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 PRELIMINARY INJUNCTION

This case challenges yet another attempt by two federal agencies—the United States Department of Transportation (the "U.S. DOT") and the Federal Highway Administration (the "FHWA")—to implement the Biden Administration's "whole of government" approach to dealing with perhaps the most complex and dynamic ecological system on Earth, *i.e.*, the climate.[1] *National Performance Management Measures; Assessing Performance of the National Highway System, Greenhouse Gas Emissions Measure,* 88 Fed. Reg. 85364 (Dec. 7, 2023) ("Emissions Rule"). With the Emissions Rule, the Agencies seek to impose on the States a mandate to establish declining targets for mobile greenhouse gas emissions, specifically CO_2, with the apparent purpose of pursuing the Biden Administration's declared goal of a 50%

[1] Climate Policy Office, THE WHITE HOUSE, https://perma.cc/GL39-X56M (last visited Jan 5, 2024).

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] That is an issue of indisputably far-reaching impact. It is also an issue on which the Agencies, like so many of their sister agencies in the Biden Administration, have dramatically overstepped their statutory authority.

The question before this Court is whether to maintain the *status quo* while this litigation proceeds. It should. All the factors weigh in favor of a preliminary injunction. The Plaintiff States show below both the requisite likelihood of success on the merits and irreparable injury absent an injunction. Additionally, they demonstrate an injunction is in the public interest and will not harm the Agencies.

INTRODUCTION

The Emissions Rule represents another unlawful effort by the Biden Administration to use its limited regulatory authority as a means of circumventing Congress and achieving its policy goals. *See, e.g., W. Va. v. EPA*, 142 S.Ct. 2587 (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 the EPA to make such major policy decisions); *Kentucky v. EPA*, No. 23-5343 (6th Cir. May 10, 2023)

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

(order 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 (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 the FHWA (collectively, "the Agencies") to further the President's climate policies by requiring states to set declining targets for on-road CO_2 emissions. The Agencies do not have authority to force the States to implement the Biden Administration's policy preferences.

This situation is one that requires a preliminary injunction. *See Fowler v. Benson*, 924 F.3d 247, 256 (6th Cir. 2019). Policy-making authority in the federal government belongs only to Congress. The Executive branch may not flout the allocation of power between the federal government and the States set out in the Constitution without subjecting the States to irreparable harm to their sovereignty. Nor can the Agencies compel the States to administer a federal regulatory program in service to Executive branch policy wishes absent some statutory authority to do so—which is lacking as to this rule. Furthermore, the Emissions Rule is arbitrary and capricious. To prevent the harm the Emissions Rule will inflict on the States, this Court should preliminarily enjoin it.

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 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

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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.

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.

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 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 goals for the NHPP and specified what makes a facility or project eligible for funding. *See* 23 U.S.C. §§ 119, 150. Moreover, 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). This statutory language explicitly limits the discretion of the Secretary, and of the Agencies. Section 119 specifies the purposes of the national highway performance program: to provide support for (i) "the condition and performance of the [NHS]," (ii) "the construction of new facilities on the [NHS]," (iii) "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 (iv) to ensure that Federal-aid funds are

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[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 supra* note 8.

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

directed toward the achievement of performance targets established in a State's asset management plan. 23 U.S.C. § 119(b).

II. The Final GHG Emissions Rule

On December 7, 2023, the Agencies published the Emissions Rule in the Federal Register. 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." Emissions Rule at 85364. The States' first targets must be established and reported to FHWA no later than February 1, 2024. *Id*. at 85372. The form made available by the Agencies for States to use to report the targets mandates that the targets "shall be a negative value, and be reported to the nearest tenth of a percent."[13] Specifically, according to the Agencies, "[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. Emissions Rule at 85365, 85367–69. The Agencies contend that the term "performance" in 23 U.S.C. § 150(c)(3) can include "environmental performance." *Id*. at 85364. They assert the other provisions "support FHWA's authority" for the

[13] State Initial GHG Report, *available at* https://www.regulations.gov/document/FHWA-2021-0004-39831.

