

No. 22-30087

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

THE STATE OF LOUISIANA, et al.,	}	Appeal from the United States District Court for the Fifth Circuit of Louisiana No.2021-CV-1074.
<i>Plaintiffs-Appellees,</i>		
v.		
JOSEPH R. BIDEN, JR., et al.,		
<i>Defendants-Appellants.</i>	}	The Honorable Judge James Cain, Jr., Presiding

**BRIEF OF AMICUS CURIAE DR. WILLIAM HAPPER,
DR. RICHARD S. LINDZEN, AND THE CO2 COALITION
IN SUPPORT OF THE PLAINTIFF-APPELLEE STATES**

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ORAL ARGUMENT REQUESTED

RULE 26.1 DISCLOSURE STATEMENT

The Amici Curiae are two individual scientists who are recognized experts in the field of climate science, and the CO2 Coalition. William Happer and Richard Lindzen are filing based on their personal knowledge and expertise. The CO2 Coalition is a Section 501(c)(3) member organization, consisting of individual members. It has no parent companies. CO2 Coalition issues no securities.

RULE 29(A) STATEMENT ON AMICUS FILING

All parties have consented to the filing of this Amicus Brief.

**STATEMENT REGARDING
AUTHORSHIP AND MONETARY CONTRIBUTIONS**

Under Federal Rule of Appellate Procedure 29(a)(4)(E), the Amici Curiae state that no party's counsel authored this brief in whole or in part, and no party or party's counsel contributed money intended to fund the preparation or submission of this brief. No person—other than the amicus curiae, its members, or its counsel—contributed money intended to fund the preparation or submission of this brief.

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INTEREST OF AMICI CURIAE

Dr. William Happer, Emeritus Professor of Physics, at Princeton University, Dr. Richard S. Lindzen, Emeritus Professor in the Department of Earth, Atmospheric, and Planetary Sciences at MIT, and the CO2 Coalition Amici support the Plaintiff States and urge this court to reinstate the preliminary injunction against the implementation of the Social Cost of Carbon Rules by Defendants, pending the outcome of a full hearing in the lower court. The CO2 Coalition is a Section 501(c)(3) member organization with individual expert members interested in understanding carbon dioxide and its essential role in the Earth's atmosphere.

Dr. Happer, Dr. Lindzen and the CO2 Coalition Amici believe that the “science” touted by the President and imposed by him on the entire federal government is seriously flawed and not truly scientific. They believe that therefore the “climate crisis” declaration by the President to justify these rules is without a valid scientific basis, arbitrary and capricious. They make their declaration to this Court and affirm they are willing to offer evidence of the validity of their declaration to the lower court in order to prevent the rule dictated by the President from being allowed to stand and adversely affect the economic and social well-being of Americans without their lawful consent.

CURRICULUM VITAE OF AMICI CURIAE AS STATED BY THEM

William Happer, Ph. D

I am a Professor Emeritus in the Department of Physics at Princeton University.

I began my professional career in the Physics Department of Columbia University in 1964, where I served as Director of the Columbia Radiation Laboratory from 1976 to 1979. I joined the Physics Department of Princeton University in 1980.

I invented the sodium guidestar that is used in astronomical adaptive optics systems to correct for the degrading effects of atmospheric turbulence on imaging resolution. I have published over 200 peer-reviewed scientific papers, am a Fellow of the American Physical Society, the American Association for the Advancement of Science, and a member of the American Academy of Arts and Sciences, the National Academy of Sciences and the American Philosophical Society.

I served as Director of Energy Research in the U.S. Department of Energy from 1991 to 1993. I was a co-founder in 1994 of Magnetic Imaging Technologies Incorporated (MITI), a small company specializing in the use of laser-polarized noble gases for magnetic resonance imaging. I served as Chairman of the Steering Committee of JASON from 1987 to 1990.

I served as Deputy Assistant to the President and Senior Director for Emerging Technologies at The National Security Council in the White House from 2018 to

2019.

I am the Chair of the Board of Directors of the CO2 Coalition, a non-profit 501(c)(3) organization established in 2015 to educate thought leaders, policy makers and the public about the vital contribution made by carbon dioxide to our lives and our economy.

