

Case No. 22-30087

**United States Court of Appeals
for the Fifth Circuit**

THE STATE OF LOUISIANA, *et al.*,

Plaintiffs-Appellees,

v.

JOSEPH R. BIDEN, JR., *et al.*,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA

**AMICUS BRIEF FOR THE STATES OF NEW YORK, COLORADO,
DELAWARE, ILLINOIS, MARYLAND, MICHIGAN, NEW JERSEY,
OREGON, VERMONT, WASHINGTON, WISCONSIN, AND THE
COMMONWEALTH OF MASSACHUSETTS
AS AMICI CURIAE SUPPORTING APPELLANTS**

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CERTIFICATE OF INTERESTED PARTIES

A certificate of interested persons is not required, as amici are government entities. 5th Cir. R. 28.2.1.

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GLOSSARY

2021 Good Neighbor Rule	<i>Revised Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS</i> , 86 Fed. Reg. 23,054 (Apr. 30, 2021)
CO ₂	Carbon dioxide
EPA	United States Environmental Protection Agency
Good neighbor provision	Clean Air Act section 110(a)(2)(D)(i)(I), 42 U.S.C. § 7410(a)(2)(D)(i)(I).
NAAQS	National ambient air quality standards
NO _x	Oxides of nitrogen
VOCs	Volatile organic compounds
Working Group	Interagency Working Group on the Social Cost of Greenhouse Gases

INTERESTS OF AMICI CURIAE

In this case, the U.S. District Court for the Western District of Louisiana issued a sweeping preliminary injunction that severely constrains federal agencies' ability to rely upon or continue to develop interim estimates for the social cost of certain greenhouse gas emissions. These estimates are under development by the Interagency Working Group on the Social Cost of Greenhouse Gases (the Working Group) and reflect the monetary value of the net harm associated with emissions of greenhouse gases in a given year. *See Louisiana v. Biden*, ___ F.Supp.3d ___, 2022 WL 438313 (W.D. La. Feb. 11, 2022), *stayed pending review* 2022 WL 866282 (5th Cir. Mar. 16, 2022). (*See also* Record on Appeal 311.) A motions panel of this Court stayed the preliminary injunction pending appeal, thus allowing the Working Group to continue developing the interim social cost estimates.

The district court's determination that the interim social cost estimates inflict irreparable harm on the State Plaintiffs rests on a fundamental misunderstanding of the cooperative federalism programs relied on by the district court, such as the Clean Air Act's national ambient air quality standards (NAAQS) program. 42 U.S.C. §§ 7408-

7410. Those programs do not rely on the interim social cost estimates to establish the stringency of federal regulation and do not require States to use the interim social cost estimates at all. *See* 2022 WL 438313, at *10, *20.

Amici States of New York, Colorado, Delaware, Illinois, Maryland, Michigan, New Jersey, Oregon, Vermont, Washington, Wisconsin, and the Commonwealth of Massachusetts (collectively, amici States) have strong interests in the outcome of this case. First, enjoining the Working Group from fulfilling its responsibilities would deprive amici States of their opportunity to participate in the administrative proceedings to issue revised social cost estimates. The Working Group is currently engaged in a notice-and-comment process to revise and improve the interim social cost estimates and issue final estimates that reflect the best available, most up-to-date science. *See Notice of Availability and Request for Comment*, 86 Fed. Reg. 24,669 (May 7, 2021). Many amici States provided comments generally supporting the finalization of the interim estimates and suggesting ways that those estimates could be improved. If allowed to take effect, the preliminary injunction order would “effectively shutter[]” the Working Group and

halt its work on final estimates of the social cost of greenhouse gases.

See Declaration of Dominic J. Manicini, ECF#104, ¶ 35 (Feb. 19, 2022).¹

The amici States thus have an interest in ensuring that the preliminary injunction order is reversed so that the Working Group can continue its review of their comments and suggestions for improvements to the social cost estimates.

Second, although no cooperative federalism program or federal law requires States to use the interim social cost estimates established by the Working Group, the preliminary injunction would prevent amici States from benefiting from the ongoing work and expertise of the Working Group. The Working Group's efforts often assist state programs by providing updated estimates of the social cost of greenhouse gases. Many amici States have enacted robust state programs to regulate greenhouse gas emissions from sources within that State. *See, e.g.*, Climate Leadership and Community Protection Act, N.Y. L. 2019, ch. 106; Climate Commitment Act, Rev. Code. of Wash. Ch. 70A.65; Clean Fuels Standard, Rev. Code. of Wash. Ch.

