

The forced reprioritization of investments will have serious consequences on the States' economy. The Agencies acknowledge that achieving a declining target for on-road CO_2 emissions will be "challenging" in a context of economic growth. *See* Doc. 1-1, PageID.74. In reality, the Emissions Rule's mandate for States to set declining

targets for on-road CO_2 emissions is a limitation on economic growth. And that means it infringes on state sovereignty when the States have economic growth as a state goal. *See* Doc. 1, PageID.3–22; *see also* Declaration of Moore of Idaho Transportation Department, Exhibit 6 ("[A]chieving declining targets is especially problematic in the context of economic growth, a goal of Idaho's government."); Declaration of Holland of Florida DOT, Exhibit 5 (explaining that "Florida is a fuel-diverse state and relies on several options to ensure its economic success and a high quality of life for both residents and visitors alike," and the population and number of visitors to the state of Florida "are projected to increase, likely increasing vehicle traffic in the State"); Declaration of Huot of Utah DOT, Exhibit 12 (discussing the disproportionate impact of the Emissions Rule on states with growing economies); Kentucky 2021–2024 STIP[19] (making clear economic development is a critical factor for the Commonwealth and the Kentucky Transportation Cabinet).

The Agencies acknowledge in the Regulatory Impact Analysis for the Final Rule that "the rule may result in some offsetting loss of benefits from investment projects that are no longer pursued, if funds are shifted toward other projects as a result of the rule." Doc. 62-2, PageID.616. They also say, "it is not possible to conclude with any degree of certainty whether and how the GHG measure might cause State DOTs and MPOs to make transportation-investment and operations decisions that they otherwise would not have made." *Id.* But the Agencies attempt to wave away

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[19] *Available at* https://transportation.ky.gov/Program-Management/2021%20Statewide%20Transportation%20Improvement%20Program/Complete%202021%20STIP%20Book.pdf

any concern by pointing to "benefits that *may possibly* flow from the GHG measure" including "the potential to increase public awareness of GHG emissions trends, promote the consideration of GHG emissions in transportation planning decisions, and more transparently characterize the impact of these decisions on GHG emissions." *Id.* at 760 (emphasis added). As the Agencies acknowledge, "[t]hese benefits are not easily quantifiable" *id.*, and certainly cannot counteract the very real economic costs of reprioritizing investments and achieving declining on-road CO_2 emissions, *see infra* II.C.

All of this clearly demonstrates the Plaintiff States have standing.

ARGUMENT

For a challenge filed under the Administrative Procedure Act, a motion for "summary judgment serves as the mechanism for deciding, as a matter of law, whether an agency action is supported by the administrative record and is otherwise consistent with the APA standard of review." *Norton v. Beasley*, 564 F.Supp.3d 547, 569 (E.D. Ky. 2021) (vacated and remanded on other grounds) (citation omitted). The appropriate standard of review for agency decisions like the Emissions Rule is asking whether the agency action is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law, contrary to constitutional power, or in excess of statutory jurisdiction. *See* 5 U.S.C. 706(2); *City of Cleveland v. Ohio*, 508 F.3d 827, 838 (6th Cir. 2007). The Emissions Rule fails review under the APA

standard. It must be set aside as unlawful.

I. The Emissions Rule is not in accordance with law.

The Constitution gives the power to legislate to Congress alone. U.S. CONST. art. I. Therefore, the Agencies' ability to act is limited to what Congress authorizes. *See City of Arlington v. FCC*, 569 U.S. 290, 297 (2013) (explaining the Agencies' "power to act and how they are to act is authoritatively prescribed by Congress"). Agency action that exceeds the authority given by Congress is unlawful and must be set aside. 5 U.S.C. § 706(2)(A).

A. The Agencies unlawfully attempt to address a major question.

Under the major questions doctrine, an agency's claim of authority must be clearly supported by statute before an agency can assert "'unheralded' regulatory power over a 'significant portion of the American economy.'" *W. Va. v. EPA*, 597 U.S. at 722 (citation omitted). The Supreme Court has accordingly rejected agencies' claims of regulatory authority when the underlying claim of authority concerns an issue of "vast 'economic and political significance,'" *unless* Congress has clearly spoken to empower the agency. *See Util. Air Reg. Grp.*, 573 U.S. 302, 324 (2014).