Richard S. Lindzen, Ph. D

I am a Professor Emeritus in the Department of Earth, Atmospheric, and Planetary Sciences at MIT. After completing my doctorate at Harvard in 1964 (with a thesis on the interaction of photochemistry, radiation and dynamics in the stratosphere), I did postdoctoral work at the University of Washington and at the University of Oslo before joining the National Center for Atmospheric Research as a staff scientist. At the end of 1967, I moved to the University of Chicago as a tenured associate professor, and in 1971 I returned to Harvard to assume the Gordon McKay Professorship (and later the Burden Professorship) in Dynamic Meteorology. In 1981, I moved to MIT to assume the Alfred P. Sloan Professorship in Atmospheric Sciences. I have also held visiting professorships at UCLA, Tel Aviv University, and the National Physical Laboratory in Ahmedabad, India, the Hebrew University in Jerusalem, the Jet Propulsion Laboratory in Pasadena, and the Laboratory for Dynamic Meteorology at the University of Paris.

I developed our current understanding of the quasi-biennial oscillation of the

tropical stratosphere, the current explanation for dominance of the solar semidiurnal and diurnal tides at various levels of the atmosphere, the role of breaking gravity waves as a major source of friction in the atmosphere, and the role of this friction in reversing the meridional temperature gradient at the tropopause (where the equator is the coldest latitude) and the mesopause (where temperature is a minimum at the summer pole and a maximum at the winter pole). I have also developed the basic description of how surface temperature in the tropics controls the distribution of cumulus convection, and led the group that discovered the iris effect where upper level cirrus contract in response to warmer surface temperatures. I have published approximately 250 papers and books. I am an award recipient of the American Meteorological Society and the American Geophysical Union. I am a fellow of the American Meteorological Society, the American Geophysical Union and the American Association for the Advancement of Science, and a member of the National Academy of Sciences and the American Academy of Arts and Sciences.

I have served as the director of the Center for Earth and Planetary Sciences at Harvard, and on numerous panels of the National Research Council. I was also a lead author on the Third Assessment Report of the UN's Intergovernmental Panel on Climate Change – the report for which the IPCC shared the Nobel Peace Prize with Al Gore. I am currently a member of the CO2 Coalition.

CO2 Coalition

The CO2 Coalition is the nation's leading organization providing facts, resources and information about the vital role carbon dioxide plays in our environment. Its membership is comprised of more than 90 of the world's foremost experts on climate change and represent a wide range of expertise including atmospheric physics, climatology, geology, oceanography, economics and more. The Coalition provides facts and science without political ideology to the public through publications, public presentations, commentaries and interviews. Our membership has published many thousands of peer-reviewed scientific papers over a wide spectrum of climate-related topics.

**PART 1: DECLARATION OF AMICI CURIAE
PROFESSORS WILLIAM HAPPER AND RICHARD LINDZEN**

As career physicists, it is our opinion for the scientific reasons detailed below, the District Court’s preliminary injunction should be reinstated because the SCC TSD Rule¹ and Executive Order 13990 section 5 are scientifically invalid, and will be disastrous for the poor, people worldwide, future generations and the United States.

I. RELIABLE SCIENTIFIC THEORIES COME FROM VALIDATING THEORETICAL PREDICTIONS WITH OBSERVATIONS, NOT CONSENSUS, GOVERNMENT OPINION, PEER REVIEW OR MANIPULATED DATA

Scientific knowledge is determined by scientific method. Nobel Laureate in Physics, Prof. Richard Feynman, provided an incisive definition of scientific method:

“[W]e compare the result of [a theory’s] computation to nature, ... compare it directly with observations, to see if it works. If it disagrees with experiment it is wrong. In that simple statement is the key to science.” *The Character of Physical Law* (1965), p. 150.

Agreement with observations is the measure of scientific truth. Scientific progress proceeds by the interplay of theory and observation. Theory explains

¹ Interagency Working Group, “Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide Interim Estimates under Executive Order 13990” (February 26, 2021) (“SCC TSD Rule”).

observations and makes predictions about what will be observed in the future. Observations anchor understanding and weed out the theories that don't work. This has been the scientific method for more than three hundred years.

However, scientific knowledge is not determined by:

Consensus. What is correct in science is not determined by consensus, but by experiment and observations. Historically, scientific consensuses have often turned out to be wrong. The greatest scientists in history are great precisely because they broke with consensus. The frequent assertion that there is a consensus behind the idea that there is an impending disaster from climate change is not how the validity of science is determined. To quote the profoundly true observation of Michael Crichton:

“If it's consensus, it isn't science. If it is science, it isn't consensus.”

Government Opinion. Nobel physicist Richard Feynman put it clearly:

“No government has the right to decide on the truth of scientific principles.” *The Meaning of It All* (1998), p. 57.