¹ Unless otherwise noted, all ECF citations are to the district court docket.

70A.535; N.J. Admin. Code 7:27-2.28, 7:27C; Or. Admin. Rules ch. 340, div. 271. Amici States often chose to use the Working Group's social cost estimates in their own programs. *See* N.J.S.A. 48:3-87.3(b)(8); NYSDEC, *Establishing a Value of Carbon* (Rev. Oct. 2021);² Washington Utilities and Transportation Commission, *Social Cost of Carbon*, Wash. Admin. Code Ch. 173-485;³ Oregon Environmental Quality Commission, Greenhouse Gas Emissions Program 2021 Rulemaking, at 10-11 (Dec. 16, 2021);⁴ Using the federal social cost estimates allows the States to benefit from the extensive analytical work that has already been done by the federal government, avoids duplicative research by federal and state entities, and facilitates consistency for regulated entities. *See, e.g.*, NYSDEC, *Establishing a Value of Carbon*, at 11-12 (selecting social cost estimates developed by

² Available at https://www.dec.ny.gov/docs/administration_pdf/vocguidrev.pdf (last visited May 5, 2022).

³ Available at <https://www.utc.wa.gov/regulated-industries/utilities/energy/conservation-and-renewable-energy-overview/clean-energy-transformation-act/social-cost-carbon> (last visited May 5, 2022).

⁴ Available at https://www.oregon.gov/deq/EQCdocs/121621_ItemA.pdf (last visited May 5, 2022).

Working Group in part due to their use at the federal level and the “extensive literature” supporting their development). By enjoining the Working Group from continuing its administrative process, the preliminary injunction order would prevent amici States from benefitting from the Working Group’s expertise and resources in updating the federal social cost estimates to reflect the best available science—which can then be used, if appropriate, in state programs.

Third, amici States have an interest in ensuring that this Court has a correct understanding of the cooperative federalism programs on which the district court and State Plaintiffs improperly relied in reasoning that those States have been irreparably harmed by the interim social cost estimates. *See* 2022 WL 438313, at *10 & n.49, *20 (Feb. 11, 2022) (citing *Revised Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS*, 86 Fed. Reg. 23,054 (Apr. 30, 2021) (2021 Good Neighbor Rule)); Pls’ Memo in Supp of PI, ECF#63, at 14, 44 (July 29, 2021) (same). Amici States have longstanding experience implementing such programs, including the Clean Air Act’s good neighbor provision, 42 U.S.C. § 7410(a)(2)(D)(i)(I). Amici States have been involved in litigation regarding several different iterations of EPA’s good neighbor

regulations for ground-level ozone and particulate matter.⁵ Based on that experience, amici States are well-positioned to demonstrate that the district court fundamentally misunderstood the Clean Air Act’s good neighbor provision—which does not use the interim social cost estimates or require States to do so.

⁵ For example, amici States supported a successful challenge to EPA’s Clean Air Interstate Rule (CAIR), which sought to extend the States’ attainment deadlines. *See North Carolina v. EPA*, 531 F.3d 896, 907-911 (D.C. Cir. 2008). Later, amici States successfully helped defend EPA’s authority to promulgate a replacement regulation, the Cross State Air Pollution Rule (CSAPR), that established emissions budgets for upwind States based, in part, on considerations of the cost-effectiveness of further reductions of ozone and particulate matter emissions. *See EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489, 513-520 (2014). And when EPA promulgated an update to CSAPR that provided only a partial remedy for upwind States’ good neighbor obligations, amici States participated in litigation that resulted in remand of the rule to EPA to promulgate a remedy in compliance with the statute. *See Wisconsin v. EPA*, 938 F.3d 303, 313 (D.C. Cir. 2019); *see also New York v. EPA*, 781 Fed. Appx. 4 (D.C. Cir. 2019) (vacating related good neighbor rule that sought to “close out” state obligations).

ARGUMENT

THE SOCIAL COST OF GREENHOUSE GASES HAS NOT BEEN USED TO DISAPPROVE STATE IMPLEMENTATION PLANS OR IMPOSE FEDERAL IMPLEMENTATION PLANS UNDER THE CLEAN AIR ACT'S GOOD NEIGHBOR PROVISION

The preliminary injunction order is based in part on a fundamental misunderstanding of the Clean Air Act's good neighbor provision. That provision seeks to ensure that certain listed pollutants emitted in upwind States do not harm air quality in downwind States—it is not intended to reduce greenhouse gas emissions. *See* 42 U.S.C. § 7410(a)(2)(D)(i)(I). The social cost of greenhouse gases has not been a driver of any of EPA's decision-making under that provision, nor has EPA ever mandated that States use the social cost of greenhouse gases as part of that program. The district court was simply incorrect to conclude otherwise.