The Emissions Rule, which mandates every State, the District of Columbia, and Puerto Rico to reduce on-road CO_2 emissions, attempts to address the major question of climate change.[20] And the Agencies know it. In the Regulatory Impact

[20] Congress has been debating the contentious issue of climate policy for years with no clear consensus. *See, e.g., https://www.nature.com/articles/28447, Gore Calls for Action on Climate Change as Congress Stalls (July 23, 1998); Congressional Committees Delve into Climate Change Debate*, ASSOCIATION OF METROPOLITAN WATER AGENCIES (Feb. 2019), https://perma.cc/G7P6-S66U; Jeff Brady, *Congress is Debating Its Biggest Climate Change Bill Ever. Here's What's At Stake*, NPR (Sept. 15, 2021), https://perma.cc/M4Q7-PUWJ.

Analysis for the final rule, the Agencies note that "[t]he transportation sector represents the largest source of CO_2 emissions in the United States[.]" Doc. 62-2, PageID.736. For the joint press release issued when the Agencies finalized the Emissions Rule, Defendant Administrator Bhatt said, "Transportation is the leading source of greenhouse gas emissions in the U.S. . . . . We don't expect state DOTs and MPOs to solve a problem this large on their own[.]"[21] The Agencies' solution—the Emissions Rule—is large in response; it regulates every State and will impact a vast portion of the American economy. The Emissions Rule will change the States' selection of transportation projects because it effectively requires States to select projects that will achieve a "declining target" for CO_2 emissions.[22] *See* Doc. 1-1, PageID.72–3. That reprioritization has widespread and long-term costs, as already discussed above.

Disingenuously, the Agencies seek to shrink the elephantine Emissions Rule to fit into a mousehole. Rather than admitting the Emissions Rule requires 52 DOTs and hundreds of MPOs administering hundreds of billions of dollars of road project funds "to change their approach to selecting projects," the Agencies claim that "the measure will provide [state DOTs and MPOs] with additional information to inform their decision making." Doc. 1-1, PageID.79. Despite the assertion of authority by a

[21] *Biden-Harris Administration Finalizes Greenhouse Gas Emissions Reduction Tool, Moves Climate Change Performance Measure Forward*, U.S. DEPARTMENT OF TRANSPORTATION FEDERAL HIGHWAY ADMINISTRATION (Nov. 22, 2023), https://perma.cc/LLG3-QQVP.

[22] This is the case despite the Agencies' assertion otherwise. According to the Agencies, the Emissions Rule not only does not require States to set specific declining targets (as the Proposed Rule did), but also does not require States to "achieve actual reductions in GHG emissions." Doc. 1-1, PageID.82. But the language of the Emissions Rule is indeed mandatory: "Targets established for the GHG measure in paragraph (c)(5) of this section shall be declining targets for reducing tailpipe CO_2 emissions on the NHS." Doc. 1-1, PageID.94.

highway regulator over "climate change" policy being plainly novel, the Agencies claim the Emissions Rule simply represents a routine interpretation of "longstanding FHWA authority." *Id.*

Not so. A "problem this large" must be handled by Congress. Courts "presume that 'Congress intends to make major policy decisions itself, not leave those decisions to agencies.'" *W. Va. v. EPA*, 597 U.S. at 723 (citation omitted). Therefore, before finding an agency has authority to address a major question, "[t]he agency instead must point to 'clear congressional authorization' for the power it claims." *Id*. Even in *Utility Air* where the Supreme Court found there was some textual plausibility to construe the term "air pollutant" in a provision of the Clean Air Act to cover greenhouse gases, the Court declined to uphold EPA's claim of "unheralded" regulatory power over "a significant portion of the American economy." 573 U.S. at 324. A more clear statement was required.

Therefore, even if the enabling legislation at issue here were ambiguous (and it is not, *infra* section I.B.), Congress must speak clearly to authorize the Agencies to act. Congress has not done so. In fact, it is clear Congress has *not* empowered the Agencies to act in this way. A comparison of the House version and the final enacted version of the IIJA demonstrates Congress decided not to give the Agencies expanded authority to address climate change. In the House version, the bill called for 23 U.S.C. § 119(d) to be amended by striking "or freight movement on the National Highway System" and inserting "freight movement, environmental sustainability,

transportation system access, or combating climate change." [23] The final version made no such change. IIJA at § 11105. Likewise, there were several other places where the House version added language on climate change, but that language was not included in the enacted version of the IIJA. *See* Doc. 1, PageID.55–56. Congress has not authorized the Agencies to address the object of the Emissions Rule.[24]

In reality, the Agencies' action is taken in reliance on climate models and policies endorsed by the Biden Administration but never adopted by Congress.[25] Repeatedly, the Agencies point to the Executive Orders as the motivation for the Emissions Rule. Doc. 1-1, PageID.69, 92–93; Doc. 1-6, PageID.219, 220–21, 224; Doc. 62-2, PageID.676 (Transcript from Webinar on proposed rule); *id.* at 736 (Final Regulatory Impact Analysis). That Executive Branch policies are driving the Emissions Rule is evident—even as the Agencies engage in double-speak. For instance, the Agencies say the Emissions Rule "does not force investments in specific

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[23] H.R. 3684, 117th Congress (engrossed in House Jul. 1, 2021), at § 1201, *available at* https://www.congress.gov/bill/117th-congress/house-bill/3684/text/eh.

