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10
 11 IN THE UNITED STATES DISTRICT COURT
 12 FOR THE NORTHERN DISTRICT OF CALIFORNIA

13 **THE PEOPLE OF THE STATE OF**
 14 **CALIFORNIA ACTING BY AND**
 15 **THROUGH ATTORNEY GENERAL**
 16 **XAVIER BECERRA AND THE**
 17 **CALIFORNIA AIR RESOURCES BOARD;**
 18 **THE STATE OF IOWA; THE STATE OF**
 19 **MARYLAND; THE COMMONWEALTH**
 20 **OF MASSACHUSETTS; THE STATE OF**
 21 **MINNESOTA BY AND THROUGH THE**
 22 **MINNESOTA DEPARTMENT OF**
 23 **TRANSPORTATION; THE STATE OF**
 24 **OREGON; THE STATE OF VERMONT;**
 25 **AND THE STATE OF WASHINGTON,**

Plaintiffs,

v.

26 **U.S. DEPARTMENT OF**
 27 **TRANSPORTATION; ELAINE L. CHAO,**
 28 **in her official capacity as Secretary of**
Transportation; FEDERAL HIGHWAY
ADMINISTRATION; and BRANDYE
HENDRICKSON, in her official capacity as
Deputy Administrator of the FEDERAL
HIGHWAY ADMINISTRATION,

Defendants.

Case No.:

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

Administrative Procedure Act, 5
U.S.C. § 553

INTRODUCTION

1
2 1. Plaintiffs, the People of the State of California by and through Attorney General
3 Xavier Becerra and the California Air Resources Board (“CARB”); the State of Iowa; the
4 Commonwealth of Massachusetts, the State of Maryland, the State of Minnesota by and through
5 the Minnesota Department of Transportation, the State of Oregon, the State of Vermont and the
6 State of Washington (hereinafter, collectively, “Plaintiffs”) challenge the Federal Highway
7 Administration’s (“FHWA”) delays and subsequent suspension of the effective date of its
8 Greenhouse Gas Performance Measure (“GHG Measure”) for the national highway system in
9 violation of its non-discretionary duty under Section 553 of the Administrative Procedure Act
10 (“APA”), 5 U.S.C. § 553 to provide notice and opportunity to comment on the suspension of the
11 GHG Measure.

12 2. The GHG Measure was promulgated under the Moving Ahead for Progress in the
13 21st Century Act, Pub. L. 112-141 (2012) (codified in relevant part at 23 U.S.C. §§ 119, 134-35,
14 148-50) (“MAP-21”), and the Fixing America’s Surface Transportation Act, Pub. L. 114-94
15 (2015) (codified in relevant part at 23 U.S.C. §§ 119, 148, 150, 167) (“FAST Act”), which
16 amended MAP-21. MAP-21 and the FAST Act (collectively, the “Acts”) require FHWA to set
17 performance goals in seven categories, including environmental sustainability, to ensure the most
18 efficient investment of federal transportation funds. 23 U.S.C. § 150(b).

19 3. The GHG Measure would require State Departments of Transportation (“SDOTs”)
20 to track on-road greenhouse gas (“GHG”) emissions within their jurisdictions and set locally
21 appropriate targets for GHG emissions on national highways. By requiring SDOTs to track and
22 set targets for GHG emissions on national highways, the GHG Measure incentivizes the funding
23 of transportation strategies that will achieve the desired outcome: reducing GHG emissions.

24 4. On January 18, 2017, FHWA issued a National Performance Measures Final Rule
25 (“Final Rule”) which set performance measures for GHGs as well as for congestion and freight
26 movement on the national highways. Its effective date was February 17, 2017. 82 Fed. Reg.
27 5,970 (January 18, 2017).

1 10. Plaintiff California Air Resources Board (“CARB”) is the clean air agency of the
2 State of California established in 1967 pursuant to the Mulford-Carrell Air Resources Act, Stats.
3 1967, ch. 1545, CAL. HEALTH & SAFETY CODE §§ 39000-39570 (repealed 1975). CARB is the
4 lead California state agency charged with adopting measures to achieve statewide GHG emissions
5 targets and coordinating the State’s climate change efforts. *See* California Global Warming
6 Solutions Act of 2006, as amended, CAL. HEALTH & SAFETY CODE §§ 38500-38599 (“AB 32”).
7 Among other duties, CARB is charged with establishing greenhouse gas reduction and planning
8 targets for communities in California. *See* Sustainable Communities and Climate Protection Act
9 of 2008, CAL. HEALTH & SAFETY CODE §§ 65080, 65400, 65583, 65584, 65587, 65588, 14522,
10 21061, 21159 (“SB 375”). GHG emissions from mobile sources are the largest source of
11 greenhouse gas emissions, and the dominant source of all air pollution emissions, within
12 California. *See* California Greenhouse Gas Emission Inventory - 2017 Edition,
13 <https://www.arb.ca.gov/cc/inventory/data/data.htm> (last visited 9/19/2017). Accordingly, CARB
14 has focused, for decades, on reducing these emissions.

15 11. Plaintiff the State of Iowa is a sovereign state represented by Attorney General
16 Tom Miller. The Iowa Attorney General has the independent statutory authority to file civil
17 actions in any court or tribunal when, “in the attorney general’s judgment, the interest of the state
18 requires such action.” Iowa Code § 13.2(1)(b).

