COMMENTS OF THE ATTORNEYS GENERAL OF COLORADO, CALIFORNIA, WASHINGTON, ARIZONA, DELAWARE, HAWAI'I, ILLINOIS, MARYLAND, THE COMMONWEALTH OF MASSACHUSETTS, MICHIGAN, MINNESOTA, NEW JERSEY, NEW MEXICO, NEW YORK, OREGON, RHODE ISLAND, VERMONT, THE COMMONWEALTH OF VIRGINIA, WISCONSIN, THE DISTRICT OF COLUMBIA, AND THE GOVERNOR OF THE COMMONWEALTH OF KENTUCKY

March 16, 2026

Via Electronic Filing on regulations.gov

Docket No. FHWA-2025-0070

Sean McMaster
Federal Highway Administration
U.S. Department of Transportation
1200 New Jersey Avenue SE
Washington, DC 20590

Re: Proposed Modification of the Waiver of Buy America Requirements for Electric Vehicle Chargers

Dear Administrator McMaster:

The undersigned Attorneys General of Colorado, California, Washington, Arizona, Delaware, Hawai'i, Illinois, Maryland, the Commonwealth of Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, the Commonwealth of Virginia, Wisconsin, and the District of Columbia, and the Governor of the Commonwealth of Kentucky (the States) write in opposition to the Federal Highway Administration's (FHWA) proposal to modify the existing Buy America waiver applicable to electric vehicle (EV) chargers to require that "up to" 100 percent of the cost of all components of EV chargers funded by FHWA be from domestic sources. *Notice of Proposed Modification of the Waiver of Buy America requirements for Electric Vehicle Chargers*, 91 Fed. Reg. 6721 (Feb. 12, 2026) (the Proposed Modification or Modification).[1]

The States have an interest in the Modification as we are actively implementing federal EV charging programs, including the National Electric Vehicle Infrastructure (NEVI) program and the Charging and Fueling Infrastructure (CFI) program administered by FHWA. Other federal programs have also made funding available for EV charging infrastructure, such as the Carbon Reduction Program, the Congestion Mitigation and Air Quality Improvement Program, and the

[1] The Proposed Modification indicates FHWA is considering raising the cost component of the domestic content requirement for EV chargers "from 55 percent to up to 100 percent of the cost." 91 Fed. Reg. at 6723. However, FHWA does not specify any cost thresholds it is considering other than 100 percent, and "specifically seek[s] comment on the higher level at which this domestic content threshold should be set." *Id.* Thus, the proposal appears to contemplate a 100 percent cost requirement.

Federal Transit Administration's Congressionally Directed Spending Program. The States have made significant planning, administrative, and financial commitments in reliance on the current Buy America framework reflected in FHWA's regulations and established waivers, which include a phased EV Charger Waiver that aligns with the requirements Congress established in the Infrastructure Investment and Jobs Act (IIJA). Pub. L. 117-58, Sections 70911-70917; *see Waiver of Buy America Requirements for Electric Vehicle Chargers*, 88 Fed. Reg. 10,619 (Feb. 21, 2023). The proposal to revise the EV Charger Waiver to impose a 100 percent domestic component cost requirement will severely undermine the States' efforts. It would set Buy America requirements that are impossible for manufacturers to achieve, frustrate congressional intent, and impair the public interest by slowing or halting federally funded EV charger deployment nationwide.

The States support American manufacturing and are committed to utilizing domestic components in infrastructure projects. However, in order to be successful and encourage investment in American manufacturing, Buy America requirements must balance timely execution of federally funded infrastructure projects and Congress's goal of maximizing use of American-made materials. Achieving this balance requires realistic, attainable standards. The 55-percent domestic content threshold established by statute in the IIJA and implemented in the initial EV Charger Waiver strikes that balance under current industry conditions. A 100-percent threshold does not, and the FHWA has provided no evidence to suggest otherwise.

For the reasons explained below, FHWA's Proposed Modification is contrary to law, exceeds statutory authority, is arbitrary and capricious, and ignores reliance interests of States and manufacturers. FHWA should withdraw the proposal and maintain the current EV Charger Waiver and its alignment with the Buy America framework that Congress created and that FHWA codified in its regulations for other manufactured products.