[14] *Id*.

Emissions Rule. *Id.* at 85368. But none of these provisions grant the Agencies authority to compel the States to set declining targets for on-road CO_2 emissions.

III. This action

After the Agencies published the Emissions Rule, the Plaintiff States immediately assessed its 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. The Plaintiff States now move for a preliminary injunction to avoid irreparable harm and to protect the public interest while this Court considers the full merits of this case.

STANDARD

Preliminary injunctive relief turns on a four-part test: "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). "These factors are not prerequisites, but are factors to be balanced against each other." *Overstreet v. Lexington–Fayette Urb. Cnty. Gov't*, 305 F.3d 566, 573 (6th Cir. 2002). Here, the balance clearly weighs in favor of preliminarily enjoining the Emissions Rule.

ARGUMENT

I. The Plaintiff States are likely to succeed on the merits.

The Plaintiff States are likely to succeed on the merits. Such a showing "is often dispositive" for a preliminary injunction motion. *Wilson v. Williams*, 961 F.3d 829, 839 (6th Cir. 2020). Indeed, "[p]reliminary injunctions in constitutional cases

often turn on likelihood of success on the merits, usually making it unnecessary to dwell on the remaining three factors." *Roberts v. Neace*, 958 F.3d 409, 416 (6th Cir. 2020). The Plaintiff States are likely to succeed on the merits because it is clear the Emissions Rule exceeds the Agencies' authority, violates principles of federalism, and is arbitrary and capricious in violation of the Administrative Procedure Act.

A. The Emissions Rule exceeds the Agencies' authority.

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. *See, e.g.*, *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 325–26 (2014) (the EPA could not impose a rule when it admitted the statute was not designed to grant such authority); *W. Va. v. EPA*, 142 S.Ct. at 2609 (an agency must be able to point to "clear congressional authorization for the power it claims").

1. 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.'" *Id*. at 2608–09 (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*, 573 U.S. at 324. 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,[15] resulting in regulation of a vast portion of the American economy.[16] And the Agencies know it. In 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[.]"[17]

Indeed, "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*, 142 S.Ct. at 2609 (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*. But the Agencies do not—and cannot—point to any clear authorization. Indeed, this is an even clearer situation than in *Utility Air*. In that case, the Supreme Court addressed

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[15] Congress has been debating the contentious issue of climate policy for years with no clear consensus. *See, e.g., 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.

[16] The Emissions Rule will impact a significant portion of the American economy because it will change the States' selection of transportation projects. It effectively requires States to select projects that will help the State achieve a "declining target" for CO_2 emissions. *See* Emissions Rule at 85368–69. The Agencies' economic assessment acknowledges that "the rule may result in some offsetting loss of benefits from investment projects that would no longer be pursued, if funds are shifted towards other projects as a result of the rule." *Summary Report Economic Assessment: National Performance Management Measures; Assessing Performance of the National Highway System, Greenhouse Gas Emissions Measure RIN 2125-AF99 Proposed Rule*, at 29 (June 2022), *available at* https://www.regulations.gov/document/FHWA-2021-0004-0002 [hereinafter Economic Assessment].

[17] *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.

whether the EPA could construe the term "air pollutant," in a provision of the Clean Air Act, to cover greenhouse gases. 573 U.S. at 310, 134 S.Ct. 2427. There, despite the textual plausibility, the Court declined to uphold EPA's claim of "unheralded" regulatory power over "a significant portion of the American economy." *See id.* at 324. The Agencies here have no textual plausibility. *See infra* section I(A)(2).

Rather, it is clear Congress has *not* empowered the Agencies to assert the unheralded regulatory authority presented by the Emissions Rule. 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." [18] 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. Thus, the IIJA does not authorize the Agencies to address the climate generally or on-road CO_2 emissions specifically.

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

[18] 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 [hereinafter "House Version"].

the Clean Air Act and the Energy Policy and Conservation Act of 1975, giving limited authority to EPA and NHTSA to address emissions from new vehicles.[19] That Congress assigned the role U.S. DOT and FHWA now seek to play to other agencies 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 Agency—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.

