Case No. 24-5532

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

COMMONWEALTH OF KENTUCKY, et al.,

Plaintiffs-Appellees,

v.

FEDERAL HIGHWAY ADMINISTRATION; SHAILEN BHATT, in his official capacity as Administrator of the Federal Highway Administration; UNITED STATES DEPARTMENT OF TRANSPORTATION; PETER P.M. BUTTIGIEG, in his official capacity as Secretary of Transportation; JOSEPH R. BIDEN, in his official capacity as President of the United States,
Defendants-Appellants.

On Appeal from the United States District Court for the Western District of Kentucky (Beaton, J.) (No. 5:23-cv-00162)

BRIEF OF *AMICI CURIAE* AMERICAN ROAD AND TRANSPORTATION BUILDERS ASSOCIATION AND ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC. IN SUPPORT OF PLAINTIFFS-APPELLEES

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 24-5532 Case Name: Commonwealth of Kentucky , et al. v. Federal Highway Administration , et al.

Name of counsel: John A. Sheehan

Pursuant to 6th Cir. R. 26.1, American Road & Transportation Builders Association and Associated General Contractor of America
Name of Party

makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on October 7, 2024, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ *John A. Sheehan*
John A. Sheehan

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

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INTEREST OF AMICUS CURIAE[1]

The *Amicus Curiae* represents national construction trade associations, including key stakeholders from the construction and transportation sectors.[2] These associations' members include businesses and governmental agencies that are affected by federal infrastructure policy. The Federal Highway Administration (FHWA) rule in question[3] lacks statutory authority and would inappropriately prioritize the reduction of on-road greenhouse gas (GHG) tailpipe emissions, inherently reducing priority for the safety and resilience of federal highway infrastructure. The FHWA Emissions Rule would have far-reaching consequences, particularly regarding highway funding decisions and compliance costs. Amici are concerned that the Emissions Rule will divert critical highway funding away from projects to enhance physical and structural resilience that are consistent with Congressional intent, thereby jeopardizing the safety and durability of transportation networks.

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[1] Pursuant to FRAP Fed. R. App. P. 29(a)(4)(i)-(iii), Amici state that no part of this brief was authored by counsel for any party, and no person or entity other than Amici made any monetary contribution to the preparation and submission of the brief.

[2] Pursuant to Fed. R. App. P. 29(a)(2), amici state that all parties have consented to the filing of this brief.

[3] *National Performance Management Measures; Assessing Performance of the National Highway System, Greenhouse Gas Emissions Measure,* 88 Fed. Reg. 85364 (Dec. 7, 2023) (Emissions Rule).

The American Road & Transportation Builders Association (ARTBA) is made up of more than 8,000 member organizations in the transportation construction industry, including construction contractors, professional engineering firms, public agencies, state and local transportation administrators, heavy equipment manufacturers, and materials suppliers. The transportation construction industry generates more than $500 billion annually in U.S. economic activity. ARTBA's members are responsible for the design and construction of vital public infrastructure projects such as highways, bridges, airports, railroads, and mass transit facilities, for which the Infrastructure Investment and Jobs Act (IIJA) is providing substantial investment.[4] ARTBA's membership includes state and local transportation agencies directly responsible for planning and funding highway projects. As such, ARTBA's members are directly impacted by the greenhouse gas performance measures in the Emissions Rule.

The Associated General Contractors of America, Inc. (AGC) is the nation's largest and most diverse trade association in the commercial construction industry, now representing more than 28,000 member companies, which include general

[4] The 2021 Infrastructure Investment and Jobs Act provided $450 billion in funding for highway, bridge, public transportation, and safety improvements. roads, bridges, and other transportation infrastructure. Infrastructure Investment & Jobs Act Analysis & Timeline of ARTBA Leadership on the Road to Reauthorization, available at: www.artba.org/wp-content/uploads/2023/10/IIJA_Publication-1.pdf

contractors, specialty contractors, and service providers and suppliers to the industry through a nationwide network of chapters in all 50 states, the District of Columbia, and Puerto Rico. AGC represents both union- and open-shop employers engaged in building, heavy, civil, industrial, utility, and other construction for both public and private property owners and developers. AGC members regularly bid for contracts with and perform work for state departments of transportation to build roads, bridges, and other transportation infrastructure. AGC works to ensure the continued success of the construction industry by advocating for federal, state, and local measures that support the industry and by connecting member firms with the resources and individuals they need to be successful businesses and corporate citizens.