I. State Interests Implicated by the Proposed Modification

FHWA proposes to apply new waiver requirements to unobligated funds immediately upon issuance of any final waiver modification. 91 Fed. Reg. at 6723. This sudden change in requirements applicable to EV chargers would have significant impacts on state programs that have unobligated funds. For example, if the Modification goes into effect, Arizona will not be able to deploy 43 of the 74 EV stations on 16 corridors that were included in Arizona's FHWA-approved NEVI plans. Arizona's Department of Transportation estimates that it will lose access to more than $45 million of the $76.5 million that Arizona was allocated for NEVI. The harm to EV charging station investments funded by Oregon's NEVI, CFI, and Carbon Reduction Programs would similarly be substantial. Oregon's remaining unobligated funds for NEVI, CFI, and much of the Carbon Reduction Program are dedicated for construction and thus would be subject to the Proposed Modification. Approximately $42 million, or almost half of the Oregon Department of Transportation's $88.6 million FHWA committed funds for EV charging and refueling investments from these three programs would be subject to the new requirements. In Massachusetts, the Department of Conservation and Recreation (DCR) has a $1,200,000 CFI award from FHWA—

$875,000 of which remains unobligated. DCR is awaiting the relevant federal, state, and local approvals to begin construction on the project funded by this award, which involves installing charging stations in approximately 15 locations. If FHWA's proposal goes through, however, and DCR cannot purchase compliant EV chargers, then the project will not be able to proceed as planned, and DCR will be prevented from utilizing the unobligated $875,000.

The proposed requirement would also create significant procurement and compliance challenges for states implementing the NEVI program. These impacts would be particularly pronounced in rural states such as New Mexico, where NEVI investments are focused on building charging stations along long-distance interstate and highway corridors designated under the Alternative Fuel Corridors Program. In rural and frontier regions, station spacing requirements, limited utility infrastructure like transformers/distribution lines, and fewer qualified vendors already present challenges for timely deployment. Additional component sourcing restrictions could further limit the availability of compliant equipment and qualified suppliers, making it more difficult for states to meet corridor coverage requirements and delaying the development of charging infrastructure necessary to support interstate travel and regional connectivity. These delays would also have direct economic consequences. In New Mexico, significant NEVI formula funding remains unobligated, including $4,449,395.08 in FY24 funds, $8,176,498.00 in FY25 funds, and $8,175,510.00 in FY26 funds. Additional procurement barriers could delay the obligation and deployment of these federal investments, slowing associated economic activity such as construction, electrical contracting, equipment installation, and operations in rural communities along designated corridors. Ultimately, these impediments will be a detriment to vehicle purchasers and travelers in impacted states who will have less access to charging stations.

II. Background and Regulatory History

Congress imposed Buy America requirements for federally funded transportation projects in the Surface Transportation Assistance Act of 1978, Public Law 95-599 (1978), which were updated in the 1982 Surface Transportation Assistance Act and later codified at 23 U.S.C. § 313. *See* 96 Stat. 2097. 23 U.S.C. § 313 requires that steel, iron, and manufactured products used in these projects be "produced in the United States,"[2] but beginning in 1983, FHWA waived Buy America requirements for manufactured products after determining the waiver was in the public interest. Under the Manufactured Products General Waiver, manufactured products that were permanently incorporated into Federal-aid projects did not need to be produced domestically, apart from predominantly iron or steel components of manufactured products. *See Contract Procedures; Buy America Requirements*, 48 Fed. Reg. 1946 (Jan. 17, 1983); *Buy America Requirements*, 48 Fed. Reg. 53,099 (Nov. 25, 1983). This Manufactured Products General Waiver remained in effect for decades and meant that manufactured products used in federally funded transportation projects

[2] 23 U.S.C. 313(a) states "notwithstanding any other provision of the law, the Secretary of Transportation shall not obligate any funds authorized to be appropriated to carry out the Surface Transportation Assistance Act of 1982 (96 Stat. 2097) or this title and administered by the Department of Transportation unless steel, iron, and manufactured products used in such project are produced in the United States."

were not required to meet a domestic content threshold. During this period, FHWA did not supply a definition of "produced in the United States" for manufactured products.

In November 2021, Congress enacted the IIJA, including the Build America, Buy America Act (BABA), which expanded the coverage and application of domestic content procurement preferences. Additionally, BABA established uniform definitions for "produced in the United States," including a requirement that the cost of the domestic components of manufactured products (which include EV chargers) is more than 55 percent, unless another applicable standard for determining the minimum amount of domestic content of the manufactured product had already been established in law or regulation. Pub. L. 117-58, Section 70912(6). Shortly after passage of BABA, FHWA conducted a Request for Information (RFI) to gather information about the domestic manufacturing capabilities of the EV charger industry. *See Buy America Request for Information*, 86 Fed. Reg. 67,115 (Nov. 24, 2021).