The importance of scientific principles that government does not determine science was chillingly underscored when Stalin made Trofim Lysenko the czar of Russian biology. False biology prevailed for 40 years in the Soviet Union because Lysenko gained dictatorial control, providing one of the most thoroughly documented and horrifying examples of the politicization of science. Lysenko was strongly supported by “scientists” who benefitted from his patronage. Millions died

as a result. William Happer, Chapter 1 “Harmful Politicization of Science,” Michael Gough Ed., *Politicizing Science* (2003).

Peer Review. Peer review can be helpful in many areas of science, but it does not determine scientific validity. Agreement of theoretical predictions with observation or experiment, “the scientific method,” is the real touchstone of truth in science.

In our decades of personal experience in the field we have been dismayed that many distinguished scientific journals now have editorial boards that further the agenda of climate-change alarmism rather than objective science. Research papers with scientific findings contrary to the dogma of climate calamity are rejected by reviewers, many of whom fear that their research funding will be cut if any doubt is cast on the coming climate catastrophe. Journal editors have been fired for publishing papers that go against the party line of the climate-alarm establishment.

Alas, peer review of the climate literature is a joke. It is pal review, not peer review. The resulting present situation violates the ancient principle “no man shall be a judge in his own cause.” Accordingly, all peer reviewed climate publications need to be viewed with skepticism. Some are right, but many have serious problems with confirmation bias.

Manipulated and Omitted Unfavorable Observations. Since theories are tested with observations, fabricating and omitting unfavorable facts to make a theory

work is an egregious violation of scientific method.

Richard Feynman also stated this fundamental principal of scientific method: “If you’re doing an experiment, you should report everything that you think might make it invalid – not only what you think is right about it.... Details that could throw doubt on your interpretation must be given, if you know them.” 1974 Caltech commencement address, *Surely You're Joking, Mr. Feynman!* (1985), p. 311-12. The application of fundamental principles of science and scientific method to the SCC TSD Rule and Executive Order 13990 are addressed in section 5, next.

II. THE SOCIAL COST OF CARBON RULE AND EXECUTIVE ORDER 13990 ARE SCIENTIFICALLY INVALID AND DISASTROUS FOR PEOPLE WORLDWIDE AND THE UNITED STATES, AND THUS THE PRELIMINARY INJUNCTION AGAINST THEM SHOULD BE REINSTATED

A. The SCC TSD Rule and Executive Order 13990 are Scientifically Invalid for Omitting the Enormous Social Benefits of CO2

Executive Order 13990 section 5 dictates that only the social costs of CO2 and GHGs be considered, stating “it is essential that agencies capture the full cost of [CO2 and other] greenhouse gas emissions,” and “accurately determine the social benefits of reducing [CO2 and other] greenhouse gas emissions,” violating basic scientific method by excluding the enormous social benefits of CO2 and greenhouse gases (GHGs).

The IWG estimated the social cost of carbon by combining three models, DICE, PAGE and FUND, together called Integrated Assessment Models (IAMS).

However, two of the three models, DICE and PAGE, only computed the social costs of CO2 and excluded data on the enormous social benefits of CO2 (detailed in Part III below).² This is an example of violating scientific method by omitting unfavorable data.

It is like promoting the theory the world is flat by only considering observations as far as the eye can see, excluding all the evidence the world is round.

For this reason alone, the SCC TSD Rule and Executive Order 13990 section 5 mandating that the social benefits of GHGs not be considered violate scientific method and the preliminary injunction against both should be reinstated.

B. The SCC TSD Rule is Scientifically Invalid for Relying on Consensus and Peer Review

The SCC TSD Rule expressly explained it relied on peer review and consensus, not scientific method, to determine its estimates:

“In developing the SC-GHG estimates in 2010, 2013, and 2016 the IWG used **consensus**-based decision making, relied on **peer-reviewed** literature and models Going forward the IWG commits to maintaining a **consensus** driven process for making evidence-based decisions that are guided by the best available science and input from the public, stakeholders, and **peer reviewers**.” *Id.* P. 36 (emphasis added).

As explained, peer review and consensus do not determine scientific knowledge, scientific method does.

² Dayaratna, McKittrick & Michaels, "Climate Sensitivity, Agricultural Productivity and the Social Cost of Carbon in FUND," *Environmental Economics & Policy Studies* (2020), pp. 443.

Accordingly, for this reason alone, the SCC TSD Rule is scientifically invalid and the preliminary injunction should be reinstated.