Amici and their members have a direct and substantial interest in this case.[5]

The FHWA's actions in the Emissions Rule impose Executive Branch priorities in lieu of clear legislative direction from Congress that reserved authority to the states to set their own performance targets.[6] The universal mandating of GHG performance measures in transportation improvement projects for carbon

[5] *See Comments of the Am. Rd. & Transp. Builders Ass'n and the Associated Gen. Contractors of Am., Inc., available at: https://www.regulations.gov/docket/FHWA-2021-0004 (last visited Oct. 7, 2024).*

[6] 23 U.S.C. § 150(d).

dioxide ($CO_{2)}$ emissions[7] from the vehicles that drive on our nation's roadways will divert resources in many states from existing priorities to maintain and enhance highway and bridge conditions, performance, safety, connectivity, and efficiency, all core missions specified by Congress.[8] The FHWA's attempt to add such GHG performance standards also complicates states' compliance efforts regarding their separate responsibilities to meet federal National Ambient Air Quality Standards (NAAQS).[9] In numerous states, integrating GHG requirements into an already complex process of uniting air quality planning and critically important transportation infrastructure decisions ultimately will hamper the state department of transportation's efforts to maintain and improve a safe and resilient system of highways and bridges, in which they partner with their state's transportation construction industry.

Amici support the Commonwealth of Kentucky and the 20 other states in their request that this court affirm the decision of the lower court. Amici, national construction trade associations, submit this brief to confirm to this Court the negative impacts the Emissions Rule would have on the state highway programs

[7] In this FHWA rule, GHG is defined solely as CO_2.
[8] *See* Associated Gen. Contractors of Am., Inc. Comments at pg. 2.
[9] *See* Clean Air Act § 109, 42 U.S.C. § 7409 (2021).

that amici's members help to build, maintain, and improve, all of which could be negatively impacted if this Court decides not to affirm the lower court's decision.

SUMMARY OF THE ARGUMENT

Two federal district courts have declared that the Emissions Rule, which mandates state departments of transportation measure and set targets to achieve declining GHG emissions from vehicle tailpipes, is invalid for lack of statutory authority.[10] Congress's intent in promulgating 23 U.S.C. § 150 was clear: performance measures are designed to focus on the physical and structural resilience of infrastructure, without reference to tracking transportation-related GHG. By mandating GHG reporting and target-setting requirements beyond the scope of congressional authorization, the Emissions Rule imposes environmental objectives never passed into law by Congress, rendering the rule invalid.

As the states set forth in their principal brief, the rule violates the major questions doctrine the Supreme Court established in *West Virginia v. EPA*.[11] In that case, the Supreme Court clarified that an agency must point to clear congressional authorization when an agency asserts the power to regulate "a significant portion of the American economy."[12] The Emissions Rule attempts to transform the

[10] *Kentucky v. FHA*, No. 5:23-cv-162-BJB, 2024 U.S. Dist. LEXIS 59960 (W.D. KY Apr. 1, 2024); *Texas v. DOT*, No. 5:23-CV-304-H, 2024 WL 1337375 (N.D. Tex. Mar. 27, 2024), *appeal pending* No. 24-10470 (5th Cir.).
[11] *West Virginia v. EPA*, 597 U.S. 697, 722 (2022))
[12] *Id.*

FHWA into a regulator of certain GHG emissions, a matter with vast economic impacts and the subject of national debate, and it does so without congressional authorization, and fails to meet the standards set forth in *West Virginia v. EPA*. As such, the lower court's decision should be upheld because that court correctly found that the FHWA lacked express legislative direction authorizing the regulation of GHG emissions through the federal highway program.