[24] This does not mean Congress has not tasked any federal actor with regulating vehicle emissions. Indeed, a review of "the overall statutory scheme," *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (cleaned up), reveals that Congress did speak clearly to emissions standards for motor vehicles—in Title II of the Clean Air Act and in the Energy Policy and Conservation Act of 1975, giving limited authority to EPA and NHTSA to address emissions from new vehicles. That Congress assigned to other agencies the role U.S. DOT and FHWA now seek to play demonstrates "a mismatch between [the Agencies'] challenged action and [their] congressionally assigned mission and expertise." *W. Va. v. EPA*, 142 S.Ct. at 2623 (Gorsuch, J., concurring). The FHWA—whose expertise is funding and regulating physical infrastructure—is no more tasked to regulate CO_2 emissions than OSHA is to mandate vaccines or the CDC is to regulate landlords. *See NFIB v. OSHA*, 142 S.Ct. at 665; *Alabama Assn. of Realtors v. Department of Health and Human Servs.*, 141 S.Ct. 2485, 2488–2489 (2021); *see also Gonzales v. Oregon*, 546 U.S. 243, 267 (2006). In each instance, the federal agency strayed from its "congressionally assigned mission and expertise," and thus acted unlawfully. Such is the case here too.

[25] And Congress may have chosen to not adopt the models because researchers have found the "models have serious limitations that dramatically limit their value in making predictions and in guiding policy." David R. Henderson & Charles L. Hooper, *Flawed Climate Models*, HOOVER INSTITUTION (Apr. 4, 2017), https://www.hoover.org/research/flawed-climate-models.

projects" or "require the achievement of an absolute reduction target," but in the same paragraph say, "FHWA has determined that the targets for the GHG measure should show a reduction in CO_2 emissions." Doc. 1-1, PageID.72–3. And the Agencies explain they want this reduction because it will help achieve the "principle set forth in E.O. 14008"—that is, the principle of "tackling the climate crisis" as perceived by the President. *See id.*; Doc. 1-3. Although the Emissions Rule does not contain the language linking the declining targets to specific numbers that was in the Proposed Rule, Doc. 1-6, PageID.219, it is clear that is still the Agencies' goal. Indeed, the preamble to the Emissions Rule explains that the rule "responds to the direction" in Executive Order 13990 "that Federal agencies . . . take steps to address any [regulations] that conflict with the national objectives set forth in the order to address climate change." Doc. 1-1, PageID.69.

Presidential policy wishes—even if found in Executive Orders—are not sufficient authorization for the Agencies to address a major question like climate change. Such authorization must be clearly granted by Congress. *See W. Va. v. EPA*, 597 U.S. at 723. No authorization is present here.

B. The Emissions Rule conflicts with the enabling legislation.

"Agency action is 'not in accordance with the law' when it is in conflict with the language of the statute relied upon by the agency." *City of Cleveland*, 508 F.3d at 838 (quoting 5 U.S.C. 706(2)(A)). A review of the enabling legislation makes clear the Agencies do not have authority to promulgate the Emissions Rule. "Agencies have only those powers given to them by Congress, and enabling legislation is generally not an open book to which the agency may add pages and change the plot line." *W. Va.*

v. EPA, 597 U.S. at 723 (cleaned up, citation omitted). In large part, the Agencies rely on their assertion that the term "performance" in 23 U.S.C. § 150(c)(3) includes "environmental performance" to demonstrate their authority for the Emissions Rule. Doc. 1-1, PageID.68. That assertion is an unfounded attempt to rewrite the enabling legislation.

An interpretation of "performance" that includes "environmental performance" is inconsistent with the law. In 23 U.S.C. § 150(c), Congress plainly stated that the Agencies "shall . . . limit performance measures only to those described in this subsection." 23 U.S.C. § 150(c). Nothing in the subsection discusses a performance measure for on-road CO_2 emissions. The subsection directs the Agencies to establish "minimum standards" and "measures" "for the purpose of carrying out section 119." 23 U.S.C. § 150(c). These minimum standards relate to the sort of engineering and construction matters that naturally are involved in a national highway system, such as developing and operating bridge and pavement management systems, and then "only for the purpose of carrying out section 119." 23 U.S.C. § 150(c)(3). Likewise, even though one of the delineated purposes in Section 119 is "[e]nvironmental mitigation efforts," 23 U.S.C. § 119(d)(2)(O), the statute explicitly and clearly limits the scope of the permitted environmental mitigation efforts. By law, only those efforts that are "described in subsection (g)" of Section 119 are allowed. The efforts described in subsection (g) relate to natural habitats and wetlands—not to CO_2.