In reality, the Agencies' action is taken in reliance on climate models endorsed by the Biden Administration but never adopted by Congress.[20] The Emissions Rule says it "does not force investments in specific projects," but in the same paragraph says, "FHWA has determined that the targets for the GHG measure should show a reduction in CO_2 emissions," which will help achieve the "principle set forth in E.O.

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[19] The Clean Air Act requires the EPA Administrator to prescribe "standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7521(a)(1). The Energy Policy and Conservation Act requires NHTSA to set national fuel-economy standards for new vehicles at "the maximum feasible average fuel economy level that the Secretary [of Transportation] decides the manufacturers can achieve in that model year." 49 U.S.C. § 32902(a).

[20] 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.

14008"—that is, the principle of "tackling the climate crisis" as perceived by the President. *See* Emissions Rule at 85368–69; Executive Order 14008. Not only is this constraint on the policy and project selection processes of the States unconstitutional under federalism principles, *infra* section I.B., but it is also an unauthorized assertion of unheralded regulatory authority over the economies of all the States.

Yet, instead of pointing to a clear grant of authority in statute, the Agencies reference Executive Orders. The preamble to the Emissions Rule explains:

> [T]he [Emissions Rule] responds to the direction in sections 1 and 2 of E.O. 13990 (86 FR 7037) that Federal agencies review any regulations issued . . . between January 20, 2017 and January 20, 2021, and . . . take steps to address any such actions that conflict with the national objectives set forth in the order to address climate change. The FHWA reviewed its 2018 final Rule . . . that repealed a GHG measure FHWA adopted in 2017 . . . and determined that the repeal conflicts with those objectives.

Emissions Rule at 85365. But presidential policy wishes 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*, 142 S.Ct. at 2609. The Executive cannot empower itself.

2. The Emissions Rule conflicts with the enabling legislation.

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." *Id.* (cleaned up, citation omitted). The Agencies' assertion that the term "performance" in 23 U.S.C. § 150(c)(3) includes "environmental performance," Emissions Rule at 85364, is an attempt to rewrite the

enabling legislation. The provision of Section 150 that authorizes the Agencies to establish performance measures says the Secretary "shall . . . limit performance measures only to those described in this subsection." 23 U.S.C. § 150(c)(2).[21] The subsection does not include a CO_2 measure. *See id.* And the goals delineated in subsection (b) are not a directive 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"). 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. The reference in § 150(b) to environmental sustainability as a national goal is not a clear grant of authority sufficient for the Agencies to require States to establish and demonstrate progress in achieving declining targets for on-road CO_2 emissions.

Indeed, the Agencies acknowledge that nothing in the statute "requires FHWA to adopt a GHG emissions measure." Emissions Rule at 85368. Combined with the clearly limiting language in subsection 150(c) and the fact that the Emissions Rule attempts to address a major question, that acknowledgement reinforces that the Court should find the Emissions Rule an unlawful assertion of authority. 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

[21] This statutory prescription came into effect in 2012 when carbon dioxide emissions from the energy sector had fallen to their lowest level in decades despite economic growth. CLIMATE & ENERGY, OBAMA FOUNDATION, https://perma.cc/4WCU-ZRZX (last visited Jan. 8, 2024)

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—as the Agencies admit. Therefore, it is "patently unreasonable" for the Agencies to impose such a rule.

Moreover, an interpretation of "performance" that includes "environmental performance" is inconsistent with the law. In § 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)(2)(C). The words "limit" and "only" are clear, and their use expressly prohibits the Agencies from attempting to expand the list of performance measures to include an on-road CO_2 emissions measure—something not mentioned or described in the performance measure statute. Under 23 U.S.C. § 150(c)(3), the Agencies must establish "minimum standards" and "measures" "for the purpose of carrying out section 119." But 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 payment management systems, and then "only for the purpose of carrying out section 119."