The Emissions Rule is also arbitrary and capricious. The FHWA failed to provide a logical explanation for why states must prioritize GHG emissions reporting and reductions in determining highway projects, deviating from its longstanding focus on infrastructure safety and resilience. Further, the FHWA failed to provide any evidence to support its position that setting a decreasing GHG emission target will, in fact, reduce CO_2 tailpipe emissions. This lack of justification renders the rule arbitrary and capricious.

As a result, the FHWA has fundamentally changed the federal-state balance Congress established in administering the federal highway program, while providing no rational explanation. The Emissions Rule interferes with the states' primary authority to make decisions to maintain and improve transportation infrastructure assets based on their unique circumstances, while considering other factors such as economic, environmental, population growth, safety concerns, and state constitutional restrictions on the use of highway funds. Instead, the FHWA's

Emissions Rule would transform these state agencies into regulators of GHG emissions from vehicles that travel in and across their states, a role Congress considered and rejected.

This Court should affirm the lower court's finding that the Emissions Rule is arbitrary and capricious under the Administrative Procedures Act.

ARGUMENT

I. NO FEDERAL LAW AUTHORIZES THE FHWA'S EMISSIONS RULE

A. The Statute is Clear that the States Set Targets

The Emissions Rule requires state departments of transportation and metropolitan planning organizations (MPOs) to establish GHG emission targets and methods for measuring transportation sector emissions, including a requirement that such targets decrease over time.[13] The FHWA asserts that its authority for these mandates falls under the National Highway Performance Program (NHPP).

[13] *See* 88 Fed. Reg. 85364, 85365 (State DOTs and MPOs have the flexibility to set targets that work for their respective climate change policies and other policy priorities, so long as they are declining.).

The NHPP was established in 2012 to support the condition and performance of 230,000 miles of roads in the National Highway System (NHS).[14] These are high classification roads, including Interstate System roads, accounting for only five percent of the nation's over four million miles of roads. Every state and the District of Columbia and Puerto Rico rely on federal-aid funding to build and maintain NHS roads.[15] Federal-aid funding for the NHS is distributed to each state based on a percentage established by statute.[16] How a state chooses to use those funds is determined by the states but governed by federal and statewide regulations and must be consistent with NHPP performance goals and specifications on eligibility that were set forth by Congress.[17]

State transportation investment planning was transitioned in 2016 to require performance-driven, outcome-based approaches mandated by the passage of the Moving Ahead for Progress in the 21st Century Act (MAP-21) and the Fixing America's Surface Transportation (FAST) Act.[18] The initial regulations and

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[14] *See* Program Purpose, U.S. Department of Transportation Federal Highway Administration Bipartisan Infrastructure Law Fact Sheets available at: https://www.fhwa.dot.gov/bipartisan-infrastructure-law/nhpp.cfm

[15] *See Plaintiff-Appellee's Br.* at 43, where the Commonwealth of Kentucky explains that federal-aid highway funding is a significant portion of the states' infrastructure budgets, making up approximately $1 billion of Kentucky's $1.6 billion highway-construction budget in fiscal year 2023.

[16] 23 U.S.C. § 104

[17] 23 U.S.C. § 135.

[18] 81 Fed. Reg. 34050-34164, (May 27, 2016).

subsequent iterations established that "the statewide and metropolitan transportation planning processes must provide for the use of a performance-based approach to decision-making in support of the national goals described in 23 U.S.C. § 150(b)[19] and the general purposes described in 49 U.S.C. § 5301.[20] In addition, the regulations reflected FAST Act changes that added new planning factors, including "resiliency needs" and "reducing vulnerability of existing transportation infrastructure to natural disasters."[21] Further, the states were required to develop performance-based plans to address specified issues, including emission-related measurements such as Congestion Mitigation and Air Quality Improvement.[22] Under that program, Congress established parameters to assess traffic congestion and on-road mobile source emissions. Congress did not include a requirement to address GHG levels from vehicles when the NHPP was established in 2012, nor in any subsequent amendments to the surface transportation reauthorization law.