In addition, the statutory definition of the "environmental sustainability" goal reinforces the lack of statutory authority for an emissions performance measure. The

statute declares that its purpose is "[t]o enhance the *performance* of the transportation system *while* protecting and enhancing the natural environment." 23 U.S.C. § 150(b)(6) (emphases added). In other words, "protecting and enhancing the natural environment" is something to be considered "while" the FHWA goes about its work of "enhance[ing] the performance of the transportation system."

Further, the Supreme Court has rejected expansive constructions of statutes if allowing the broader interpretation would mean relying on a "cryptic" delegation of authority. *See Brown & Williamson*, 529 U.S. at 160. Neither the reference to "environmental mitigation efforts" in § 119 nor the reference in § 150(b) to environmental sustainability as a national goal[26] are clear grants of authority sufficient for the Agencies to require States to establish and demonstrate progress in achieving declining targets for on-road CO_2 emissions.

Additionally, a general rule in aid of statutory construction is that "the specific governs the general." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992). Within 23 U.S.C. § 150(c), paragraph (5) is the provision concerned with congestion and "on-road mobile source emissions." The provision has the purpose of carrying out 23 U.S.C. § 149, and neither § 150(c)(5) nor § 149 list CO_2 as one of the covered emissions. Yet, rather than respect that Congress has specifically addressed performance measures for emissions in paragraph (c)(5), the Agencies conclude that a general reference to "performance" in a different provision is sufficient to justify the

[26] Moreover, the goals delineated in subsection (b) cannot be used to rewrite subsection (c). *See Kentucky v. Biden*, 23 F.4th 585, 604 (6th Cir. 2022) (explaining that purpose statements are not operative provisions so they "cannot confer freestanding powers . . . unbacked by operative language elsewhere in the statute").

Emissions Rule. They are wrong. Because Congress expressly stated in § 150(c)(5) how emissions were to be addressed, the rest of § 150(c)—including paragraph (c)(3)—provides no authority to regulate emissions, including CO_2 emissions.

And the words "shall," "limit," and "only" in 23 U.S.C. § 150(c) cannot be ignored. They are clear demonstrations of Congress placing limits on the authority of the Agencies to expand the list of performance measures. The Agencies acknowledge that nothing in the statute "requires FHWA to adopt a GHG emissions measure," but argue that they can adopt one so as long as Congress has not explicitly forbidden it. Doc. 1-1, PageID.72. That badly misapprehends how agency action is authorized. It is clearly not the case that an agency has authority to do everything other than what Congress expressly forbids it from doing. Indeed, in *Utility Air*, the Supreme Court held that because the "statute does not compel EPA's interpretation, it would be patently unreasonable—not to say outrageous—for EPA to insist on seizing expansive power that it admits the statute is not designed to grant." 573 U.S. at 324. The same is true here. Nothing in the statute authorizes, much less compels, the Agencies to adopt a rule requiring states to set declining on-road CO_2 emissions targets. Rather, the limiting language used by Congress makes it clear the Emissions Rule is not in accordance with law.

The Agencies list six other provisions that "support FHWA's authority" for the Emissions Rule. Doc. 1-1, PageID.72 (citing 23 U.S.C. §§ 101(b)(3)(G), 134(a)(1), 134(c)(1), 134(h), 135(d)(1), 135(d)(2)). None of these provisions give the Agencies

authority to compel the States to set declining targets for on-road CO_2 emissions.[27] And the Agencies know it. That is why they say the provisions "*support* FHWA's authority" for the Emissions Rule rather than say "authorize" or "enable." Even if the provisions would support FHWA's authority, such support is insufficient. Because the Emissions Rule seeks to address the major question of how to respond to climate change, *supra* section I.A., the absence of a "clear grant of authority" means the Agencies do not have authority. *See Brown & Williamson*, 529 U.S. at 160; *W. Va. v. EPA*, 597 U.S. at 723.

Nothing in the IIJA gave the Agencies authority to promulgate the Emissions Rule either. The new language from IIJA made it a purpose of the NHPP to provide "support for activities to increase the resiliency of the NHS to mitigate the cost of damages from sea level rise, extreme weather events, flooding, wildfires, or other natural disasters." Pub. L. 117-58 § 11105; 23 U.S.C. § 119(b). This language is intended to address physical issues with roads, not CO_2 emissions, and it is clearly meant to support activities that are *responsive* to damage. Additionally, that there are programs in the IIJA that relate to carbon dioxide reduction and transportation emissions does not mean the Agencies have authority for the Emissions Rule. In fact, these programs make it obvious that Congress could have given the Agencies authority to address on-road CO_2 emissions, but chose not to do so.