Following this RFI and a notice-and-comment period, FHWA carved EV chargers out of the 1983 Manufactured Products General Waiver (which imposed no specific standard for domestic content, apart from iron or steel, on manufactured products) and instead established new waiver requirements for EV chargers that would be implemented in two phases. *Waiver of Buy America Requirements for Electric Vehicle Chargers*, 88 Fed. Reg. 10,619 (Feb. 21, 2023). FHWA structured the waiver to partially phase out over a specified timeframe, culminating in a domestic content component-cost threshold consistent with section 70914 of the IIJA. *Id.* at 10,621. The first phase of the waiver required EV chargers to have final assembly in the United States and was applicable until June 30, 2024. *Id*. at 10,634. The second phase required chargers manufactured on or after July 1, 2024, to have final assembly in the United States and required the cost of components manufactured in the United States to exceed 55 percent.[3] *Id*. In November 2023, FHWA conducted an additional RFI to determine whether to adjust the timelines for beginning the second phase of the waiver. *Biannual Request for Information on the Status of the Electric Vehicle (EV) Charger Industry*, 88 Fed. Reg. 77,140 (Nov. 8. 2023). This was the most recent RFI that FHWA has conducted to assess the status of the EV charger industry, and it only inquired about manufacturers' ability to meet the 55 percent threshold; it did not inquire about any higher domestic component amounts. *See id.* at 77,142-143 (EV Charger Manufacturers Questions: 1.b, 2.b, 5.b, 11, and 15). Upon completion of the second phase in 2024, domestic content requirements for EV charging infrastructure were fully aligned with the statutory definition of "produced in the United States" for manufactured products set forth in the IIJA.

Next, in January 2025, FHWA separately began to phase out its 1983 Buy America waiver for all other manufactured products and align it with BABA requirements. *See Buy America Requirements for Manufactured Products*, 90 Fed. Reg. 2932 (Jan. 14, 2025). Similar to the EV Charger Waiver, the first stage of the phaseout requires products to be manufactured in the United

[3] In all phases of the EV charger waiver, all predominantly steel and iron housing components are excluded from the waiver and must meet FHWA's Buy America requirements for steel and iron. 88 Fed. Reg. 10,619 (Feb. 21, 2023).

States. *Id*. at 2958. The second phase, beginning October 1, 2026, requires both that the product be manufactured in the United States and that the cost of components manufactured in the United States exceed 55 percent. *Id*.

This phaseout's resemblance to the EV Charger Waiver is no coincidence. The regulatory framework was deliberately designed to converge on a uniform 55 percent threshold for all manufactured products to align with BABA's statutory standards.[4] In adopting the phaseout of the Manufactured Products General Waiver, FHWA also modified 23 CFR Section 635.410 (Buy America requirements) to define "produced in the United States" for manufactured products using the 55 percent threshold. *Id*. This definition conforms the 23 U.S.C. Section 313 Buy America provisions that require manufactured products be "produced in the United States" with the statutory definition of that term established in the IIJA.

Ignoring the EV Charger Waiver's purpose to transition EV charger manufacturers into alignment with BABA requirements in reasonable and achievable stages, FHWA now proposes a drastic change that is neither reasonable nor achievable, and would effectively preclude new obligations of funding for EV charging projects after its effective date. This is not the administration's first attempt to disrupt federal funding of EV chargers. On January 20, 2025, the President issued Executive Order 14154, "Unleashing American Energy," which directed federal agencies to pause disbursement of funds appropriated through the IIJA, including NEVI and CFI funds. FHWA then issued a letter on February 6, 2025, suspending approval of states' NEVI implementation plans and halting new funding obligations under that program. A coalition of states challenged that funding freeze and, in *Washington v. Department of Transportation*, 25-cv-00848 (W.D. Wash.), the court granted the states' motion for summary judgment after finding that the agency action suspending NEVI funding was unlawful under the Administrative Procedure Act (APA). More recently, another coalition of states filed suit on December 16, 2025, to challenge FHWA's de facto suspension of the CFI program and Electric Vehicle Charger Reliability and Accessibility Accelerator program, which is set-aside within NEVI. *California v. Department of Transportation*, 2:25-cv-02574, (W.D. Wash.). Seen against that backdrop, it appears that FHWA's Proposed Modification is yet another effort to carry out the President's directive to halt congressionally mandated funding for EV infrastructure.