C. The SCC TSD Rule is Scientifically Invalid Because the IPCC CMIP and Other Models Fail to Reliably Predict Temperatures and Thus Should Be Scientifically Rejected

The IWG estimated the SCC as noted, using three climate models abbreviated DICE, PAGE and FUND combined with an economic model, together called Integrated Assessment Models (IAMs). The key variable in the climate model is called the Equilibrium Climate Sensitivity (ECS). The SCC TSD Rule explained the ECS numbers used in the IAM model calculations were based on models used in the IPCC's Fourth Assessment Synthesis Report in 2007 (IPCC AR4), which were "confirm[ed] and strengthen[ed]" by recent assessments by the IPCC, US Global Change Research Program (USGCRP) and the National Academies:

Climate system representation. There have been advancements in climate science since the publication of the IPCC's Fourth Assessment Synthesis report (IPCC 2007), which was the basis for the IWG decision on what equilibrium climate sensitivity (ECS) input to use in the IAM model runs. The conclusions of recent scientific assessments, e.g., from the IPCC (2014, 2018, 2019a, 2019b) ... confirm and strengthen the science, updating projections of future climate change and documenting and attributing ongoing changes. SCC TSD Rule, p. 32.

IPCC AR4, in turn, to compute the ECS, used what is called the Coupled Model Inter Comparison Project Phase 4 (CMIP4). Since models are a type of scientific theory, their scientific validity is determined by comparing their

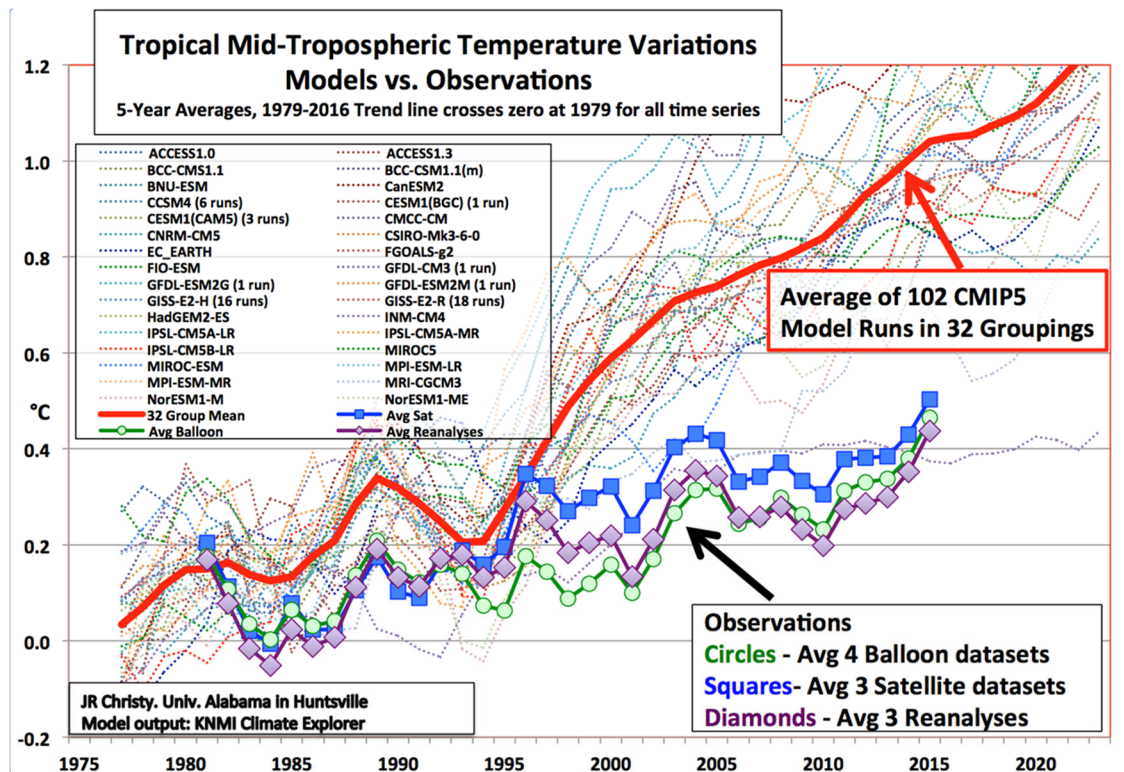
predictions with observations to see if they work. If they don't "work," they are "wrong" and invalid as science. The CMIP models don't "work" and are thus invalid as science, demonstrated next.

IPCC CMIP Models. The Intergovernmental Panel on Climate Change ("IPCC"), the dominant source of models, explained that its "Assessments of climate risks ... [are] based on climate model simulations [predictions] that are part of the fifth and sixth Coupled Model Intercomparison Project phase (CMIP5, CMIP6)." IPCC. *Climate Change 2022: Impacts, Adaptation and Vulnerability, Summary For Policymakers* (2022), p. SPM-6.