The Emissions Rule clearly conflicts with the enabling legislation and exceeds

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[27] 23 U.S.C. §§ 101(b)(3)(G) and 134(a)(1) are declarations of policy, not grants of authority. Sections 134(c)(1) and 134(h) are directives to MPOs, not to the Agencies. Section 135(d) relates to the planning of the States; nothing in it is a grant of authority to the Agencies.

the authority given to the Agencies therein. Accordingly, the Court should set the Emissions Rule aside as unlawful.

C. The Emissions Rule violates principles of federalism.

The Emissions Rule is also not in accordance with law because it violates principles of federalism by usurping the role of the States through mandating they set declining emissions targets. *See* Doc. 1-1, PageID.68, 84.

Congress explicitly envisioned a role for the States in the NHPP. According to 23 U.S.C. § 150(d), "each State shall set performance targets." States must "develop a risk-based asset management plan . . . to improve or preserve the condition of the assets and performance of the [NHS]." 23 U.S.C. § 119(e)(1). The plan needs to "include strategies . . . that would make progress toward achievement of the *State targets* for asset condition and performance of the [NHS] in accordance with section 150(d) and supporting the progress toward the achievement of the national goals identified in section 150(b)." 23 U.S.C. § 119(e)(2) (emphasis added).

The Agencies' role is only to certify the States' plans. *See* 23 U.S.C. § 119(e)(6). Nothing authorizes the Agencies to establish the parameters within which the States must act, or to impose a rule requiring constantly diminishing CO_2 targets on the States. Even if there were a questionable grant of authority, it would be insufficient to find the Emissions Rule lawful. Under the federalism canon, "Congress must use 'exceedingly clear language if it wishes to significantly alter the balance between federal and state power.'" *Kentucky v. Biden*, 23 F.4th at 609 (quoting *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489). "Exceedingly clear language" to alter the federal/state balance of power is obviously absent here. To the contrary, the statute clearly affirms

State authority, as it provides that performance targets authorized by 23 U.S.C. § 150(d) are set by "each State." *See also New York v. United States*, 505 U.S. at 188 (The Constitution "leaves to the several States a residuary and inviolable sovereignty. . . .").

D. The Emissions Rule violates the Spending Clause.

"The legitimacy of Congress' power to legislate under the spending power . . . rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'" *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) (citation omitted). "States cannot knowingly accept conditions of which they are 'unaware' or which they are 'unable to ascertain.'" *Arlington Cent. Sch. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006) (quoting *Pennhurst*, 451 U.S. at 17). Therefore, "Congress must provide 'clear notice' of the obligations a spending law entails." *Kentucky v. Yellen*, 54 F.4th at 348 (quoting *Pennhurst,* 451 U.S. at 25).

And it must indeed be Congress that provides the notice. The Spending Clause empowers Congress alone with the power of the purse; the Executive has no such power. *See The Federalist* Nos. 78 (Alexander Hamilton), 58 (James Madison); *see also Texas Educ. Agency v. United States Dep't of Educ.*, 992 F.3d 350, 362 (5th Cir. 2021).

Here, there is nothing in the law that is a clear statement to put States on notice that the Agencies may mandate States set declining on-road CO_2 emissions targets and report on how they will achieve the targets as part of receiving NHPP funds. And the Emissions Rule does not constitute "mere implementation details," *see*

Yellen, 54 F.4th at 354, because the rule's requirement for declining on-road CO_2 emissions targets means States must supplant their policy choices with the policy choices of the Executive Branch. That is a significant and substantive change to how Congress envisioned the program. *See* 23 U.S.C. § 145(a). Even if the Emissions Rule were mere implementation details, the Constitution would still demand that Congress speak "with a clear voice" to give the States notice because the statute has "implications for the balance of power between the Federal Government and the States." *See Yellen*, 54 F.4th at 354. Congress has not spoken clearly, therefore, the Emissions Rule is not in accordance with law because it is impermissible under the Spending Clause.

II. The Emissions Rule is arbitrary and capricious.

An agency rule will be found "arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Specifically, when an agency changes position—as the Agencies did here—it must, at a minimum, show that "the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better" than the old one. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (emphasis omitted).