19 12. Plaintiff the State of Maryland is a sovereign state represented by and through
20 Maryland Attorney General Brian Frosh. The Attorney General is the chief law enforcement
21 officer of Maryland, and has the authority to file civil actions in the federal courts on behalf of
22 Maryland and the people of Maryland on matters of public concern. These matters include action
23 or inaction by the federal government that threatens the public interest and welfare of the
24 residents of the State, including actions that harm the environment and natural resources of
25 Maryland. 2017 Md. Laws J.R. 1; Md. Const., Art. V, § 3.

26 13. Plaintiff the Commonwealth of Massachusetts brings this action by and through
27 Massachusetts Attorney General Maura Healey. Attorney General Healey is the chief legal
28 officer of the Commonwealth and is authorized to bring this action on behalf of the

1 Commonwealth, and as *parens patriae*, on behalf of the residents of the Commonwealth, pursuant
2 to her statutory authority under MASS. GEN. LAWS ch. 12, §§ 11D and 11E.

3 14. Plaintiff the State of Minnesota, by and through its Minnesota Department of
4 Transportation (“MnDOT”), brings this suit to protect its interests in environmental sustainability
5 efforts. MnDOT is Minnesota’s lead agency for the implementation of the State’s Multimodal
6 Transportation Plan, which sets forth MnDOT’s plan for reducing the transportation sector’s
7 GHG emissions. MnDOT has jurisdiction over the implementation and administration of state
8 transportation policies, plans, and programs. Minn. Stat. § 174.01, subd. 1 (2016).

9 15. Plaintiff the State of Oregon brings this suit by and through Oregon Attorney
10 General Ellen Rosenblum. The Oregon Attorney General is the chief legal officer of the State of
11 Oregon. The Attorney General’s duties include acting in federal court on matters of public
12 concern and upon request by any state officer when, in the discretion of the Attorney General, the
13 action may be necessary or advisable to protect the interests of the state. OR. REV. STAT.
14 180.060(1) (2015). The Oregon Department of Transportation, established as a state agency by
15 the Oregon Legislature pursuant to OR. REV. STAT. 184.615, has requested that the Attorney
16 General bring this suit to protect Oregon’s sovereign and proprietary interest in combating
17 climate change. The Attorney General also brings this suit as *parens patriae* on behalf of the
18 state’s affected citizens and residents.

19 16. Plaintiff the State of Vermont brings this action by and through Vermont Attorney
20 General Thomas J. Donovan, Jr. The Attorney General is the State of Vermont’s chief legal
21 counsel, and is vested with broad authority and powers to protect the State’s interests. Vt. Stat.
22 Ann. tit. 3, § 152 (Attorney General “may represent the State in all civil and criminal matters as at
23 common law and as allowed by statute”). The Attorney General appears for Vermont in all cases
24 in which Vermont is a party, or when the interests of Vermont so require; and has “general
25 supervision of matters and actions” for Vermont. *Id.*, §§ 157, 159. This action is brought
26 pursuant to the Attorney General’s authority to protect the interests of Vermont.

27 17. Plaintiff the State of Washington is a sovereign entity and brings this action to
28 protect its own sovereign and proprietary rights, and as *parens patriae* on behalf of its affected

1 citizens and residents. The Attorney General is the chief legal adviser to the State of Washington.
2 The Attorney General's powers and duties include acting in federal court on matters of public
3 concern. This challenge is brought pursuant to the Attorney General's independent constitutional,
4 statutory, and common law authority to bring suit and obtain relief on behalf of the State of
5 Washington.

6 **B. Plaintiffs' Interests**

7 18. California. California seeks to protect its sovereign and proprietary interests in
8 protecting its citizens' health and welfare and in safeguarding its citizens from the adverse effects
9 of climate change. California also has a legislatively-mandated State objective to reduce GHG
10 emissions, including carbon dioxide, which is the main GHG emitted by the transportation sector.
11 California law establishes targets to reduce the State's GHG emissions to 1990 levels by 2020 and
12 to 40 percent below 1990 levels by 2030. *See* California Global Warming Solutions Act of 2006,
13 as amended, CAL. HEALTH & SAFETY CODE §§ 38500-38599. California is extraordinarily
14 vulnerable to the adverse effects of climate change, such as diminishing the average annual
15 snowpack that provides approximately 35 percent of the State's water supply and rising sea levels
16 which erodes beaches and damages such as infrastructure of coastal cities, State facilities, and
17 highways. California has a vital interest in preventing and mitigating the harms that climate
18 change poses to the health of its citizens, the State's economy and its environment, including
19 increased numbers of heat-related deaths, damaged coastal areas, disrupted ecosystems, reduced
20 agricultural crop yields, disrupted transportation networks, more frequent severe weather events,
21 increased risk of forest fires and longer and more frequent droughts (recently experiencing driest
22 four-year span (2012-2016) of Statewide precipitation on record). *See Massachusetts v. EPA*, 549
23 U.S. 497, 521 (2007).