The good neighbor provision is part of the Clean Air Act's NAAQS program, which requires EPA to establish national ambient air quality standards (or NAAQS) for certain listed air pollutants. *See* 42 U.S.C. § 7409(a). States then designate (subject to EPA review and approval) which geographical areas meet those standards and are therefore in

“attainment,” and which areas do not meet the standards and are therefore in “nonattainment.” 42 U.S.C. § 7407(d); *see generally Texas v. EPA*, 983 F.3d 826, 836-37 (5th Cir. 2020) (overview of NAAQS program). Each State must then submit an implementation plan describing how that State plans to maintain or achieve attainment of the NAAQS throughout the State. 42 U.S.C. § 7410(a). Recognizing that pollution emitted in one State can harm air quality in other States, the Clean Air Act’s good neighbor provision requires that a state implementation plan regulate the emission of “any air pollutant” that will “contribute significantly to nonattainment in, or interfere with maintenance by, any other State.” *Id.* § 7410(a)(2)(D)(i)(I). State implementation plans are subject to review and approval by EPA, which must impose a federal implementation plan on any State that fails to submit an adequate state plan. *Id.* § 7410(c).

The district court erred in concluding that the 2021 Good Neighbor Rule shows that EPA has used the interim social cost estimates to “impose additional duties” on State Plaintiffs under cooperative federalism programs, 2022 WL 438313, at *10, *20 (citing

86 Fed. Reg. at 23,061.)⁶ To begin, the 2021 Good Neighbor Rule focuses on reducing the criteria pollutant of ground-level ozone (or smog) under the statute’s NAAQS program. *See* 86 Fed. Reg. at 23,057-58. Smog forms when precursor pollutants—nitrogen oxides (NO_x) and volatile organic compounds (VOCs)—interact with sunlight. *See Clean Wisconsin v. EPA*, 964 F.3d 1145, 1154 (D.C. Cir. 2020). But neither NO_x nor VOCs are regulated as greenhouse gases. *See Endangerment and Cause or Contribute Findings for Greenhouse Gases*, 74 Fed. Reg. 66,496, 66,498 (Dec. 15, 2009) (defining greenhouse gas air pollution to include “the mix of six long-lived and directly-emitted greenhouse gases,” none of which is NO_x or VOCs). Accordingly, neither NO_x nor VOCs are a subject of the Working Group’s interim estimates for the social cost of greenhouse gases. *See* 86 Fed. Reg. at 24,660 (interim estimates include the social cost of carbon dioxide, methane, and

⁶ This conclusion echoed State Plaintiffs’ repeated misstatements that EPA “relied upon” the social cost estimates “in disapproving state implementation plans under the NAAQS good neighbor provisions and to justify the imposition of federal implementation plans.” Pls’ Memo in Supp of PI, ECF#63, at 14; *see* Pls’ Memo in Opp. to MTD, ECF#48, at 12; Br. in Opp to Stay, Doc#516235860, at 13-14 (5th Cir.); Pet. for Rehearing En Banc, Doc#516261056, at 9-10 (5th Cir.); Application to Vacate Stay Order, Supreme Court Docket No. 21A658, at 28-29 (Apr. 27, 2022).

nitrous oxide). Put simply, the NAAQS program—including the 2021 Good Neighbor Rule—speak to a different set of pollutants than those for which costs are included in the estimates of the social costs of greenhouse gas emissions.⁷

Against that background, EPA plainly did not rely on the interim estimates for the social cost of greenhouse gases in promulgating the 2021 Good Neighbor Rule. Rather, EPA issued the 2021 Good Neighbor Rule after the D.C. Circuit remanded EPA’s prior attempts to promulgate updated NO_x emission budgets for States, *Wisconsin v. EPA*, 938 F.3d at 336-37, and vacated EPA’s attempt to “close out” state obligations under the good neighbor provision, *New York v. EPA*, 781 Fed. Appx. at 7. In response to these decisions, the 2021 Good Neighbor Rule updated EPA’s federal implementation plan establishing budgets for NO_x emissions from sources in upwind States that “contribute significantly to nonattainment” of the 2008 ozone NAAQS in downwind States. 86 Fed. Reg. at 23,056. In the rule, EPA described the multi-step

⁷ Nitrous oxide (N₂O) is a greenhouse gas, 74 Fed. Reg. at 66,497, but it is chemically distinct from the nitrogen oxides that are precursors to ozone pollution and are regulated pursuant to the 2021 Good Neighbor Rule.

process it used for setting the emissions budget for each State. *Id.* at 23,069-71. Although EPA did take cost into account (which is within EPA’s authority as recognized by the Supreme Court in *EME Homer City Generation LP*, 572 U.S. at 519-520), the relevant costs were the costs of installing controls that reduce ozone-causing NO_x pollution—not any costs related to reducing greenhouse gas emissions. 86 Fed. Reg. at 23,069-71.