CMIP5. John Christy, PhD, Professor of Atmospheric Science at the University of Alabama, applied the scientific method to CMIP5 102 predictions of temperatures 1979-2016 by models from 32 institutions.

He explained he used "the traditional scientific method in which a claim (hypothesis) is made and is tested against independent information to see if the claim can be sustained," and produced the following chart:³

³ John Christy, House Comm. Science, Space and Technology (March 29, 2017), pp. 3,5.



At the bottom, the blue, purple and green lines show the actual reality temperature observations against which the models' predictions were tested.

The dotted lines are 102 temperature “simulations” (predictions) made by the models from 32 institutions for the period 1979-2016.

The red line is the consensus of the models, their average.

The graph clearly shows that 101 of the 102 predictions by the models (dotted lines) and their consensus average (red line) fail miserably to predict reality.⁴

Focusing on the consensus red line, he concluded:

⁴ The one model that closely predicted the temperatures actually observed is a Russian model and is the only model that should be used in science. However, the IPCC did not use it but used the models that it should have rejected.

“When the ‘scientific method’ is applied to the output from climate models of the IPCC AR5, specifically the bulk atmospheric temperature trends since 1979 (a key variable with a strong and obvious theoretical response to increasing GHGs in this period), I demonstrate that the consensus of the models [red line] fails the test to match the real-world observations by a significant margin. As such, the average of the models is considered to be untruthful in representing the recent decades of climate variation and change, and thus would be inappropriate for use in predicting future changes in the climate or related policy decisions.” *Id.*, p. 13 (emphasis added).

Thus, the models that produced the 101 predictions fail the Feynman test. They do not “work,” therefore they are “wrong.” Scientifically, they all should be abandoned. Rejecting science, the IPCC governments keep using CMIP models, including CMIP6 even though it is no better.

CMIP6. Steven Koonin, Ph.D., a Cal-Tech physicist, professor at New York University and author of *Unsettled* (2021), concluded:

“One stunning problem is that ... the later generation of [CMIP] models are actually more uncertain than the earlier one[s].”

“The CMIP6 models that inform the IPCC’s upcoming AR6 [Climate Change reports] don’t perform any better than those of CMIP5.” *Id.* pp. 87, 90 (emphasis added).

He elaborated CMIP6’s failure using the scientific method in detail:

- “An analysis of 267 simulations run by 29 different CMIP6 models created by 19 modeling groups around the world shows that they do a very poor job [1] describing warming since 1950 and ... [2] underestimate the rate of warming in the early twentieth century.” *Id.* p. 90 (emphasis added).
- “Comparisons among the [29] models [show] ... model results differed dramatically both from each other and from observations ... [and] disagree wildly with each other.” *Id.* p. 90 (emphasis added).

- “One particularly jarring failure is that the simulated global average surface temperature ... varies among models ... three times greater than the observed value of the twentieth century warming they’re purporting to describe and explain.” *Id.* p. 87 (emphasis added).
- As to the early twentieth century warming when CO₂ levels only increased from 300 to 310 ppm, “strong warming [was] observed from 1910 to 1940. On average, the models give a warming rate over that period of about half what was actually observed. That the models can’t reproduce the past is the big red flag -- it erodes confidence in their projections of future climate.” *Id.* pp. 88, 95 (emphasis added).

Thus, the IPCC CMIP models used by SCC TSD Rule fail the fundamental test of scientific method, they do not work. Accordingly, for this reason alone, the SCC TSD Rule is scientifically invalid and the preliminary injunction should be reinstated.

D. The SCC TSD Rule is Scientifically Invalid for Relying On IPCC Government Dictated Opinions

The SCC TSD Rule also explained that key numbers it used in its estimates were based in part, as noted, on the IPCC’s Fourth Assessment Synthesis Report in 2007 (IPCC AR4) and that four “recent scientific assessments by the IPCC.” *Id.* p. 32. The five IPCC publications relied upon were:

1. IPCC 2007 Synthesis Report, Contribution of Working Groups I, II and III to the Fourth Assessment Report;
2. IPCC 2014 Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II and III to the Fifth Assessment Report;
3. IPCC 2018 Global Warming of 1.5°C;

4. IPCC 2019a Climate Change and Land; and
5. IPCC 2019b Special Report on the Ocean and Cryosphere in a Changing Climate.

However, unknown to most, two IPCC rules require that IPCC governments control what is published in its Summaries for Policymakers (“SPMs”), which in turn controls what is published in IPCC full reports.