24 19. California Air Resources Board. CARB submitted comments to the U.S.
25 Department of Transportation on the proposed rulemaking on August 19, 2016. *See* August 19,
26 2016 Comment letter, attached as Exhibit A. As CARB explained in those comments, through
27 the work of CARB and its sister state agencies, California has developed considerable expertise in
28 planning for reductions of transportation sector GHG emissions, pursuant to AB 32 among other

1 statutes. *See id.* and SB 375. Pursuant to SB 375, CARB sets GHG emissions reduction targets
2 for statewide transportation planning. Plaintiffs have a strong interest in coordinating
3 implementation of measures to reduce GHG emissions reductions from the highway system in
4 order to successfully implement and strengthen planning programs pursuant to its statutory
5 authority. Moreover, continued GHG emissions from portions of the highway system outside of
6 California directly affect Californians by worsening the impacts of climate change. The federal
7 GHG Measure is essential to secure nationwide emissions reductions from the transportation
8 sector to mitigate the climate impacts already being experienced within California as well as to
9 mitigate anticipated future impacts.

10 20. Iowa. The State of Iowa seeks to protect its sovereign and proprietary interest in
11 protecting Iowans' health, welfare, and prosperity. Iowa has a well-established concern for GHG
12 emissions and the effects GHGs can have on its citizenry. *See Iowa Code § 455J.1(c)* (declaring
13 the general assembly's recognition that taking certain actions to "reduc[e] the amount of
14 greenhouse gases released into the atmosphere" can "mitigate climate change effects"); Iowa
15 Code § 473.7(12)(a)-(d) (requiring a review on climate change impacts); Iowa Code § 455B.152
16 (tasking the Department of Natural Resources with routine monitoring and annual reporting on
17 GHG emissions). Iowa is already experiencing the adverse effects of climate change with
18 increased extreme rain events that result in catastrophic flooding, more severe summer droughts
19 that reduce crop yields and livestock productivity, and humid temperatures that are linked to lung
20 and heart problems. *What Climate Change Means for Iowa*, EPA (August 2016),
21 [https://19january2017snapshot.epa.gov/sites/production/files/2016-09/documents/climate-change-](https://19january2017snapshot.epa.gov/sites/production/files/2016-09/documents/climate-change-ia.pdf)
22 [ia.pdf](https://19january2017snapshot.epa.gov/sites/production/files/2016-09/documents/climate-change-ia.pdf) (last visited 9/19/2017). The Attorney General has a strong interest in preventing and
23 mitigating the harms that climate change poses to Iowans and their environment, including
24 increased illness, damaged river communities, and disrupted ecosystems. *See Massachusetts v.*
25 *EPA*, 549 U.S. at 521.

26 21. Commonwealth of Massachusetts. The Commonwealth of Massachusetts has vital
27 sovereign, quasi-sovereign, and proprietary interests associated with addressing the significant
28 negative effects of climate change; these interests are harmed by the FHWA's suspension of the

1 GHG Measure. The federal GHG Measure is needed to secure nationwide GHG emissions
2 reductions that are essential to mitigate the climate impacts already being experienced within the
3 Commonwealth, as well as to mitigate future impacts. Such impacts include, for example, loss of
4 land mass to coastal erosion and infrastructure damage from sea level rise and flooding; increase
5 in heat waves; changes in weather patterns in Boston, within the next 50 to 100 years, to more
6 closely resemble those found today in Richmond, Virginia, or even Atlanta, Georgia; a decline in
7 air quality due to projected temperature increases, which could cause or exacerbate asthma and
8 other human health effects; an increase of 25 to 55 more days each summer with temperatures
9 higher than 90 degrees; and changes in amount, frequency and timing of precipitation.¹ Notably,
10 transportation is the single largest sector responsible for GHG emissions in Massachusetts,
11 representing in 2013 approximately 40 percent of the Commonwealth's GHG emissions and
12 representing nearly 50 percent of GHG emissions throughout New England. Moreover,
13 transportation is the only sector in Massachusetts and New England in which GHG emissions
14 have been continuing to increase. In 2008, Massachusetts enacted the Global Warming Solutions
15 Act, 2008 Mass. Acts ch. 298, requiring a state GHG reduction target between 10 percent and 25
16 percent below 1990 levels by 2020, with a goal of an 80 percent reduction by 2050. And the
17 Commonwealth's Clean Energy and Climate Plan for 2020,
18 <http://www.mass.gov/eea/docs/eea/energy/cecp-for-2020.pdf> (last visited 9/19/2017), reflects the
19 importance of effective transportation sector policies and programs that address GHG emissions
20 for the Commonwealth to be able to realize by 2020 its GHG reduction goals. Achieving long-
21 term climate goals in the Commonwealth will require significant GHG emission reductions from
22 the transportation sector. To achieve such long-term GHG reduction goals from the
23 transportation sector, planners must track and account for GHG emissions from on-road sources
24 in a manner that allows planners to compare benefits of different mitigation policies and
25 transportation funding decisions. Conversely, the lack of such tracking measures will impair
26

27 ¹ See, e.g., *Massachusetts v. EPA*, 549 U.S. at 521, <http://www.mass.gov/eea/waste-mgmt-recycling/air-quality/climate-change-adaptation/climate-change-adaptation-in-ma.html> (last
28 visited 9/19/2017); <http://www.mass.gov/eea/agencies/massdep/climate-energy/climate/about/what-is-climate-change.html> (last visited 9/19/2017).