[4] *See Waiver of Buy America Requirements for Electric Vehicle Chargers*, 88 Fed. Reg. at 10,621 (Feb. 21, 2023) (stating, "FHWA structured the proposed waiver to partially phase out over a specified timeframe to a domestic content threshold that is generally consistent with how manufactured are covered under section 70914 of BABA."); *Buy America Requirements for Manufactured Products*, 90 Fed. Reg. 2932 (Jan. 14, 2025) (stating that FHWA chose to align with BABA's definition of "produced in the United States" to "minimize burden and ensure consistency with other Federal agencies implementing BABA" and noting that, "for projects obligated on or after October 1, 2026, the requirements that apply to EV chargers and those that apply to manufactured products will effectively be the same").

III. The Proposed Revision is contrary to law and exceeds FHWA's statutory authority

The States agree that EV charging infrastructure should be domestically manufactured to the greatest extent feasible. But Congress fixed a clear, uniform definition of what counts as domestic manufacture in BABA: a product is "produced in the United States" if (i) the product is manufactured (final assembly) in the United States and (ii) "the cost of the components of the manufactured product that are mined, produced, or manufactured in the United States is greater than 55 percent of the total cost of all components, unless another standard for determining the minimum amount of domestic content of the manufactured product has been established under applicable law or regulation." Pub. L. No. 117-58, § 70912(6). FHWA had no alternative domestic-content standard for EV chargers or other manufactured products at the time BABA was enacted. Rather, FHWA had a general applicability waiver that had waived all Buy America requirements for manufactured products since 1983. And FHWA did not have an agency definition for "produced in the United States" for manufactured products[5] that established a domestic content standard until 2025. FHWA's more specific waiver for EV Chargers was developed after the enactment of the IIJA's Buy America requirements. *See* 86 Fed. Reg. 67,115 (Nov. 24, 2021); 88 Fed. Reg. 10,619 (Feb. 21, 2023). Therefore, BABA's statutory default of 55 percent should govern.[6]

FHWA lacks authority to replace that definition with a 100 percent threshold through the proposed "modification" of the EV Charging Waiver. "[A]n agency literally has no power to act unless and until Congress confers power upon it." *City of Providence v. Barr*, 954 F.3d 23, 31 (1st Cir. 2020) (cleaned up). FHWA's only possible source of authority here is 23 U.S.C. § 313(b), which allows FHWA to "waive Buy America requirements" under certain specified conditions. But that waiver authority does not empower FHWA to rewrite the definition of "produced in the United States" that Congress crafted.[7] The proposed 100 percent threshold was not "already …

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[5] *See* *Federal Highway Administration Buy America Policy Memorandum* (Dec. 22, 1997) (noting that although 23 U.S.C. § 313 includes manufactured products, "the implementing regulations in 23 CFR 635.410 do not" and "FHWA does not apply Buy America requirements to 'manufactured products.').

[6] In addition, BABA required each federal agency to prepare a report identifying all domestic content procurement preferences applicable to the Federal financial assistance administered by that agency and listing "deficient programs," *i.e.*, those assistance programs where a domestic content requirement "(1) does not apply in a manner consistent with section 70914 [the Buy American Preference]; or (2) is subject to a waiver of general applicability not limited to the use of specific products for use in a specific project." Pub. L. No. 117-58, § 70913(c). DOT's report identified FHWA's Manufactured Products General Waiver as a waiver of general applicability, which was therefore "deficient" under BABA. *See* U.S. Department of Transportation, "DOT's Identification of Federal Financial Assistance Infrastructure Programs Subject to the Build America, Buy America Provisions of the Infrastructure Investment and Jobs Act" (Jan. 2022). Following issuance of this report, FHWA embarked on the phase-out of the general waiver for manufactured products now set forth at 23 CFR Section 635.410, which adopts BABA's 55 percent cost threshold standard for minimum domestic content as required by the IIJA.

[7] To the extent Section 70917 of the IIJA and 23 U.S.C. § 313(a) mean that the BABA definition of "produced in the United States" does not control Title 23-funded programs, Section 70912(6) still should give meaning to the exact same term in Section 313(a)—all the more because BABA is so clearly drafted to mirror Section 313 in language and structure. *See Smith v. City of Jackson*, 544 U.S. 228, 233 (2005) ("[T]he same language in two statutes having similar

established in … law or regulation" at the time of the IIJA's enactment, so the plain text dictates that FHWA is bound by the content standard—i.e., 55 percent—established in that statute.