Likewise, even though one of the delineated purposes in Section 119 is "[e]nvironmental mitigation efforts," § 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. Nothing in the

subsection refers to carbon dioxide emissions.

Further, 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 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.

Nothing in the IIJA gives the Agencies authority to promulgate the Emissions Rule either. The new language from IIJA makes 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 Agencies list six provisions that "support FHWA's authority" for the Emissions Rule. Emissions Rule at 85368 (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 states to set declining targets for on-road CO_2 emissions.[22] 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. 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*, 142 S.Ct. at 2609.

Congress has not directed the Agencies to impose a rule like the Emissions Rule—and the Agencies are obviously aware of that. The Agencies cannot be permitted to flout constitutionally-established roles and impose policy on the States without a clear grant of authority from Congress.

B. The Emissions Rule violates principles of federalism.

Congress has said, "each State shall set performance targets," 23 U.S.C. § 150(d), but the Emissions Rule usurps that role by mandating the States set declining emissions targets. *See* Emissions Rule at 85364, 85380.[23] This mandate violates the principles of federalism, which Congress sought to protect when it

[22] 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.

[23] The way an agency talks about the rule matters. *See W. Va. v. EPA*, 142 S.Ct. at 2611–12 (finding the EPA was asserting an unprecedented power based on how the EPA described the rule). The Agencies cannot expect the States or this Court to treat as optional what they talk about as mandatory.

enacted the governing statutes.

Congress envisioned a role for the States with respect to the NHPP. According to 23 U.S.C. § 150(d), it is *the States* that set the performance targets. By law, 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.

The Constitution is also clear that action by the States cannot be mandated through administrative action like the Emissions Rule. *See New York v. United States*, 505 U.S. 144, 188 (1992). "[T]he Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day." *Id.* at 187. Even if Congress believed the Emissions Rule was the best means of reducing CO_2, the States could not be directed to implement the policy choices of the federal government.[24] *See Printz v.*

[24] The Constitution permits the Federal Government to hold out incentives to the States to encourage them to adopt a suggested regulatory scheme, *see, e.g., South Dakota v. Dole*, 483 U.S. 203 (1987), but the Emissions Rule "requires" action by the States, *see* Emissions Rule at 85364.

United States, 521 U.S. 898, 924 (1997).

Likewise, "[t]he 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). Therefore, "Congress must provide 'clear notice' of the obligations a spending law entails." *Kentucky v. Yellen*, 54 F.4th 325, 348 (6th Cir. 2022) (quoting *Pennhurst,* 451 U.S. at 25). Here, there is nothing in the law that is a clear statement to put States on notice that the Agencies could use it to mandate States set declining on-road CO_2 emissions targets.

C. The Emissions Rule is arbitrary and capricious.

Agency actions may not be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). 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).

Congress has not authorized the Agencies to consider CO_2 emissions in implementing the governing statutes, much less to develop a rule to reduce them. The lack of authority for the subject of the Emissions Rule means the Agencies are relying on factors and considerations Congress did not intend for them to consider. That is impermissible. *See id.*

Further, 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 id.* at 42; *see also Burlington Truck Lines, Inc. v. U.S.*, 371 U.S. at 167 (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)).

The Agencies said they reconsidered the arguments for the 2018 repeal and found them "lacking." Emissions Rule at 85366. Specifically, they are imposing the GHG measure "[i]n light of the Agency's policy emphasis on using its available authorities to confront worsening climate change—as well as the new facts identified in reports issued between 2018 and 2021 that expand our knowledge of the severe consequences of climate change." Proposed Rule at 42405; *see also* Emissions Rule at 85369 (adopting in full the analysis in the Proposed Rule justifying the reconsideration). However, as discussed, Congress has not authorized or directed the Agencies to address the climate by requiring states to reduce on-road CO_2 emissions. And the "new facts" are not sufficient reason for imposing the Emissions Rule.