1 mitigation efforts well into the future. As such, the Commonwealth has regulations that require
2 planning organizations to use GHG emission impacts as a transportation project selection
3 criterion when reviewing projects and the Massachusetts Department of Transportation must
4 evaluate and report annually on the total GHG emission impacts of various statewide
5 transportation improvement projects. *See* 310 C.M.R. 60.05, *Global Warming Solutions Act*
6 *Requirements for the Transportation Sector and Massachusetts Department of Transportation*
7 (January 2015). Given the ubiquitous nature of GHGs, the nationwide transportation sector GHG
8 Measure is essential to promote cost-efficient and effective steps to reduce GHG emissions and
9 will mitigate climate impacts in the Commonwealth and elsewhere. Suspension of the GHG
10 Measure will harm Massachusetts by lessening the GHG emissions reductions that are expected
11 under the federal rule, thereby eliminating anticipated mitigation of harms related to climate
12 change that the Commonwealth has a strong interest in preventing and mitigating. FHWA's
13 suspension of the GHG Measure increases the harm to the Commonwealth's natural resources
14 (including land, air quality, water, wildlife, and vegetation, among others), as well as to its
15 economy, and the health and welfare of Commonwealth residents.

16 22. Maryland. With more than 3,000 miles of coastline and the home of the largest
17 estuary in the United States – the Chesapeake Bay – Maryland is particularly vulnerable to rising
18 sea levels and the more extreme weather events associated with climate change: shoreline
19 erosion, coastal flooding, storm surges, inundation, and saltwater intrusion into groundwater
20 supplies. Maryland has documented a sea level rise of more than one foot in the last century and
21 increasing water temperatures in the Chesapeake Bay. *See* Maryland Commission on Climate
22 Change, Greenhouse Gas Emissions Reduction Act Plan UPDATE 2015 (Dec. 2015), available at
23 <http://www.mde.state.md.us/programs/Air/ClimateChange/Documents/ClimateUpdate2015.pdf>
24 (last visited 9/19/2017).

25 23. Minnesota Department of Transportation. MnDOT seeks to protect its proprietary
26 interests in achieving GHG emissions reduction goals as required by Minnesota's Next
27 Generation Energy Act of 2007 (the "Act"). The Act requires that all state sectors reduce GHG
28 emissions to 30% below 2005 levels by 2025 and to 80% below 2005 levels in 2050. Minn. Stat.

1 § 216H.02, subd. 1. To achieve these goals, MnDOT maintains and implements Minnesota’s
2 Statewide Multimodal Transportation Plan (“Plan”). The Plan addresses Minnesota’s
3 transportation sector’s methods for reducing GHG emissions. Minnesota’s environment currently
4 experiences significant and lasting impacts due to climate change. Minnesota’s average
5 temperatures have increased one to three degrees Fahrenheit in the past century. *What Climate
6 Change Means for Minnesota*, EPA (August 2016), available at
7 <https://www.epa.gov/sites/production/files/2016-09/documents/climate-change-mn.pdf> (last
8 visited 9/19/2017). The rising temperatures have interfered with winter recreational activities,
9 changed the composition of trees in Minnesota’s North Woods, and led to increased pollution
10 problems in Minnesota’s water bodies. *Id.* Minnesota has a strong interest in preventing and
11 mitigating harms that climate change poses to human health and the environment. *See*
12 *Massachusetts v. EPA*, 549 U.S. at 521.

13 24. Oregon. Oregon seeks to protect its sovereign and proprietary interests in
14 achieving its State objective to reduce GHG emissions, including carbon dioxide. Oregon law
15 establishes targets to reduce the State’s GHG emissions to 10 percent below 1990 levels by 2020
16 and to 75 percent below 1990 levels by 2050. Or. Rev. Stat. 468A.205(1)(b) and (c). Oregon is
17 already experiencing the adverse effects of climate change, including a decline in the average
18 annual snowpack that provides stream flows to provide energy, municipal water, watershed health
19 and irrigation, increased erosion of beaches and low-lying coastal properties from rising sea
20 levels, and increased formation of ground-level ozone (or smog), which is linked to asthma, heart
21 attacks, and pulmonary problems, especially in children and the elderly. Oregon also has a strong
22 interest in preventing and mitigating harms that climate change poses to human health and the
23 environment, including increased heat-related deaths, damaged coastal areas, disrupted
24 ecosystems, more severe weather events, and longer and more frequent droughts. *See*
25 *Massachusetts v. EPA*, 549 U.S. at 521.

26 25. Vermont. Vermont law establishes targets to reduce the state’s GHG emissions
27 from a 1990 baseline by 25% by 2012, 50% by 2028, and, if practicable using reasonable efforts,
28 75% by 2050. 10 V.S.A. § 578(a). Vermont is already experiencing adverse effects of climate

1 change, including increasingly frequent heavy rains and resulting flooding. These effects
2 adversely impact the health and safety of citizens and residents of the state; damage or destroy
3 homes, commercial, state and municipally-owned buildings and infrastructure, including
4 highways and bridges; and cause massive influxes of nutrients and other pollutants to rivers and
5 lakes. Additionally, rising temperatures are increasing the frequency of days on which
6 Vermonters experience heat-related illnesses, contributing to an increased incidence of tick-borne
7 diseases, including Lyme disease, disrupting ecosystems and threatening the State's ski and
8 maple industries. FHWA's delay of the GHG measure – which would have reduced GHG
9 emissions – harms Vermont's sovereign and proprietary interests in achieving its legislatively-
10 mandated directive to reduce greenhouse gas emissions, protecting its citizens, residents, and
11 resources from the harms attributable to climate change, avoiding damage to or destruction of
12 State-owned property and resources, and avoiding costs, including emergency response costs, of
13 addressing harms attributable, at least in part, to climate change. It also harms Vermont's quasi-
14 sovereign interest in acting as *parens patriae* on behalf of its citizens and residents to protect
15 them from harms attributable to climate change.