Section 70912(6) of the IIJA defines domestic manufacture in this context as (1) final assembly in the United States and (2) achieving a minimum 55 percent domestic content threshold as measured by component cost. Congress's definition controls, and FHWA may not redefine "produced in the United States" to fit its policy preferences. *See Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 403–404 (2024). Section 70912(6) is not, for example, one of the statutes that "expressly delegate" to an agency the power to define key terms prospectively (here, "produced in the United States" for manufactured products). *Loper Bright*, 603 U.S. at 394. Rather, by its plain terms, the BABA definition preserves any preexisting standard for determining minimum domestic content in manufactured products but otherwise defines "produced in the United States" for manufactured products going forward.

But to the extent FHWA claims discretion under Section 70912(6) to exceed the statutory 55 percent threshold, the agency's exercise of discretion must still be compatible with the ordinary meaning of "produced in the United States." Modern manufacturing depends on global supply chains, and EV chargers, like other electronic components used in federal highway projects, require semiconductors, displays, and payment systems that are not currently manufactured domestically at scale. A 100 percent threshold is both unprecedented and unachievable, further placing it outside the realm of common-sense textual reading. FHWA identifies no manufactured product in any industry (let alone EV charging or EV-related industry) that has ever met a 100 percent domestic component standard—*i.e.*, whose supply chains are fully insulated from globalized trade. The February 12, 2026, notice itself frames the 100 percent threshold as something FHWA is merely "seeking comment" on, highlighting the absence of supporting evidence. And because an unattainable ban on imported components is not a reasonable means of achieving BABA's purpose of promoting domestic manufacturing, it is not a plausible reading of "produced in the United States."

Furthermore, FHWA may not use its authority to "waive Buy America requirements" to make those requirements *more stringent*. 23 U.S.C. § 313(b). Consistent with the ordinary meaning of "to waive," FHWA's Buy America statute authorizes waivers to *relax* requirements when (1) application would be inconsistent with the public interest; (2) covered materials are unavailable in

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purposes" creates a "presum[ption] that Congress intended that text to have the same meaning in both statutes."). Nor is it obvious that Section 70917 precludes Section 70912(6)(B) from controlling here. If one were to read Sections 70912 and 70917 to have such an effect, the proviso of Section 70912(6)(B) for other minimum-content standards would be surplusage: such "another standard for determining the minimum amount of domestic content of the manufactured product," Pub. L. No. 117-58, § 70912(6)(B), would only have "been established," *id.*, in a "domestic content procurement preference" for "manufactured products," *id.* § 70917(a). If the existence of a "domestic content procurement preference" such as 23 U.S.C. § 313(a) prevented the BABA definition sections from applying, then the Section 70912(6)(B) proviso would do no work at all. The better reading is that both the proviso in Section 70912(6)(B) and Section 70912(a) operate together to "grandfather" in prior minimum-content thresholds if they have been established, but no more.

sufficient quantity or quality; or (3) inclusion would increase project cost by more than 25 percent. *Id*. It does not authorize using a waiver to *tighten* domestic content requirements beyond the standards established by Congress.

Finally, any exceedance of the 55 percent threshold may occur only by "law or regulation." Pub. L. No. 117-58, § 70912(6)(B)(ii). A waiver modification is neither. And any requirement that goes beyond BABA's 55 percent cost threshold standard for manufactured products must have already "been established" at the time BABA was enacted, as the use of past perfect tense demonstrates. The statutory language shows that the FHWA cannot use a Buy America "waiver" to make Buy America requirements stricter.

IV. The Proposed Revision is Arbitrary and Capricious

Under the APA, an agency action is arbitrary and capricious if it is not "reasonable and reasonably explained." *Ohio v. EPA*, 603 U.S. 279, 292 (2024). Agencies must provide "genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public." *Dep't of Com. v. New York*, 588 U.S. 752, 785 (2019). The Proposed Modification is arbitrary and capricious because it is unreasoned, lacks any rational connection to its stated objective, fails to consider reliance interests or reasonable alternatives, and is pretextual.

A. The Proposed Modification Is Not Reasonably Explained and Lacks a Rational Connection to Its Objectives

A federal agency must explain the reasons underlying its rulemaking. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 50 (1983). That explanation must be sufficient to justify the rule and must include "a rational connection between the facts found and the choice made." *Ohio*, 603 U.S. at 292. Where an agency changes a prior position, it must show there are good reasons for the new policy. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009). By the same token, courts "cannot ignore [a] disconnect between the decision made and the explanation given." *Dep't of Com.*, 588 U.S. at 785.