The picture following tells all.⁵



IPCC Summary for Policymakers writing meeting

This is not how scientific knowledge is determined. In science, as the Lysenko experience chillingly underscores, and Richard Feynman, as noted,

⁵ Donna Laframboise, “US Scientific Integrity Rules Repudiate the UN Climate Process” (January 29, 2017) link [US Scientific Integrity Rules Repudiate the UN Climate Process | Big Picture News, Informed Analysis](#)

emphasized:

“No government has the right to decide on the truth of scientific principles.”

The two IPCC rules dictating IPCC governments’ control of what is written in the SPMs and IPCC reports, line by line, are:

IPCC SPM Rule No.1: All Summaries for Policymakers (SPMs) Are Approved Line by Line by Member Governments

“IPCC Fact Sheet: How does the IPCC approve reports? ‘Approval’ is the process used for **IPCC Summaries for Policymakers (SPMs)**. **Approval signifies that the material has been subject to detailed, line-by-line discussion, leading to agreement among the participating IPCC member countries**, in consultation with the scientists responsible for drafting the report.”⁶

Since governments control the SPMs, the SPMs are merely government opinions and therefore, have no value as scientific evidence.

What about the thousands of pages in the IPCC reports? A second IPCC rule requires that everything in an IPCC published report must be consistent with what the governments agree to in the SPMs about CO2 and fossil fuels. Any drafts the independent scientists write are rewritten as necessary to be consistent with the SPM.

IPCC Reports Rule No. 2: Government SPMs Override Any Inconsistent Conclusions Scientists Write for IPCC Reports

IPCC Fact Sheet: “‘Acceptance’ is the process used for the full underlying report in a Working Group Assessment Report or a Special Report after its SPM has been approved.... **Changes ...are limited to**

⁶ Sections 4.4-4.6 of Appendix A to the Principles Governing IPCC Work, the Procedures for the Preparation, Review, Acceptance, Adoption, Approval and Publication of IPCC Reports. https://archive.ipcc.ch/news_and_events/docs/factsheets/FS_ipcc_approve.pdf; <http://www.ipcc.ch/pdf/ipcc-principles/ipcc-principles-appendix-a-final.pdf> (Emphasis added).

those necessary to ensure consistency with the Summary for Policymakers.” IPCC Fact Sheet, *supra*. (Emphasis added).

IPCC governments’ control of full reports using Rule No. 2 is poignantly demonstrated by the IPCC’s rewrite of the scientific conclusions reached by independent scientists in their draft of Chapter 8 of the IPCC report *Climate Change 1995, The Science of Climate Change* (“1995 Science Report”). The draft by the independent scientists concluded:

“No study to date has positively attributed all or part (of the climate warming observed) to (manmade) causes.” Frederick Seitz, “A Major Deception on Climate Warming,” *Wall Street Journal* (June 12, 1996).

However, the government written SPM proclaimed the exact opposite:

“The balance of evidence suggests a discernible human influence on global climate.” *1995 Science Report* SPM, p. 4.

What happened to the independent scientists’ draft? IPCC Rule No. 2 was applied, and their draft was rewritten to be consistent with the SPM in numerous ways:

- Their draft language was deleted.
- the SPM’s opposite language was inserted in the published version of Chapter 8 in the *1995 Science Report*, on page 439: “The body of statistical evidence in chapter 8 ... now points towards a discernible human influence on global climate.”

- The IPCC also changed “more than 15 sections in Chapter 8 of the report ... after the scientists charged with examining this question had accepted the supposedly final text.” Seitz, *supra*.

Thus, **IPCC SPM and findings used in the SCC TSD Rule have no value as scientific evidence because they are government dictated opinions, like Lysenko’s. For this reason alone**, relying on IPCC government dictated publications contaminates the science in the SCC TSD Rule and renders it scientifically invalid, and therefore the preliminary injunction should be reinstated.

III. THERE IS OVERWHELMING SCIENTIFIC EVIDENCE THAT FOSSIL FUELS AND CO₂ PROVIDE ENORMOUS SOCIAL BENEFITS FOR THE POOR, PEOPLE WORLDWIDE, FUTURE GENERATIONS AND THE UNITED STATES, AND THEREFORE IT WOULD BE DISASTROUS TO REDUCE OR ELIMINATE THEM

The SCC TSD Rule, as noted, does not consider the enormous social benefits of CO₂, GHGs and fossil fuels.

A. CO₂ is Essential to Food, and Thus to Life on Earth.

Nearly all of the food we eat comes ultimately from photosynthesis on the land or in the oceans. The oxygen we breathe was produced by photosynthesis over the geological history of the Earth. In the process of photosynthesis, energy from sunlight forces molecules of water, H₂O, and molecules of carbon dioxide and CO₂ to combine to make sugars and other organic molecules. A molecule of oxygen, O₂, is released to the atmosphere for every molecule of CO₂ converted to sugar.