16 26. Washington. Washington experiences many negative effects of climate change,
17 including rising ambient temperatures, a diminished and unpredictable snowpack that is necessary
18 for water consumption and hydropower generation, and ocean warming and acidification, which
19 is harmful to Washington's shellfishery. Washington has enacted statutes and expended
20 significant financial resources in reducing greenhouse gas emissions and slowing the pace of
21 climate change. According to the University of Washington, climate change adversely affects
22 Washington's water resources by decreasing snowpack, increasing stream temperatures,
23 decreasing summer minimum stream flows, and causing widespread changes in streamflow
24 timing and flood risk. These changes increase the potential for more frequent summer water
25 shortages in some basins (e.g., the Yakima basin) and for some water uses (e.g., irrigated
26 agriculture or instream flow management), particularly in fully allocated watersheds with little
27 management flexibility. Washington's forests are likely to experience significant changes in the
28 establishment, growth, and distribution of tree species as a result of increasing temperatures,

1 declining snowpack, and changes in soil moisture. A rise in forest mortality is also expected due
2 to increasing wildfire, insect outbreaks, and diseases. Sea level is projected to rise in most coastal
3 and marine areas of the state, increasing the likelihood for permanent inundation of low-lying
4 areas, higher tidal and storm surge reach, flooding, erosion, and changes and loss of habitat. Sea
5 level rise, rising coastal ocean temperatures, and ocean acidification will also affect the
6 geographical range, abundance, and diversity of Pacific Coast marine species. Climate change is
7 expected to affect both the physical and mental health of Washington's residents by altering the
8 frequency, duration, or intensity of climate related hazards to which individuals and communities
9 are exposed. Health impacts include higher rates of heat-related illnesses (e.g., heat exhaustion
10 and stroke); respiratory illnesses (e.g., allergies, asthma); vector-, water-, and food-borne
11 diseases; and mental health stress (e.g., depression, anxiety). These impacts can lead to increased
12 absences from schools and work, emergency room visits, hospitalizations, and deaths.

13 27. Collective Interests. Plaintiffs collectively have significant proprietary and
14 sovereign interests in protecting their populations and their environments from the effects of
15 catastrophic climate change, including increased numbers and severity of heat waves, greater air
16 pollution, more frequent and intense storms and associated flooding, reduced snowpack and water
17 supplies, increased wildfires, and sea level rise. Plaintiffs have long been leaders in working to
18 reduce GHG emissions and slow the pace of climate change and its impacts on Plaintiffs. Several
19 Plaintiffs (including California, the Commonwealth of Massachusetts, Oregon, and Vermont)
20 have state laws setting reduction targets for levels of GHG emissions in their environments. These
21 Plaintiffs have significant interests in nationwide measures that will achieve reductions of GHGs
22 from on-road surfaces from all states; given the ubiquitous nature of GHGs, nationwide measures
23 will benefit these Plaintiffs by enhancing their own ability to achieve their own GHG reduction
24 targets. Plaintiffs (including but not limited to the States of Iowa, Oregon, and Vermont) that do
25 not presently have state measures similar to the GHG Measure are harmed by the Delay Rules
26 and the Suspension Rule, because their SDOTs may not begin measuring and formulating
27 reduction targets for GHG emissions from their roadways to meet the specific statutory and
28 regulatory deadlines defined by the GHG Measure.

1 28. Climate change is a cumulative impact that is not caused, nor can it be adequately
2 addressed by individual states. Nationwide efforts, such as the GHG Measure, are required to
3 adequately lessen or slow the effects of climate change. GHG emissions from the transportation
4 sector currently account for 27% of national GHG emissions. *See*
5 <https://www.epa.gov/ghgemissions/sources-greenhouse-gas-emissions> (last visited 9/19/2017).
6 Because the transportation sector is the largest sources of GHG emissions in the United States
7 (contributing approximately 1.7 billion tons of carbon dioxide per year to our atmosphere),
8 FHWA’s delays and ultimate suspension of the GHG Measure – which would have reduced GHG
9 emissions from the federal highway system and lessened the harmful effects of climate change –
10 harms Plaintiffs by increasing the likelihood that most of the national emissions from the federal
11 highway system will continue unabated. 82 Fed. Reg. 6,026. Consequently, Plaintiffs have
12 suffered a legal wrong as a result of the Delay Rules and the Suspension Rule, and have standing
13 to bring this suit. In the absence of a declaratory judgment and permanent injunction requiring
14 FHWA to vacate the Suspension Rule, the suspension of the GHG Measure is likely to continue
15 indefinitely, and will continue to cause the aforementioned harms to Plaintiffs.

16 **C. Defendants**

17 29. Defendant U.S. Department of Transportation (the “Department”) is an agency of
18 the United States. The Department, through its sub-agency FHWA, is responsible for
19 implementing MAP-21 and the FAST Act.

20 30. Defendant Elaine L. Chao is Secretary of Transportation, and is named in her
21 official capacity. She is responsible for the administration of the Department.

22 31. Defendant FHWA is a sub-agency of the Department. It is responsible for
23 implementing MAP-21 and the FAST Act.