FHWA provides no reasoned justification for increasing the domestic content threshold applicable to EV chargers from 55 percent to 100 percent. FHWA previously determined, after public comment and RFIs to industry, that a phased approach culminating in 55 percent was appropriate to apply Buy America requirements to EV chargers.[8] The agency now gestures at national-security concerns and a presidential preference for maximizing domestic content, but it does not analyze why 55 percent is insufficient, why 100 percent is necessary to meet these goals, or how 100 percent is achievable at any time, let alone "immediately" upon a new waiver taking effect. Further, the Proposed Modification does not explain why the EV charger domestic content

[8] *Waiver of Buy America Requirements for Electric Vehicle Chargers*, 88 Fed. Reg. 10,619 (Feb. 21, 2023) ("FHWA structured the proposed waiver to partially phase out over a specified timeframe to a domestic content threshold that is generally consistent with how manufactured products are covered under section 70914 of BABA.")

threshold needs to be raised above 55 percent now, even before the currently applicable 55 percent threshold for any other manufactured product takes effect on October 1, 2026.

In addition, the Proposed Modification is disconnected from the rationale FHWA provides. First, despite claiming that manufacturers have stated they can meet the higher threshold, FHWA fails to provide any evidence to support this. In the Proposed Modification, FHWA states, "Comments received from manufacturers in response to the November 23, 2023, RFI suggested that manufacturers have capabilities to manufacture EV Chargers wholly within their facilities located within the United States." 91 Fed. Reg. at 6722. But the ability to manufacture chargers in U.S. facilities (*i.e.*, final assembly) does not imply the ability to source 100 percent of their components from the United States.

The November 23, 2023, RFI ***only*** asked about manufacturer's abilities to: (1) have final assembly of EV chargers in the United States in accordance with phase one of the waiver, and (2) have final assembly and have the cost of components manufactured in the United States be at least 55 percent of the cost of all components in accordance with phase two of the waiver. 88 Fed. Reg. at 77,142-143. At no point in the EV Charger Waiver process (the first RFI, proposed waiver, issuance of final waiver, or second RFI), was a 100 percent cost threshold *even contemplated or mentioned*. A review of the manufacturers' submissions in response to the November 23, 2023, RFI confirms that manufacturers did not address the capability to source 100 percent of EV charger components from the United States, because that information was not requested. Of the 18 comments received, zero mention capabilities to meet a 100 percent domestic content threshold.[9] "Reliance on facts that an agency knows are false at the time it relies on them is the essence of arbitrary and capricious decision making." *Delaware Dep't of Nat. Res. & Env't Control v. EPA*, 785 F.3d 1, 11 (D.C. Cir. 2015).

Second, the Proposed Modification would undermine, rather than support, domestic manufacturing, and is thus directly contrary to FHWA's stated goal. The Proposed Modification indicates that FHWA's objective is to promote domestic manufacturing. However, the Proposed Modification ignores the realities of basic economics and manufacturing. As the comments already submitted to the agency on the Proposed Modification reflect, there are currently no 100 percent domestically produced chargers available for purchase, there is not enough demand for 100 percent domestically produced chargers to justify investing in domestic production, and some critical

[9] *See, e.g.*, Comment from Rivian Automotive, LLC (https://www.regulations.gov/comment/FHWA-2023-0029-0014) (stating that there has been a definitive increase in costs for components whose manufacturing location needs to be adjusted to the United States to comply with the final 55% threshold; requesting clarification about which Buy America requirements apply to different components at EV charging sites); Comment from Tritium (https://www.regulations.gov/comment/FHWA-2023-0029-0013) (stating, "Tritium is on track to comply with at least 55 percent of the cost of components for our Buy America product line by the…deadline."); Comment from Electrify America (https://www.regulations.gov/comment/FHWA-2023-0029-0016) (stating that Electrify America is working diligently with vendors and supply chain stakeholders to meet the 55 percent threshold deadline); Comment from Enel X Way USA, LLC (https://www.regulations.gov/comment/FHWA-2023-0029-0017) (stating that there are multiple challenges in manufacturing Buy America-compliant chargers, including developing and certifying a Buy America-compliant bill of materials, lack of demand to incentivize the requisite investment, and contracting challenges.).