A. Impermissible Under the Law

The Emissions Rule is arbitrary and capricious because it is not permissible

under the enabling legislation. First, a GHG emissions measure is not one of the performance measures the Agencies have authority to establish or regulate. *See* 23 U.S.C. § 150(c); *supra* section I.B. Second, even if it were, the Emissions Rule conflicts with the law by dictating the type of target the States must set—targets must be reductions; targets that increase or even maintain are not allowed—in contrast to Congress' requirement that the States themselves set the targets for approved performance measures. *See* 23 U.S.C. § 150(d)(1). These conflicts demonstrate not only that the Emissions Rule is impermissible, but also that the Agencies are relying on factors and considerations Congress did not intend for them to consider. The Emissions Rule is, therefore, arbitrary and capricious.

B. Lack of Reasoned Explanation

The Emissions Rule is also arbitrary and capricious because the Agencies have failed to articulate a satisfactory explanation for the Emissions Rule. Agencies have leeway to exercise expert discretion, but they must justify their choices by providing a reasoned analysis. *See State Farm,* 463 U.S. at 42; *see also Burlington Truck Lines, Inc. v. U.S.*, 371 U.S. 156, 167 (1962) (noting that, if an agency is not required to provide reasoned analysis, it "can become a monster which rules with no practical limits on its discretion" (citation omitted)). When there is a change in policy, "a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy." *FCC*, 556 U.S. at 516. Judicial review of the change looks at whether the agency rule is reasonable and reasonably explained. *See id.* at 515–16; *Dep't of Homeland Sec. v. Regents of the Univ. of*

California, 140 S. Ct. 1891, 1916 (2020); *id*. at 1933 (Kavanaugh, J., concurring in part). The Agencies fail to provide a reasoned explanation for the Emissions Rule.

To explain why the Agencies decided to revoke their own 2018 repeal of a similar rule, the Agencies simply say they found the arguments in support of the repeal "lacking."[28] Doc. 1-1, PageID.70. This bare explanation is supplemented only by the justification that the Agencies are imposing the GHG measure "[i]n light of the Agency's policy emphasis on using its available authorities to confront worsening climate change and new facts identified in reports issued between 2018 and 2021 that expand [the Agencies'] knowledge of the severe consequences of climate change." Doc. 1-6, PageID.223; *see also* Doc. 1-1, PageID.73 (adopting in full the analysis in the Proposed Rule justifying the reconsideration). Neither of these are sound reasons for imposing the Emissions Rule.

The first part of the Agencies' justification indeed seems to be the motivation for imposing the Emissions Rule. The Agencies even say in the summary to the final rule that the Emissions Rule "responds to the direction in sections 1 and 2 of E.O. 13990 . . . that Federal agencies . . . take steps to address any [regulatory actions taken under the prior administration] that conflict with the national objectives set forth in the order to address climate change." Doc. 1-1, PageID.69. But a "policy emphasis" that comes directly from the President's executive orders does not suffice

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[28] Of course, the arguments the Agencies so summarily dismiss previously led the Agencies to conclude there was no statutory authority for the rule. *See* Doc. 1-5, PageID.214 ("[T]he statute does not encompass the GHG measure."). Moreover, beyond the breezy dismissal of its own recent analysis being insufficient to explain the Agencies' reversal, it also makes clear—both for the purposes of the major question doctrine and the Spending Clause—that it is not credible for the Agencies to claim they have "clear" authority for the Emissions Rule after they had so recently concluded that the statute did not provide authority for a GHG emissions performance measure and related targeting requirements.

to validate the Agencies' action when it means the Agencies are considering issues they have no authority to address. *See supra* section I.B.

The second part of the Agencies' justification also falls short. The Agencies fail to explain why the "new facts" warrant imposing the specific object of the Emissions Rule: mandatory declining on-road CO_2 emissions targets. The reports put forward by the Agencies as new evidence only discuss climate change generally. *See, e.g.*, Doc. 1-6, PageID.223 (characterizing the 2021 IPCC Sixth Assessment Report as saying human activities have increased atmospheric GHG emissions, and there may be "evidence linking human production of GHG emissions to extreme events such as heatwaves, heavy precipitation, droughts, and hurricanes."); *id.* (pointing to other reports asserting that limiting global warming "would likely require a decrease in global net anthropogenic CO_2 emissions[.]"). General climate change reports are not sufficient justification for why the Agencies need to mandate declining *on-road CO_2 emissions* targets. *See State Farm,* 463 U.S. at 43–44 (explaining that agency findings need to be "supported by substantial evidence on the record considered as a whole" because a reviewing court "may not supply a reasoned basis for the agency's action that the agency itself has not given").