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[19] Under 23 U.S.C. § 150 (2022), performance management goals focus on efficient investment through performance-based planning and programming. The national goals, as outlined in 23 U.S.C. § 150(b), include: (1) safety, (2) infrastructure condition, (3) congestion reduction, (4) system reliability, (5) freight movement and economic vitality, (6) environmental sustainability—"to enhance the performance of the transportation system while protecting and enhancing the natural environment," and (7) reduced project delivery delays.

[20] 81 Fed. Reg. 34050.

[21] *Id.*

[22] 23 U.S.C. § 150 (c)(5).

B. The Statute Clearly and Forcefully Limits the Secretary's Authority to Establish Performance Measures and Does Not Authorize a GHG Rule

The U.S. Secretary of Transportation is charged with establishing performance measures.[23] Congress has enumerated the permitted performance measures and set strict parameters for them, including clearly stating that the secretary "shall … limit performance measures only to those described in this subsection."[24] Through multiple surface transportation reauthorizations, Congress has chosen not to even reference GHG emissions in that section of the law, much less "describe" such a measure. The list is limited and does not include limits on GHG emissions.

Even the most significant infrastructure investment law in recent history, the 2021 bipartisan IIJA, does not include authority for a GHG reporting mandate.[25] In 2021, legislation to include a GHG measure in the IIJA passed the House of Representatives, but was rejected by the Senate, notwithstanding inclusion of a separate climate title in the IIJA.[26]

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[23] 23 U.S.C. § 150 (c)(2)(C)(2022).
[24] 23 U.S.C. § 150(c)(2)(C) (emphasis added).
[25] *See* Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 429 (2021).
[26] Amendments to the Infrastructure Investment and Jobs Act and the INVEST in America Act would have authorized a performance measure for GHG emissions, but neither passed. *See 167 Cong. Rec. S5786-87* (daily ed. Aug. 3, 2021), https://www.congress.gov/117th/crec/2021/08/03/167/138/CREC-2021-08-03-pt1-

Faced with these clear congressional instructions (and limitations), the FHWA nonetheless chose to deploy a breathtakingly expansive reading of the statute in support of its Emissions Rule. The FHWA cites to 23 U.S.C. § 150(b), which lists "environmental sustainability" as one of several goals for the federal-aid highway program. According to Congress, the sustainability objective is intended "[t]o enhance the performance of the transportation system while protecting and enhancing the natural environment."[27] Congress did not authorize GHG emissions or measurements relating to climate change anywhere in the subsection relied upon by the FWHA, nor does it set an obligation for states to establish decreasing GHG emissions from vehicles.

As set forth by the State Appellees, "where the text makes clear that performance measures promulgated under Subclauses (IV) and (V) must relate to performance of the roads themselves. Performance measures may not relate to the environmental performance of vehicles that travel on those roads."[28] The district court's statutory analysis correctly determined that Congress has spoken to the

PgS5786-3.pdf; H.R. 7095, 116th Cong. (2020), https://www.congress.gov/bill/116-congress/house-bill/7095/text; H.R. 3684, 117th Cong. (2021), https://www.congress.gov/bill/117th-congress/house-bill/3684.

[27] 23 U.S.C. § 150(b)(6).

[28] Appellee's Br. at 36.

precise question at issue, or at least cabined the meaning of the disputed provision, leaving no gaps for the agency to fill.[29]

Amici recognize that all states do not agree on any one approach to addressing and mitigating climate change impacts and that some state DOTs have developed GHG performance measures, incorporating them into existing state planning and budgets, as the states are free to do. However, the national association for state DOTs, in comments to the FHWA, stated "AASHTO disagrees with the asserted justification provided in the NPRM regarding the legal authority for the FHWA to establish a GHG emissions performance measure."[30] We strongly agree with the state Appellees' request that this Court affirm the district court's ruling based on a lack of statutory authorization for the Emissions Rule.[31]

II. THE FHWA REGULATION OF GHG EMISSIONS LACKS CLEAR CONGRESSIONAL AUTHORIZATION IN VIOLATION OF THE MAJOR QUESTIONS DOCTRINE

A. Regulation of GHG is a Matter of Vast Economic and Political Importance

[29] *Kentucky,* 2024 WL 1402443, at 8.
[30] *See* Comments of the Am. Ass'n of State Highway & Transp. Officials, at 5, FHWA-2021-0004 (July 12, 2021), *available at*: https://www.regulations.gov/comments/FHWA-2021-0004.
[31] *Kentucky,* 2024 WL 1402443, at 21.