components of the chargers are simply not produced in the United States.[10] If the intent of the newly proposed 100 percent threshold is to drive investment in domestic production, then the FHWA must consider whether that threshold will actually accomplish the stated goal. If the threshold does the opposite—and will instead jeopardize the economic viability of these domestic companies—then the 100 percent threshold is counterproductive and irrational. A sudden switch to a 100 percent threshold does not provide the necessary stability or certainty that would allow manufacturers to adjust their business strategies and make large investments in domestic manufacturing. FHWA does not point to a supply-chain study or feasibility assessment supporting the proposal, other than the misreading of responses to the November 2023 RFI. An agency's decision is arbitrary and capricious when it "rel[ies] on an economic assumption, which contradicts basic economic principles." *WildEarth Guardians v. United States Bureau of Land Mgmt.*, 870 F.3d 1222, 1237 (10th Cir. 2017); *see also MISO Transmission Owners v. FERC*, 45 F.4th 248, 264 (D.C. Cir. 2022).

Third, the Proposed Modification provides no explanation as to why EV chargers should remain separate from other manufactured products other than a conclusory statement about "national security concerns." FHWA has already harmonized its own regulations with BABA's 55 percent regime for all other manufactured products by finalizing the phase out of the Manufactured Products General Waiver and adding a definition of "produced in the United States" to 23 CFR 635.410. Those regulations include a staged schedule culminating in the 55 percent component-cost requirement effective October 1, 2026, for manufactured products. 90 Fed. Reg. at 2958. FHWA has provided no supporting evidence or threat analysis linking "national security" with EV chargers or explaining why EV chargers are a unique threat compared to other manufactured products, and has not established that a 100 percent domestic content threshold is necessary to address these interests. Accordingly, it is impossible for the public to comment or provide additional information in response to this conclusion.

Finally, FHWA fails to explain how its proposal is consistent with Congress' creation a uniform definition for "produced in the United States" in the IIJA, including a uniform 55 percent threshold for domestic components (unless another applicable standard had already been established in law or regulation). Pub. L. 117-58, Section 70912(6). In this way, FHWA has "failed to consider an important aspect of the problem." *State Farm*, 463 U.S. at 43.

In sum, the EV Charger Waiver built a record that final assembly in the United States plus a 55 percent domestic content threshold would enable compliance while also accelerating deployment. The agency's new proposal neither confronts that record nor provides updated evidence refuting it.

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[10] *See* North Carolina Department of Transportation – Comments (Mar. 3, 2026) https://www.regulations.gov/comment/FHWA-2025-0070-0022; Gyre9 – Product Design, Development & Contract Manufacturing | G9EV – American Made EV Chargers- Comments (Feb. 24, 2026) https://www.regulations.gov/comment/FHWA-2025-0070-0008.

B. Failure to Consider Reliance Interests

FHWA's proposal fails to consider the reliance interests of the States and the EV charger companies they partner with to implement federally funded EV infrastructure projects. When an agency upends settled expectations, it must consider reliance interests of regulated parties. *Fox Television Stations, Inc.*, 556 U.S. at 515–16. Manufacturers and States planned investments, procurement, and grant applications on the statutorily directed, FHWA-endorsed path to a 55 percent threshold. This includes the States' NEVI implementation plans and solicitations, which explained the BABA requirements and selected award recipients based on compliance with the requirements in place through the existing EV Charger Waiver.[11] In the Proposed Modification, FHWA fails to address or even acknowledge the significant reliance interests that would be affected by the change to a 100 percent cost threshold requirement. Instead, FHWA makes only conclusory claims that the "supply chain variability of 2023 levels…has leveled off" and "there is a Federal interest in having domestically manufactured EV chargers…due to national security concerns associated with dependency on foreign-produced electronic components." The Proposed Modification fails to adequately consider the reliance interests that would be affected by the proposed significant change in course.

American manufacturers made significant investments and efforts to comply with the EV Charger Waiver, in reliance on the increased demand that the NEVI and CFI programs would create.[12] These investments demonstrate the success of the current regime in promoting domestic manufacturing and creating jobs in the United States. But an impossible standard will not increase manufacturing. Rather, by pulling out the rug on their work to *actually* create jobs in the United States, the Proposed Modification would stifle the growth of an American EV charger manufacturing industry—the opposite of its stated intent.

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[11] *See, e.g.*, Colorado Energy Office, DCFC Plazas Grant Application Guide (July 2024) at 28 ("Awarded recipients of NEVI funds must also be able to certify compliance with the Buy America Act, based on a process to be defined by Federal and State authorities, from all relevant vendors and equipment suppliers for equipment made from iron or steel."); State of California, California's Deployment Plan for the National Electric Vehicle Infrastructure (NEVI) Program Annual Update (Aug. 2023) at 9 (noting that applicants who receive NEVI funding must comply with Build America, Buy America requirements and referring to FHWA's February 2023 implementation plan); Washington State National Electric Vehicle Infrastructure Program Pre-Solicitation Notice (Aug. 20, 2024) (listing the Build America, Buy America Act as a compliance standard).