Without CO₂, there would be no photosynthesis, plants would die and the animals that eat them would starve to death, and most higher life forms would become extinct. The peculiar biological communities at deep sea vents and various chemotropic bacteria in sediments below Earth's surface would be all that remains of the once flourished web of life that was sustained by atmospheric CO₂ and sunlight.

Most green plants evolved at CO₂ levels of several thousand parts per million (ppm), many times higher than now. Plants grow better and produce better flowers and fruit at higher levels. Commercial greenhouse operators recognize this when they artificially increase CO₂ concentrations inside their greenhouses to over 1,000 ppm.

All green plants grow faster with more atmospheric CO₂, including the CO₂ released by the combustion of fossil fuels, which is almost identical to the CO₂ respired by human beings and other living creatures.

What happens with a doubling of CO₂? Many experiments and studies confirm that when CO₂ is doubled, agricultural yields are increased significantly, especially in arid regions where more CO₂ increases the resistance of plants to droughts. Greenhouse operators routinely pay to double or triple the concentrations of CO₂ over their plants. The improved yield and quality of fruits and flowers more than pay for the cost of more CO₂, with only small and beneficial warming.

A dramatic example of the response of green plants to increases of atmospheric CO₂ is shown below: Dr. Sherwood Idso grew Elda Rica pine trees with increasing amounts of CO₂ in experiments about 10 years ago, starting with an ambient concentration of CO₂ of 385 ppm. He showed what happens over the 10 years when CO₂ is increased by 150, 300 and 450 ppm, for total CO₂ concentrations of 385, 535, 685 and 835 ppm:⁷



More CO₂ has made a significant contribution to the increased crop yields of the past 50 years, as well. The benefits to plants of more CO₂ are documented in hundreds of scientific studies.

Thus we owe our existence to green plants that, through photosynthesis,

⁷ CO₂ Coalition, [CO2_3.jpg \(1280×720\) \(co2coalition.org\)](#)

convert CO₂ and water, H₂O, to carbohydrates with the aid of sunlight, and release oxygen. Land plants get the carbon they need from the CO₂ in the air. Other essential nutrients — water, nitrogen, phosphorus, potassium, etc. — come from the soil. Just as plants grow better in fertilized, well-watered soils, they grow better in air with several times higher CO₂ concentrations than present values. As far as green plants are concerned, CO₂ is part of their daily bread—like water, sunlight, nitrogen, phosphorus, and other essential elements.

Without CO₂, there would be no photosynthesis, no food and no human or other life.

B. Greenhouse Gases Prevent Us from Freezing to Death

Greenhouse gases hinder the escape of thermal radiation to space. We should be grateful for them. Greenhouse gases keep the Earth's surface temperature warm enough and moderate enough to sustain life on our verdant planet. Without them, we'd freeze to death.

To quote John Tyndall, the Anglo-Irish physicist who discovered greenhouse gases in the 1850s:

“Aqueous vapor is a blanket, more necessary to the vegetable life of England than clothing is to man. Remove for a single summer-night the aqueous vapor from the air which overspreads this country, and you would assuredly destroy every plant capable of being destroyed by a freezing temperature. The warmth of our fields and gardens would pour itself unrequited into space, and the sun would rise upon an island held fast in the iron grip of frost.” John Tyndall, *Heat, a Mode of Motion* pp. 359-360 (5th Ed. 1875).

Tyndall identified “aqueous vapor” (water vapor) as the most important greenhouse gas. Water vapor, and clouds which condense from it, are the dominant greenhouse agents of Earth’s atmosphere.

Carbon dioxide, CO₂, is also a greenhouse gas, and does cause a small amount of warming of our planet. But it is far less effective than water vapor and clouds as previously explained.