24 32. Defendant Brandye Hendrickson is Deputy Administrator of the FHWA, and is
25 named in her official capacity. She is the agency’s highest ranking official. and is charged with
26 the supervision and management of decisions at FHWA.

JURISDICTION AND VENUE

1
2 33. The Delay Rules and the Suspension Rule are final agency action subject to
3 judicial review. 5 U.S.C. § 704. The Court has jurisdiction over Plaintiffs’ claims pursuant to the
4 federal question statute, 28 U.S.C. § 1331 and 5 U.S.C. §§ 701-706 (providing for judicial review
5 under the APA).

6 34. This Court has authority to grant the requested declaratory and injunctive relief
7 pursuant to 28 U.S.C. § 2201 (declaratory judgment), 28 U.S.C. § 2202 (injunctive relief), and 5
8 U.S.C. §§ 702-706 (providing for judicial review under the APA).

9 35. An actual controversy exists between the parties within the meaning of 28 U.S.C.
10 § 2201(a), and this court may grant declaratory relief, injunctive relief and other relief pursuant to
11 28 U.S.C. §§ 1361, 1346, 2201-2202, and 5 U.S.C. §§ 704-706 (providing for judicial review
12 under the APA).

13 36. Venue is proper in the Northern District of California pursuant to 28 U.S.C. §
14 1391(e) because this is the judicial district in which Plaintiff State of California by and through
15 Attorney General Xavier Becerra, has its offices and this action seeks relief against an agency of
16 the United States and officials acting in their official capacities.

17 37. Pursuant to Local Rule 3-2 (c) and (d), assignment to the Oakland division is
18 appropriate because the assigned attorneys representing Plaintiff People of California are based in
19 the Attorney General’s Oakland office.

20 **STATUTORY BACKGROUND**

21 **A. MAP-21 and the FAST Act**

22 38. MAP-21 adopts a performance management approach to transportation planning.
23 *See* Pub. L. No. 112-141 (2012) (codified in relevant part at 23 U.S.C. § 119, § 134-35, § 148-
24 50). The goal of this approach is to promote the “most efficient investment of Federal
25 transportation funds by refocusing on national transportation goals, increasing the accountability
26 and transparency of the Federal-aid highway program, and improving project decision-making.”
27 23 U.S.C. § 150(a).

28 39. The FAST Act reaffirms MAP-21’s performance management approach. *See* Pub.

1 L. No. 114-94 (2015) (codified in relevant part at 23 U.S.C. § 119, § 148, § 150, § 167).

2 40. The Acts establish seven national transportation goals: safety, infrastructure
3 condition, congestion reduction, system reliability, freight movement and economic vitality,
4 environmental sustainability and reduced project delivery delays. See 23 U.S.C. § 150(b).

5 41. The Acts require that the Secretary of Transportation establish performance
6 measures and standards in furtherance of the seven national transportation goals no later than
7 eighteen months from MAP-21's date of enactment, or January 6, 2014. *See id.* § 150(a)-(c);
8 Pub. L. No. 112-141 (enacted July 6, 2012).

9 42. No later than one year after the performance measures have been set, SDOTs must
10 adopt corresponding performance targets. 23 U.S.C. § 150(d). States must submit reports to the
11 Secretary describing progress in achieving the targets. *Id.*, § 150(e)(3).

12 **B. The Administrative Procedure Act**

13 43. The APA, as amended by the Freedom of Information Act, 5 U.S.C. § 552,
14 provides that federal agencies like DOT and FHWA shall publish “substantive rules of general
15 applicability” in the Federal Register for guidance to the public. 5 U.S.C. § 552(a)(1)(D).

16 44. The APA also requires that an agency publish a notice of proposed rulemaking in
17 the Federal Register and solicit public comment on all rulemakings. 5 U.S.C. § 553. The
18 requirement to publish and solicit public comment applies to amendment or repeal of a rule. *See*
19 *id.* § 551(5). Indefinite delays of the effective date of published final rules is also considered
20 rulemaking that requires compliance with the notice and comment procedures of 5 U.S.C. § 553.
21 *See, e.g., Nat. Res. Def. Council, Inc. v. U.S. E.P.A.*, 683 F.2d 752, 761-62 (3d Cir. 1982).

22 45. The APA's notice-and-comment requirement is excused “when the agency for
23 good cause finds that notice and public procedure thereon are impracticable, unnecessary, or
24 contrary to the public interest.” *Id.* § 553(b)(B).

25 46. The APA, 5 U.S.C. § 702, provides that a person suffering legal wrong because of
26 agency action or adversely affected or aggrieved by agency action is entitled to judicial review.
27 Under the APA, a reviewing court shall: “(1) compel agency action unlawfully withheld or
28 unreasonably delayed; and (2) hold unlawful and set aside agency action, findings, and

1 conclusions found to be ... arbitrary, capricious, an abuse of discretion, otherwise not in
2 accordance with law; [or] without observance of procedure required by law.” 5 U.S.C. § 706.

3 47. Section 704 of the APA, 5 U.S.C. § 704, provides that final agency action for
4 which there is no other adequate remedy in a court is subject to judicial review. Section 551 of
5 the APA defines “agency action” to include “the whole or a part of an agency rule, order, license,
6 sanction, relief, or the equivalent or denial thereof, or failure to act.” *Id.* § 551(13).