[12] *See* Responses to Nov. 2023 RFI: Comments of Zero Emission Transportation association (Dec. 22, 2023)(stating, "To date, manufacturers have announced investments of over $500 million in more than 40 American-made electric vehicle charger plants.") https://www.regulations.gov/comment/FHWA-2023-0029-0007; Comments of BTC Power (Dec. 26, 2023) (stating, "As a result of federal incentives, the business has invested in setting up and establishing domestic manufacturing in anticipation of NEVI awards…") https://www.regulations.gov/comment/FHWA-2023-0029-0009; Comments of Tritium (Dec. 26, 2023)(stating, "When deciding the location for our next factory…Tritium considered both the United States and Europe. The presence of federal incentives in the United States for EVs and EV charging infrastructure played a pivotal role in our decision to establish the factory in the country, anticipating a surge in demand driven by the [NEVI] program.") https://www.regulations.gov/document/FHWA-2023-0029-0001.

C. Failure to Consider Reasonable Alternatives

An agency decision is arbitrary and capricious if the agency failed to consider "reasonable alternatives to its decided course of action" *Neighborhood TV Co. v. FCC*, 742 F.2d 629, 639 (D.C. Cir. 1984); *see also Dep't of Homeland Sec. v. Regents of the Univ. of California*, 591 U.S. 1, 25 (2020) (holding that when an agency rescinds a prior policy, its reasoned analysis must consider the alternatives that are within the ambit of the existing policy.).

Here, even assuming FHWA's proposal were statutorily permissible, FHWA has not considered any reasonable alternatives to achieve its stated policy goals, which could include: a phase-in period (similar to the initial EV charger waiver) to allow the industry time to adjust to the new threshold; different component-cost thresholds; conducting a new RFI to get up-to-date information on the capabilities of the industry to identify such a threshold; or simply rescinding the waiver and including EV chargers with the general manufactured products waiver set forth in FHWA regulations, as the two will essentially be the same after October 1, 2026.[13] The agency must consider these, and any other, reasonable alternatives prior to reaching a final decision, and explain in a final decision why it has rejected these options.

D. Pretext

In light of this record, it is implausible that the Proposed Modification is truly intended to increase American manufacturing for EV chargers as FHWA claims. As the Proposed Modification would prevent the States from being able to use congressionally appropriated NEVI and CFI funds by setting an unachievable standard, it far more likely constitutes the agency's latest effort to interfere with these congressionally mandated infrastructure programs—consistent with FHWA's actions to date under the *Unleashing American Energy* executive order. Agency action is unlawful when it rests on a pretextual reason that is "incongruent with what the record reveals about the agency's priorities and decisionmaking process." *Dep't of Commerce v. New York*, 588 U.S. 752, 784-85 (2019); *see also Saget v. Trump*, 375 F. Supp. 3d 280, 361 (E.D.N.Y. 2019) ("An agency's actions are arbitrary and capricious under the APA if they are pretextual."). Here, the Modification's irrational reasoning and its timing—coming just weeks after the decision granting summary judgment to the plaintiff States in *Washington v. U.S. Department of Transportation*—suggest the Proposed Modification's true aim may be to obstruct EV-charging deployment after a court invalidated the administration's attempts at a broader funding freeze.[14]

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[13] *See Buy America Requirements for Manufactured Products*, 90 Fed. Reg. 2932, 2943 (Jan. 14, 2025) (stating, "FHWA nonetheless notes that, for projects obligated on or after October 1, 2026, the requirements that apply to EV chargers and those that apply to other manufactured products will effectively be the same.").

[14] In *Washington v. U.S. Department of Transportation*, the court granted summary judgment to the States on January 23, 2026, vacating agency actions freezing NEVI implementation because they exceeded statutory authority and were arbitrary, capricious, and procedurally improper. FHWA's new 100 percent proposal, published just weeks later, appears to function as a different vehicle to accomplish the same goal.

V. Conclusion

For the foregoing reasons, FHWA should withdraw the proposed revision and retain the consistent, predictable 55 percent domestic content requirement established by Congress and adopted by the agency in 23 CFR 635.410. This ensures a uniform, legally grounded framework that supports domestic manufacturing while enabling States to deploy chargers on the timelines Congress intended.

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