Moreover, the district court incorrectly concluded that EPA “employed” the social cost of greenhouse gases to “disapprov[e] state implementation plans under the NAAQS good neighbor provisions.” 2022 WL 438313, at *10. As a factual matter, the 2021 Good Neighbor Rule did not approve or disapprove state plans at all. *See* 86 Fed. Reg. 23,067-69.⁸ Rather, in the rule, EPA cited the separate Federal Register notices that disapproved the state implementation plans of several States, including Louisiana, Texas, and Kentucky. *See* 86 Fed. Reg. at 23,067-69. Those disapprovals were unrelated to the social cost of

⁸ The 2021 Good Neighbor Rule did explain why EPA deemed a prior approval of Kentucky’s state implementation plan to be in error. 86 Fed. Reg. at 13,067-068. But, again, the reasons had nothing to do with the social cost of greenhouse gases.

greenhouse gases. *See* 81 Fed. Reg. 53,308 (Aug. 12, 2016) (disapproving Louisiana plan because it relied on out-of-date methodology and standards); 81 Fed. Reg. 53,284 (Aug. 12, 2016) (disapproving Texas plan because it failed to consider full impacts of in-state emissions on downwind States); 78 Fed. Reg. 14,681 (Mar. 7, 2013) (disapproving Kentucky plan because it relied on out-of-date methodology). EPA thus provided its reasons for disapproving the state implementation plans submitted by certain of the plaintiffs here, and those reasons were unrelated to the social cost of greenhouse gases. *Contra* 2022 WL 438313, at *10; Pls’ Memo in Supp of PI, ECF#63, at 44.

There is likewise no support for State Plaintiffs’ contention that “NAAQS are now required to be set based on” the social cost of greenhouse gases such that “States must employ the [social cost] or their state implementation plans . . . will be disapproved.” Pls’ Memo in Supp of PI, ECF#63, at 44. EPA has never required States to use the social cost of carbon when proposing how they will meet their obligations under the NAAQS program—which, again, does not concern greenhouse gases.

The district court was also incorrect to the extent it suggested that EPA's reference to the social cost of greenhouse gases in a table summarizing the agency's cost-benefit analysis for the 2021 Good Neighbor Rule showed that EPA relied on the social cost of greenhouse gases to disapprove state plans. *See* 2022 WL 438313, at *10, *20 (citing 86 Fed. Reg. at 23,061, 23,153-155). EPA conducted this cost-benefit analysis as part of the regulatory impact analysis required by Executive Order, not pursuant to any provision of the Clean Air Act. *See* Br. for Appellants, at 4-5 (describing origins and current framework for requirement of agency cost-benefit analysis). As part of this regulatory impact analysis, EPA evaluated the co-benefits of the reduction of greenhouse gas emissions that will necessarily occur as sources reduce their emissions of NO_x as required by the 2021 Good Neighbor Rule. 86 Fed. Reg. at 23,150; *see Regulatory Impact Analysis for the Proposed Revised Cross-State Air Pollution Rule (CSAPR) Update for the 2008 Ozone NAAQS*, Docket No. EPA-HQ-OAR-2020-0272-0058, at 5-1 ("Implementing the Revised CSAPR Updated proposed rule is expected to reduce emissions of NO_x and provide ozone reductions, as well as consequent reductions in . . . carbon dioxide (CO₂) emissions."). But

EPA's regulatory impact analysis in the 2021 Good Neighbor Rule did not (1) increase the stringency of the federal regulation, (2) affect EPA's earlier decisions to disapprove certain state implementation plans for reasons unrelated to greenhouse gas emissions, or (3) impose any obligation on States. Indeed, under the good neighbor provision, it would have been unlawful for EPA to impose a federal implementation plan that required an upwind State to reduce emissions of NO_x "by more than is necessary to achieve attainment in every downwind State." *EME Homer City Generation, LP*, 572 U.S. at 521.⁹ As the federal defendants' note (Br. of Appellants, at 6-7) there may be circumstances in which an agency may or must rely on a regulatory impact analysis to promulgate a regulation, but the 2021 Good Neighbor Rule does not present such circumstances.