7 **FACTUAL BACKGROUND**

8 **A. The Need for the GHG Measure**

9 48. GHGs, primarily carbon dioxide, trap heat in the Earth’s atmosphere, causing
10 temperatures to rise and the climate to change. Human activities since the industrial revolution
11 are increasing atmospheric concentrations of carbon dioxide, methane, nitrous oxide, and
12 halocarbons, which are collectively referred to as GHGs because of their warming influence on
13 the climate.

14 49. The transportation sector is the largest source of GHG emissions in the United
15 States. 82 Fed. Reg. 5,970, 5,997 (Jan. 18, 2017). GHG emissions from the transportation sector
16 recently surpassed electricity generation, making transportation the largest source of GHG
17 emissions in the U.S. *Id.*, citing U.S. Department of Energy, Energy Information Agency (EIA),
18 <http://www.eia.gov/totalenergy/data/monthly/> (last visited 9/19/2017). In 2014, the U.S.
19 transportation sector emitted approximately 1.74 billion tons of carbon dioxide. Recognizing that
20 “[s]ignificantly greater reductions in transportation GHG emissions are needed” to help address
21 climate change, *id.* at 5,997, early in the rulemaking process for the Final Rule, FHWA sought
22 public comment on whether and how to establish a national performance measure for carbon
23 pollution produced from tailpipe emissions on the national highway system.

24 **B. FHWA Rulemaking Actions**

25 50. Between March 2016 and January 2017, the FHWA finalized three related rules
26 that established national performance measures for the national highway system in compliance
27 with MAP-21 and the FAST Act.

28 51. The first two rules focused on highway safety and infrastructure.

1 52. The third rule, at issue here, is the Final Rule, 82 Fed. Reg. 5,970 (January 18,
2 2017), which contained the GHG Measure and other performance measures intended to assess
3 performance of the national highway system, such as freight movement, congestion, and air
4 quality.

5 53. The GHG Measure requires states to (1) measure and track the percent change
6 from calendar 2017 levels in on-road GHG emissions (in the form of total annual tons of CO₂
7 emissions from all on-road mobile sources), calculated based on annual fuel sales, emission
8 conversion factors supplied by the FHWA, and the proportion of statewide vehicle miles traveled
9 on the national highway system, 82 Fed. Reg. 5,981 (January 18, 2017); (2) set locally-
10 appropriate performance targets; and (3) ensure consistency in data collection.

11 54. SDOTs are required to set performance targets for the GHG Measure by February
12 20, 2018, *id.* at 6,033, and report their progress every two years thereafter, *id.* at 6,037. FHWA
13 will biennially assess whether each SDOT has made significant progress towards achieving its
14 target. *Id.* at 5,981, 6,040. If a state fails to make significant progress, it must document the
15 actions it will take to achieve the target in its next performance report. *Id.* at 6,041.

16 55. FHWA received thousands of comments from a variety of stakeholders, including
17 private citizens, SDOTs, metropolitan planning organizations, U.S. Senators, Members of the
18 U.S. House of Representatives, cities, local officials, public interest, non-profit, and advocacy
19 organizations, and transportation and infrastructure industry associations. In all, nine SDOTs,
20 over 100 cities, 67 members of Congress, more than 100 public interest organizations, and almost
21 100,000 members of the public submitted comments in support of the measure. 82 Fed. Reg.
22 5,993 (January 18, 2017).

23 56. An August 19, 2016 letter submitted by a group of nine SDOTs (including
24 California, Minnesota, Colorado, Delaware, Oregon, Pennsylvania, Vermont, Virginia and
25 Washington) (hereinafter, “MnDOT letter”) supported “the creation of a new national system
26 performance measure specific to GHG emissions from the transportation sector” for the purpose
27 of encouraging and tracking efforts to reduce GHG emissions from this sector.” MnDOT letter,
28 at 1 (emphasis in original), attached as Exhibit B.

1 57. After considering the comments, FHWA decided to establish a measure related to
2 GHG emissions in the Final Rule. 82 Fed. Reg. 5,993 – 6,005 (January 18, 2017).

3 58. According to the FHWA, the GHG Measure would “support the national
4 transportation goal of environmental sustainability in the Federal-aid Highway Program and the
5 national performance management program established in 23 U.S.C. § 150.” 82 Fed. Reg. 5,993
6 (January 18, 2017).

7 59. Title 23 U.S.C. § 150(b) lists environmental sustainability as one of the national
8 goals of the Federal-aid highway program. It defines environmental sustainability as
9 “enhanc[ing] the performance of the transportation system while protecting and enhancing the
10 natural environment.” 23 U.S.C. § 150(b)(6).

11 60. The FWHA noted that the adoption of the GHG Measure reflects the fact that the
12 transportation system both contributes to climate change and will be adversely affected by it (e.g.,
13 from sea level rise and flooding). *See* 82 Fed. Reg. 5,993 (January 18, 2017) (citing A
14 Performance-Based Approach to Addressing Greenhouse Gas Emissions through Transportation
15 Planning, FHWA (December 2013) at iii-iv, available at
16 <https://www.fhwa.dot.gov/policy/2013cpr/pdfs.cfm> (last visited 9/19/2017).

17 61. FHWA adopted the GHG Measure because it will result in reduced national GHG
18 emissions. *See, e.g.*, 82 Fed. Reg. at 5,976, 6,001 (January 18, 2017) (anticipating that GHG
19 Measure will influence decision-making and reduce GHG emissions); *id.* at 5,996-97 (agreeing
20 that policies to reduce GHG pollution from transportation, such as the GHG Measure, are
21 “essential to minimize the impacts from climate change”).