The Agencies also fail to explain why evidence contrary to the "new facts" does not weigh against imposing the Emissions Rule. For instance, the Agencies received comments that assert CO_2 does not cause climate change in the magnitude suggested by the Agencies. *See* Doc. 1-1, PageID.92 ("[Some] commenters asserted that use of the Interagency Working Group (IWG) on Social Cost of Greenhouse Gases "interim"

social costs of GHGs overstate damages from GHG emissions."). But the Agencies fail to engage with these comments in any meaningful way. The Agencies summarily dismiss the concerns by saying, "The DOT is an IWG member, and FHWA has reviewed the technical support document and has determined that the recommended values are appropriate for use in the break-even analysis in the RIA." *Id.*

Similarly, comments from respected scientists at Princeton and MIT call into question the reliability of the IPCC climate models, which are the premise for both the Executive Orders and the Emissions Rule. FHWA-2021-0004-39826 at 28.[29] Discussing work by former Obama Administration Undersecretary for Science, Dr. Steven Koonin,[30] the scientists put the failure of the underlying models in stark relief: "Projections of future climate and weather events rely on models *demonstrably unfit* for the purpose." *Id.* (quoting *Unsettled* at 24) (emphasis added). Further quoting Dr. Koonin, they explain:

> "The uncertainties in modeling of both climate change and the consequences of future greenhouse gas emissions make it impossible today to provide real, quantitative statements about relative risks and consequences and benefits of rising greenhouse gases to the Earth system as a whole, let alone to specific regions of the planet."

Id. Even more fundamentally, the Princeton/MIT scientists noted that "the IPCC … models that are widely used fail the fundamental test of scientific method. They do

[29] Comment by William Happer, Professor of Physics, Emeritus, Princeton University and Richard Lindzen, Professor of Earth, Atmospheric and Planetary Science, Emeritus, Massachusetts Institute of Technology. The Administrative Record filed with the Court includes a link to "other public comments" where this comment may be found. Doc. 62-1, PageID.553–4. This comment is available at https://www.regulations.gov/comment/FHWA-2021-0004-39826.

[30] Steven E. Koonin, *Unsettled: What Climate Science Tells Us, What It Doesn't, and Why It Matters* (2021).

not work". *Id*. Specifically, relying on testimony by Dr. John Christy, Professor of Atmospheric Science, University of Alabama in Huntsville, before the House Committee on Science, Space and Technology (March 29, 2017), the scientists conclude that 101 of 102 models relied on by the IPCC for its conclusions regarding the dire threat posed by climate change "fail miserably to predict reality." *Id*.

Yet, there is no indication in the record that the Agencies gave any consideration to these points, and they certainly fail to discuss them in the explanation of the Emissions Rule.[31] This failure calls into question the soundness of the reasoning the Agencies are providing for the Emissions Rule. Indeed, it makes the Emissions Rule arbitrary and capricious for "entirely failing to consider an important aspect of the problem." *State Farm*, 463 U.S. at 43.

The Agencies do not offer anything else to explain the necessity of the rule. In fact, the Agencies' evasive and contradictory language about the consequences of a State failing to comply with the Emissions Rule demonstrates the failure to reasonably explain the Agencies' decision to impose the rule. *Compare* Doc. 1-1, PageID.82 ("The FHWA did not propose specific penalties for failure to achieve performance targets, and is not finalizing any such penalty. Failure to achieve

[31] And these are, by no means, the only points the Agencies failed to address. *See, e.g.,* FHWA-2021-0004-39816 (raising the concern that the rule will result in higher GHG emissions and more environmental harm because "the production and use of electric vehicles, including the mining of critical minerals, generating necessary electricity, constructing charging infrastructure, and operating significantly heavier vehicles, has significant environmental consequences, including substantial GHG emissions"); FHWA-2021-0004-26970 ("The introduction of [electric vehicles] creates complications, since electricity emissions (including those generated by EVs) are typically reflected in non-transportation sectors. This can lead to a situation where the transportation portion of the GHG inventory does not reflect emissions from EVs, giving a false picture that EVs will produce zero transportation emissions in the future, when these emissions should be reflected in increased emissions from the electricity sector.").

significant progress for this measure, as defined in 23 CFR 490.109, will also not trigger any penalties.") *with* Doc. 1-6, PageID.233, n. 39 ("Failure to comply with Federal requirements, including requirements to set performance targets, may be subject to penalties under 23 CFR 1.36."); Doc. 62-2, PageID.619 (saying the same in the Economic Assessment for the Proposed Rule); *id.* at 739 (explaining in the RIA for the final rule that "FHWA is not proposing specific penalties for failure to achieve performance targets. Failure to comply with Federal requirements, including requirements to set performance targets, may be subject to appropriate remedies").[32]

If, indeed, the States do not have to comply, then the rulemaking seems facially unnecessary and unwarranted. If the CO_2 emissions targets were nothing more than aspirational and meant to encourage certain behavior, the Agencies could have issued guidance that did not mandate certain actions by the States. In any event, at most, the Agencies are engaging in double-speak, intentionally obscuring the answer to what consequences States will suffer for failing to comply in the hope that the Emissions Rule will be seen as less injurious to the States. At a minimum, the Agencies have failed to reasonably explain the necessity of the mandate.