For essentially the same reasons, State Plaintiffs are incorrect in claiming (Pls' Memo in Supp of PI, ECF#63, at 44) that the Obama Administration relied on the social cost of greenhouse gases as part of

⁹ Tellingly, despite State Plaintiffs' claims that the 2021 Good Neighbor Rule increased their regulatory burdens, they never sought judicial review of that rule. See *Midwest Ozone Group v. EPA*, Docket No. 21-1146 (D.C. Cir.) (litigation over the 2021 Good Neighbor Rule that does not include any of Plaintiff States).

its 2016 rule imposing a federal implementation plan on Texas and certain other States. *See Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS*, 81 Fed. Reg. 74,504 (Oct. 26, 2016). As with the 2021 Good Neighbor Rule, the 2016 rule set the stringency for state good neighbor obligations based on a multi-step framework that had nothing to do with reducing greenhouse gases. *Id.* at 74,508-509. The only reference to the social cost of greenhouse gases again occurred in EPA’s regulatory impact analysis, where (as required by Executive Order) it quantified, for informational purposes, the “co-benefits of CO₂ reductions” that result from the rule. *Id.* at 74,581.

Since the district court issued the preliminary injunction order here, EPA has proposed a new NAAQS-related rule that further establishes that the good neighbor provision does not require States to use the interim estimates of the social cost of greenhouse gas emissions. *See generally Federal Implementation Plan Addressing Regional Ozone Transport for the 2015 Ozone National Ambient Air Quality Standard*, 87 Fed. Reg. 20,036 (Apr. 6, 2022). This proposed rule establishes federal implementation plans for twenty-six States under the 2015 ozone NAAQS. Due to the preliminary injunction order, EPA did not

monetize climate change co-benefits from the proposed rule, instead noting that reduction of CO₂ emissions was an unquantified benefit of the proposal. *Regulatory Impact Analysis for Proposed Federal Implementation Plan Addressing Regional Ozone Transport for the 2015 Ozone NAAQS*, EPA Docket No. EPA-HQ-OAR-2021-0668-0151, at 5-31 (Feb. 2022).¹⁰ EPA explicitly concluded that “the absence of monetized climate benefits from the analysis of benefits and net benefit” had “no bearing on the legal or technical basis for the proposed action itself.” *Id.* In other words, EPA has explicitly reiterated that, as in past good neighbor rules, the social cost of greenhouse gases is *not* being used as a basis for determining state obligations.

Finally, there is no support for plaintiffs’ conclusory claim that they will have an “obligation to employ” the social cost of greenhouse gases in other cooperative federalism programs they have identified. *See* Pls’ Memo in Supp of PI, ECF#63, at 44. None of the statutes or regulations cited by plaintiffs obligate States to conduct a cost-benefit analysis as part of their responsibilities in federal-state programs—let

¹⁰ Available at <https://www.regulations.gov/document/EPA-HQ-OAR-2021-0668-0151>

alone compel States to use the social cost of greenhouse gases. *See, e.g.*, 42 U.S.C. § 7411(c) (States are obligated to develop “procedure for implementing and enforcing standards of performance for new sources” as well as “a plan which establishes standards of performance for any existing source”); 23 U.S.C. § 327(a), (e) (authorizing States to assume responsibilities for specific highway projects “in lieu of and without further approval of” Secretary of Transportation); 24 C.F.R. § 58.4 (generally authorizing States to “assume the environmental review responsibilities” for certain housing projects, without referencing cost-benefit analyses or the social cost of greenhouse gases). To the extent any state plan or other action pursuant to these cooperative federalism programs is disapproved for failing to consider the social cost of greenhouse gases, that specific disapproval may be subject to judicial review.¹¹

¹¹ To the extent that State Plaintiffs and the district court speculate about impacts to state revenue that might occur if the social cost of greenhouse gases is used in the environmental review of federal leases, 2022 WL 438313, at *11. *20, amici States agree with the federal defendants that these alleged impacts are too attenuated from the social cost estimates to provide a basis for injunctive relief. *See Br. for Appellants*, at 32-34.

CONCLUSION

The preliminary injunction should be reversed and vacated.

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This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 29(a)(5) because it contains 3,357 words. This brief also complies the typefaces and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word in Century Schoolbook 14-point font, a proportionally spaced typeface.

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CERTIFICATE OF SERVICE

I hereby certify that on May 10, 2022, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/EFC system.

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