As the states set forth, in *West Virginia v. EPA*, the Supreme Court emphasized that agencies cannot act on issues of major national importance without explicit and specific congressional authorization.[32] There is no question the Emissions Rule is a matter of vast economic and political importance. According to the state transportation agencies themselves, "the rule has potential to impact a state DOT's overall federal program, including the selection of projects and require extensive changes to the transportation system to achieve."[33]

The Emissions Rule imposes significant new financial and administrative burdens on many states, requiring them to undertake extensive data collection, analysis, and report decreased GHG emissions.[34] If the Emissions Rule is allowed to stand, states will be discouraged from making investments that will achieve the statutory goals and purposes of the highway program because they would be forced to pursue GHG reductions from vehicles. The FHWA's Emissions Rule transforms Congress' authorization of federal transportation spending on the NHS, defined as a series of roads, into the regulation of emissions from the vehicles that

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[32] *W. Va. v. EPA,* 597 U.S. at 720.

[33] *See* Comments of the Am. Ass'n of State Highway & Transp. Officials, at 5. *available at* https://www.regulations.gov/comments/FHWA-2021-0004.

[34] State departments of transportation (DOTs) assert that the estimated regulatory costs of the rule are drastically underestimated, and the cost to plan and construct the necessary infrastructure would far exceed current spending authorities. *Id.* at 14-15.

travel on those roads. This is just the type of expansion of executive power over areas not otherwise authorized by Congress that the Supreme Court has prohibited.[35] Here, the USDOT has repurposed the FHWA to accomplish the Biden Administration's climate agenda, reaching "net zero" GHG emissions across the entire economy of the United States by 2050, instead of adhering to or obtaining appropriate congressional authorization.[36] While the Biden Administration has prioritized policies to address climate change, doing so through the Emissions Rule is beyond the FHWA's jurisdiction and authority.[37] This rule directly impacts state infrastructure projects, industries related to transportation, and the broader economy, making it a question of vast significance but not one Congress directed or even authorized FHWA to address through the Emissions Rule.[38]

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[35] *W. Va. v. EPA,* 597 U.S. at 720; *see also FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000) ("We are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.").

[36] The White House, *President Biden's Actions to Tackle the Climate Crisis*, https://www.whitehouse.gov/climate (last visited Oct. 6, 2024).

[37] The American Association of State Highway and Transportation Officials (AASHTO) warned of the limited ability of state DOTs to affect GHG emissions. *Comments of the Am. Ass'n of State Highway & Transp. Officials*, at 13, FHWA-2021-0004 (2021) *available at:* https://www.regulations.gov/docket/FHWA-2021-0004 (last visited on Oct. 7, 2024).

[38] *W. Va. v. EPA,* 597 U.S. at 720 at 722–23.

B. FHWA Lacks a Clear Authorization to Regulate GHG Through Federal Transportation and Infrastructure Spending Authority

The FHWA conceded it has *no direct congressional authorization* to regulate GHG emissions when it argued that "no provision of law prohibits FHWA from adopting a GHG measure."[39] FHWA also admitted that Congress had *ample opportunity to do so*, stating "no provision of law prohibits FHWA from adopting a GHG emissions measure, despite ample opportunity for Congress to do so."[40] A lack of a prohibition on regulating GHG does not amount to an authorization to do so, much less the type of explicit congressional authorization that the Supreme Court articulated and required in *West Virginia v. EPA*. Even more, an admission that the Executive Branch is mandating what Congress had ample opportunity to promulgate (and chose not to) is exactly what the Supreme Court's clear statement rule is designed to prevent. On major questions, as set forth by the Supreme Court, the Executive Branch must have clear statutory or constitutional authorization, and here it did not have either. Therefore, the Emissions Rule fails to satisfy the major questions doctrine, and this Court should affirm the district court's decision.