In reality, all the Agencies offer to explain why they are implementing the Emissions Rule is the Biden Administration's demand that they participate in the President's "whole-of-government" approach to advancing the Administration's climate agenda. That simply is not sufficient. *See Burlington Truck*, 371 U.S. at 167.

[32] The Agencies do not affirmatively disclaim these earlier statements in the Emissions Rule or say they will not use the "remedies" for noncompliance they claim to have available to them if a State does not set or meet a target.

C. Failure to Consider Costs to States' Economies

The Emissions Rule is also arbitrary and capricious because the Agencies failed to properly consider the costs associated with implementing the object of the rule. The Regulatory Impact Analysis (RIA) for the proposed rule only evaluated the costs from the perspective of the administrative costs associated with reporting; it did not consider the costs for action necessary to achieve any declining target. This failure was pointed out to the Agencies by at least one comment. *See* Doc. 62-2, PageID.1044–46 (Texas DOT noting that the RIA failed to consider costs associated with, *inter alia*, shifts to public transit or electric vehicles and freight movement changes). The Agencies summarily dismissed these concerns and "determined the RIA cost estimates should be primarily unchanged" for the final rule because the Agencies are "not requiring specific declining targets or mandating penalties for failing to meet the targets." Doc. 1-1, PageID.92. As already discussed, what penalties may be imposed for a State's failure to comply is uncertain. Regardless, at a minimum, if significant progress is not made in achieving the established targets, the Agencies will require the States to "document the actions [they] will take to achieve the GHG performance target." *Id*. at 96.[33]

Achieving any declining GHG performance target will have costs. For instance, consistently demonstrating progress toward the Biden Administration's preference

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[33] The Agencies' refusal to concede that the Emissions Rule will interfere with the States' ability to freely select projects consistent with the policies appropriate to their circumstances highlights the arbitrariness of the Agencies' action. They demand declining emissions targets and detailed plans to achieve them in the event of initial failure, but claim there is no coercive effect because the Agencies have not articulated an explicit penalty—even as they point to more general penalty provisions in the proposed rule and the economic assessment for the proposed rule. *See* Doc. 1-6, PageID.233, n. 39; Doc. 62-2, PageID.619, 739.

for declining on-road CO_2 emissions may require highway expansion projects to be cancelled or scaled back, or dramatic shifts to public transit or even less reliable electric vehicles. *See, e.g.,* Declaration of Jundt of South Dakota DOT, Exhibit 1; Declaration of Moore of Idaho Transportation Department, Exhibit 6. There are significant costs associated with such shifts—not just for the States in terms of the necessary infrastructure, but also for the States' citizens who will have to purchase new vehicles or suffer greater inconvenience to use public transportation. If freight movement changes have to be made, there will be costs experienced nationwide as the price of goods increases (even if just initially). Additionally, there will be an impact on the States' economies as they are forced to limit the number of transportation projects or select only certain types of projects. Moreover, recall that over 90% of tourism travel occurs on the NHS, so States that rely on tourism will be negatively impacted by any forced reduction of travel or limitations on the type of travel that can occur. The list of costs could continue at length—but what matters is that the Agencies considered none of these costs.

And all of these costs come with only uncertain benefits to balance them. The Agencies reject their earlier conclusion that it "was not possible to predict, with any reasonable degree of certainty, the extent to which the influence effects of the GHG measure might result in actual changes in emissions levels." Doc. 1-6, PageID.228. Now, they "anticipate[] that this proposed rule would result in substantial benefits that are neither speculative nor uncertain." *Id*. Yet, in the *same paragraph*, they say the "benefits are not easily quantifiable." *Id*.; *see also id*. at 222 ("[A]nticipated

benefits of the rule . . . are not quantified because they are difficult to forecast and monetize."). Accordingly, the Agencies are demanding the States comply with a mandate where the Agencies cannot determine the benefits—if any—and ignore the very real costs.

In addition to everything else, the Emissions Rule is arbitrary and capricious because the Agencies failed to fully consider the costs of implementing it.

CONCLUSION

For the foregoing reasons, the Court should grant the Plaintiff States' motion for summary judgment and set aside the Emissions Rule as unlawful.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on February 9, 2024, the above document was filed with the CM/ECF filing system, which electronically served a copy to all counsel of record.

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