22 **C. FHWA Delay Actions**

23 62. The effective date of the Final Rule, including the GHG Measure, was set to be
24 February 17, 2017.

25 63. On January 20, 2017, the Assistant to President Trump and White House Chief of
26 Staff issued a memorandum entitled, “Regulatory Freeze Pending Review,” which “instructed
27 agencies to temporarily postpone the effective dates of regulations that had been published in the
28 Federal Register but were not yet effective until 60 days after the date of the memorandum

1 (January 20, 2017).” 82 Fed. Reg. 22,879 (January 20, 2017).

2 64. Accordingly, the FHWA announced that it would delay the effective date of the
3 Final Rule to March 21, 2017. On March 20, 2017, the FHWA delayed the Final Rule a second
4 time, for sixty days, to May 20, 2017.

5 65. On May 19, 2017, however, just before the Final Rule was to become effective,
6 FHWA announced, without providing for notice and comment as required by the APA, that the
7 GHG Measure portion of the Final Rule would be indefinitely delayed until a new rulemaking on
8 the GHG Measure was completed. 82 Fed. Reg. 22,879 (May 19, 2017).

9 66. FHWA knew that its Suspension Rule was rulemaking and generally subject to the
10 notice and comment requirements of 5 U.S.C. § 553. The FHWA defended its decision to forego
11 notice and comment, citing the “good cause” exception, which is only applicable where “the
12 agency for good cause finds” that compliance would be “impracticable, unnecessary, or contrary
13 to the public interest.” 5 U.S.C. § 553(b)(B); *see also* 5 U.S.C. § 553(d)(3) (30-day publication
14 rule can be waived for good cause).

15 67. In this case, FHWA asserts the impracticability of undertaking notice and
16 comment because of the imminence of the Final Rule’s effective date, stating “[g]iven the
17 imminence of the effective date of the [Final Rule], seeking prior public comment on this delay of
18 the GHG measure would be impractical, as well as contrary to the public interest in the orderly
19 promulgation and implementation of regulations. The President’s appointees and designees need
20 to further delay the effective date of the sections of the [Final Rule] pertaining to the GHG
21 measure to have adequate time to review them, and neither the notice and comment process nor a
22 thirty (30) day delay in effective date could be implemented in time to allow for this review.” 82
23 Fed. Reg. 22,879, 22,880 (May 19, 2017).

24 68. FHWA stated that it would be publishing a Notice of Proposed Rulemaking “in the
25 coming weeks” relating to the proposed GHG Measure; to date, no such notice has been
26 published. Indeed, the Suspension Rule made clear it was delaying the effective date of the GHG
27 Measure “indefinitely.” *Id.* at 22,879.

28 69. The Suspension Rule harms Plaintiffs’ interests as described above, delays

1 nationwide reductions of GHG emissions from the U.S. transportation sector and inhibits the
2 reductions that would ameliorate or help slow climate change.

3 70. If the GHG Measure were in effect, SDOTs would need to begin measuring GHG
4 emissions from the national highway system and formulating reduction targets to meet its
5 statutory and regulatory deadlines, the earliest of which is February 20, 2018. The requirement to
6 formulate targets, if in effect, would lead SDOTs to develop transportation policies and guide
7 investment decisions that would reduce GHG emissions. *See, e.g.*, 82 Fed. Reg. at 5,976, 6,001
8 (January 18, 2017) (anticipating that GHG Measure will influence decision-making and reduce
9 tons of GHG emissions).

10 **FIRST CLAIM FOR RELIEF**

11 71. Plaintiffs incorporate by reference all the preceding paragraphs.

12 72. FHWA adopted the GHG Measure as part of a rule-making process that resulted in
13 publication of the Final Rule in the Federal Register on January 18, 2017, with an effective date
14 of February 17, 2017.

15 73. FHWA delayed the GHG Measure twice without publishing a notice of proposed
16 rule-making, or providing opportunity for public comment, in violation of Section 553 of the
17 APA, 5 U.S.C. § 553. FHWA ultimately suspended the GHG Measure indefinitely, without
18 providing notice and comment as required by the APA. 5 U.S.C. § 553.

19 74. FHWA's decisions to delay and suspend the GHG Measure were "arbitrary,
20 capricious [and] an abuse of discretion," and made "without observance of procedure required by
21 law." *Id.* § 706(2)(A), (2)(D).

22 75. FHWA failed to show good cause to disregard the notice and comment
23 requirements of the APA each time it arbitrarily delayed the GHG Measure, *see id.* § 553(b)(B),
24 (d)(3), and when it suspended the GHG Measure.

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PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

- A. Issue a declaratory judgment that that Defendants acted arbitrarily, capriciously, and contrary to law, abused their discretion, and violated the APA in both delaying and suspending the GHG Measure without providing notice and comment;
- B. Issue a mandatory injunction compelling Defendants to vacate the Delay Rules and the Suspension Rule for failure to comply with the APA;
- C. Award to Plaintiffs their costs of litigation, including, but not limited to, reasonable attorneys’ fees, pursuant to 28 U.S.C. § 2412, and any other applicable law;
- D. Order such other and further relief as this Court deems just and appropriate.

Dated: September 20, 2017

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