III. THE FHWA's RELIANCE ON THE ADMINISTRATION'S CLIMATE POLICY GOALS IS ARBITRARY AND CAPRICIOUS

A. The President's Executive Orders Do Not Override the Legislative Branch

[39] Doc. 81-3, PageID.5058.
[40] 88 Fed. Reg. 85358.

As the Appellee states appropriately pointed out, this case challenges the USDOT and the FHWA's expansive, virtually limitless interpretation of a statute that set forth very precise and limited regulatory authority—all to accomplish the Biden Administration's broader climate policy goals.[41] The Emissions Rule is clear that the intent of the GHG measure is to "align with Executive Orders … and supports the U.S. target of reducing GHG emissions 50-52 percent below 2005 levels in 2030, on course to reaching net-zero emissions economywide no later than 2050."[42] The FHWA explained that the rule "responds to the direction in Executive Order 13990 that federal agencies review any regulations … and, take steps to address any such actions that conflict with the Administration's national objectives on climate change."[43] And, the FHWA stated that "establishing declining targets will help state DOTs and MPOs plan toward reductions in GHG emissions and make federal infrastructure investment decisions that reduce climate pollution, a principle set forth in E.O. 14008."[44] The FHWA's reliance on non-binding Executive Orders is insufficient authority to promulgate the

[41] *Appellee's Br.* at 14.
[42] 88 Fed. Reg. 85364, 85365.
[43] *Id*.
[44] 88 Fed. Reg. 85369.

Emissions Rule.[45] The agency's admission, that there is no prohibition on proceeding with a rulemaking that directly conflicts with Congressional limitations on the agency expressed in the underlying statute, twists the need for congressional authorization into the ability to regulate based on the lack of a congressional prohibition, which is in opposite to recent Supreme Court decisions in *West Virginia* and *Loper Bright Enterprises v. Raimondo.*[46] In short, there is no underlying authority for the FHWA to establish the GHG measures in the Emissions Rule.

B. State DOTs and MPOs Cannot Affect GHG Impacts

The FHWA's assertion that the Emissions Rule will drive reductions in on-road emissions is flawed and cannot justify the substantial regulatory burdens associated with it. The district court found that the agency failed to explain how a non-binding target would achieve the agency's goal of decreased GHG emissions.[47] State DOTs have rightly pointed out that the kinds of changes required to reduce GHG tailpipe emissions extend far beyond the control of these state agencies

[45] *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952) ("The President's power, if any, to issue an order must stem either from an act of Congress or from the United States Constitution itself.").
[46] *W. Va. v. EPA,* 597 U.S. at 720; *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244 (2024).
[47] *Kentucky,* 2024 WL 1402443, at 11-13.

alone. For example, the Emissions Rule requires the states to focus their GHG emissions efforts on the NHS, roads that carry mostly interstate traffic. However, state DOTs have no ability to control GHG tailpipe emissions from vehicles traveling through and across their states.

CONCLUSION

The district court ruled that both the GHG emissions measure and the declining GHG emissions target were unlawful. Each finding is a sufficient basis for striking down the Emissions Rule. As promulgated, the two provisions are inseparable such that the measure and reporting requirements are part and parcel to making the required showing that annual GHG emissions are declining. In their entirety, depending on FHWA's enforcement decisions, both would be prerequisites for obtaining federal funding in direct contrast to congressional law. The district court's decision that the Emissions Rule is unlawful in its entirety should be affirmed.

Dated: October 7, 2024

Respectfully submitted,

/s/ John A. Sheehan

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CERTIFICATE OF COMPLIANCE

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Dated: October 7, 2024

/s/John A. Sheehan

CERTIFICATE OF SERVICE

I certify that on October 7, 2024, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit using the CM/ECF system. I also certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/John A. Sheehan