First, even according to the descriptions given by the Agencies, the new reports are not specific to on-road CO_2 emissions; they simply address greenhouse gases generally. *See* Proposed Rule at 42405. The Agencies summarized the IPCC Sixth Assessment Report from 2021 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.* The other reports put forward by the Agencies assert that limiting global warming "would likely require a decrease in global net anthropogenic CO_2 emissions[.]" *Id.* These *general* climate change reports are not sufficient justification for why the Agencies need to mandate declining *on-road CO_2 emissions* targets.

Second, the reexamination of the assumptions regarding potential costs reflects a difference in policy, not technical expertise. 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" and say they now "anticipate[] that this proposed rule would result in substantial benefits that are neither speculative nor uncertain." *Id.* at 42410. Yet, in the *same paragraph*, they say the "benefits are not easily quantifiable." *Id.*; *see also id.* at 42404 ("[A]nticipated benefits of the rule . . . are not quantified because they are difficult to forecast and monetize.").

Only the Administration's policy goals changed. In the Proposed Rule, the Agencies said the "GHG measure aligns with the national goal of reducing CO_2 emissions 50 to 52 percent below 2005 levels by 2030 in support of the Paris Agreement." *Id.* at 42411. This "national goal" that supports the Paris Agreement is just part of an Executive policy; the Senate has not given its advice and consent.[25] Further, these are political choices, not exercises of technical expertise and discretion

[25] Neither President Obama nor President Biden sought the advice and consent of the Senate to join the Paris Agreement. *See* Jane A. Leggett & Richard K. Lattanzio, *Climate Change: Frequently Asked Questions About the 2015 Paris Agreement*, CONGRESSIONAL RESEARCH SERVICE (Jun. 28, 2017), https://sgp.fas.org/crs/misc/R44609.pdf; *Press Statement: The United States Officially Rejoins the Paris Agreement*, U.S. DEPARTMENT OF STATE (Feb. 19, 2021), https://perma.cc/9BCE-PV9T/.

or legislative enactments. The numerous references to how the GHG measure "aligns" with the Executive Orders establishing the "net-zero" targets demonstrate the Agencies are fully aware they are relying on Executive policy wishes. *Id.* at 42401, 42402, 42406; Emissions Rule at 85365. Citing the President's policy wishes is insufficient to be the reasoned explanation demanded of an Agency switching its position. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009) ("[A] reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.").

Moreover, even before that, the Emissions Rule must be permissible under the enabling statute. In *FCC*, the Supreme Court explained that when making a rule change, at a minimum, the agency must show "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. *Id.* at 515 (emphasis omitted). As already discussed, the Emissions Rule conflicts with the law in several ways. It usurps the role of the States in contravention of 23 U.S.C. § 119(e)(1). It tries to address on-road CO_2 emissions when the Agencies have no such authority. It tries to say "performance" means "environmental performance" when there is no indication Congress intended for that to be the case; and to the contrary, recent legislative decisions reveal Congress chose *not* to expand the scope of the law to include environmental issues.

Because the Agencies cannot show the Emissions Rule is authorized and fail to supply a reasoned analysis for the rule, the rule is arbitrary and capricious.

II. The Plaintiff States and their citizens will be irreparably harmed.

The second factor to consider on a motion seeking a preliminary injunction is

whether the moving party "is likely to suffer irreparable harm in the absence of preliminary relief." *Platt v. Bd. of Comm'rs on Grievances & Discipline of the Ohio Sup. Ct.*, 769 F.3d 447, 453 (6th Cir. 2014). An injury is irreparable if it is not "fully compensable by monetary damages." *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012). The injury "must be both certain and immediate, not speculative or theoretical." *Memphis A. Philip Randolph Inst. v. Hargett*, 978 F.3d 378, 391 (6th Cir. 2020) (citation omitted). The Plaintiff States face irreparable injury because they will incur unrecoverable compliance costs and, more importantly, the rule infringes on their sovereignty. [26]

The irreparable injuries facing the States also demonstrate their standing. To establish standing, they 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). At the preliminary injunction stage, it is sufficient for the movants to show "they have a reasonable chance of proving facts—after discovery—that support standing." *Kentucky v. EPA*, No. 23-5343 (6th Cir. May 10, 2023).

First, the Plaintiff States and their related agencies will be harmed because they must take immediate action to meet the requirements of the Emissions Rule. States must report their first targets to FHWA by February 1, 2024. Time and effort must be devoted to complying. The Agencies estimate the initial reporting period will

[26] 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, twelve States have submitted declarations. *See* Exhibits 1–12.

require 208 hours of manpower, costing each State $636,708.[27] Several of the Plaintiff States have multiple MPOs—all of which must set targets as well. *See, e.g.*, Doc. 1, PageID.39. The cost to establish the initial emissions target is a certain and imminent harm. *See Kentucky v. Yellen*, 54 F.4th at 342; *Commonwealth v. Biden*, 57 F.4th 545, 556 (6th Cir. 2023) (recognizing compliance costs may be unrecoverable). Further, as fully detailed in the complaint, Doc. 1, PageID.4–22, many of the Plaintiff States have already announced projects that will result in additional vehicular traffic and thus, CO_2 emissions. The Plaintiff States will have to modify current projects and may be unable to pursue some projects.

Second, the Emissions Rule infringes 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 at 598. 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, 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

[27] Economic Assessment, *supra* note 16, at Tables 4 and 5.

within the sovereign control of the elected representatives of the Plaintiff States. Moreover, it is clear Congress intended for the States to set the performance targets. 23 U.S.C. § 119(e)(1). Yet under the Emissions Rule, each State would be subject to the continually constricting force of the Agencies' diktat. *See* Emissions Rule at 85364 ("The 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."). Further, the Agencies acknowledge that achieving a declining target for on-road CO_2 emissions will be "challenging" in a context of economic growth. *See id*. at 85370.

"Loss of sovereignty is an irreparable harm." *Georgia v. Pruitt*, 326 F. Supp. 3d 1356, 1367 (S.D. Ga. 2018) (collecting cases where loss of state sovereignty was deemed irreparable harm); *see also Kentucky v. EPA,* No. 23-5343 (finding there to be "ample caselaw to support [the state] loss of sovereignty argument," and therefore, Kentucky had shown it "likely faces irreparable injury if the [Emissions Rule] is not enjoined"). The Plaintiff States seek to accommodate normal demographic and economic growth, as well as consider the unique characteristics of their state, including the terrain and population distribution. *See* Doc. 1, PageID.4–22. The Emissions Rule burdens and prevents such sovereign decision making.

III. The remaining factors weigh in favor of a preliminary injunction.

Preliminarily enjoining the Emissions Rule is in the public interest. First, the Plaintiff States must expend time and money to meet the February 1, 2024, reporting deadline. But for the Emissions Rule, the States would spend that time and money

in other ways. To avoid such expenditures, and thereby preserve the relative positions of the parties until a trial on the merits can be held, this Court should preliminarily enjoin the Emissions Rule. Second, ultimately, "the public interest lies in the correct application of the law." *Commonwealth*, 57 F.4th at 556. As already laid out in the discussion of the first factor, the Emissions Rule exceeds the Agencies' authority and is arbitrary and capricious in contravention of the Administrative Procedure Act. The best way to serve the public interest is by correctly applying constitutional and statutory provisions. *See Kentucky v. Biden*, 23 F.4th at 612 (citation omitted).

Moreover, the balance of equities weighs in favor of granting a preliminary injunction. There is no indication that a preliminary injunction would cause any harm—let alone substantial harm—to the Defendants. That the Agencies waited over a year from when comments were due on the proposed rule to issue the final rule indicates there is no significant urgency. In contrast, the States will be immediately harmed if the Emissions Rule is not enjoined before the February 1, 2024, deadline.

CONCLUSION

For these reasons, the Court should grant the Plaintiffs' motion for injunctive relief, and the Court should preliminarily enjoin the Agencies from implementing, applying, enforcing, or otherwise proceeding based on the Emissions Rule.

Respectfully submitted,

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I certify that on January 12, 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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