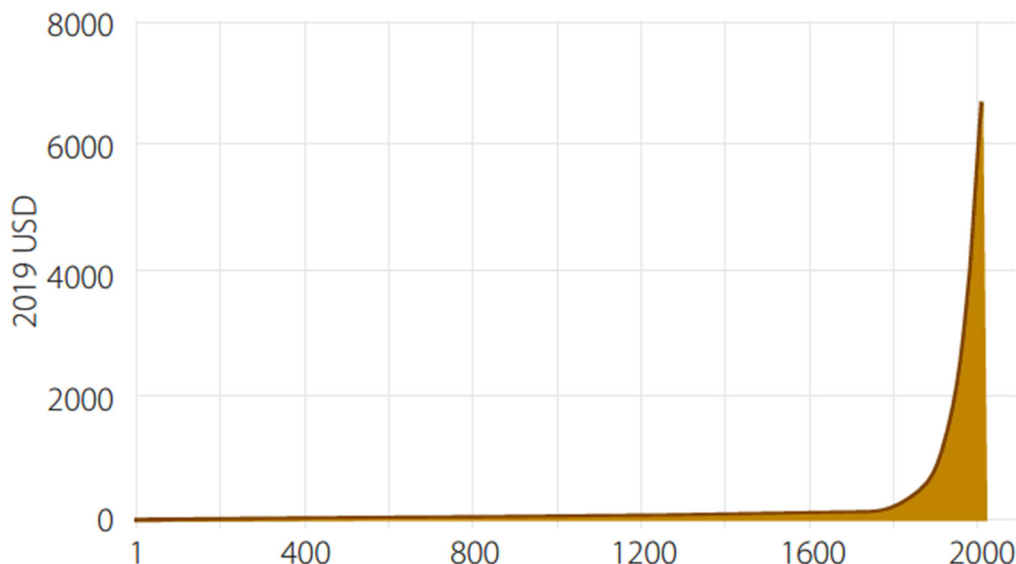
Without the greenhouse warming of CO₂ and its more potent partners, water vapor and clouds, the earth would be too cold to sustain its current abundance of life. We would freeze.

C. Fossil Fuels have Enormous Social Benefits

Contrary to the incessant attack on fossil fuels, affordable, abundant fossil fuels have given ordinary people the sort of freedom, prosperity and health that were reserved for kings in ages past.

The following chart of the GDP per person for the last 2,000 years powerfully illustrates what has happened:⁸

⁸ Rupert Darwall, *Climate Noose: Business, Net Zero and the IPCC’s Anticapitalism* (Global Warming Policy Foundation), p. 21.



In the mid-1800s, CO2 levels that averaged over 1,000 ppm over 600 million years were at a very low level, about 280 ppm. The great news is that CO2 emissions from nature and fossil fuels resulted in CO2 levels rising from this low level to about 415 ppm today.

As a result, crop yields have increased by more than 15% over the past century. Better crop varieties, better use of fertilizer, better water management, etc., have all contributed. But the fact remains that a substantial part of the increase is due to the increase in CO2 from about 300 ppm in 1850 to about 415 ppm from fossil fuels.

Mathematically, the growth rate of plants is approximately proportional to the square root of the CO2 concentration. Thus, the increase in CO2 concentration from about 280 ppm (300 ppm rounded) to 415 ppm over the past century increased

growth rates by a factor of about $\sqrt[3]{4/3} = 1.15$, or 15%.

As to temperature, CO₂ is a greenhouse gas and adding CO₂ to the atmosphere by burning coal, oil, and natural gas as a matter of radiation physics can only modestly increase the surface temperature of the earth. Specifically, physics proves that doubling the CO₂ concentration from our current 415 ppm to 830 ppm will directly cause about 1° C in warming.

In summary, the social benefits for people and life all over the world are enormous:

- since CO₂ is a plant fertilizer, agricultural and forestry yields have risen substantially over the last hundred years.
- economies have grown substantially, so that many people have prospered, and poverty has been reduced.
- electricity has become more affordable and available to many more people worldwide.
- and there has been a small but beneficial warming of the planet, about 2° Fahrenheit. This warming has been caused by a combination of natural causes and CO₂ increasing from its low level in 1850 and other greenhouse gases.

See also Goklany, *Carbon Dioxide: The Good News* (2015) & Happer, “The Truth About Greenhouse Gases,” CO₂ Coalition (June 2011).

IV. SCIENCE CONCLUSION

Contrary to what is commonly reported, CO₂ is essential to life on earth. Without CO₂, there would be no photosynthesis, and thus no plant food and not enough oxygen to breathe. Moreover, without fossil fuels there will be no reliable, low-cost energy worldwide and less CO₂ for photosynthesis making food. Eliminating fossil fuels and reducing CO₂ emissions will be disastrous for the United States and the rest of the world, especially for lower-income people.

For the scientific reasons detailed above, in Amici' opinion the District Court's preliminary injunction should be reinstated because the SCC TSD Rule and Executive Order 13990 section 5 are based on multiple violations of scientific method and will be disastrous for the poor, people worldwide, future generations and the United States.

PART 2: LEGAL AND CONSTITUTIONAL ARGUMENTS

A. U.S. Supreme Court on Science

The U.S. Supreme Court has adopted essentially the same view of what valid science is that is expressed in the opinion of Drs. Happer and Lindzen above, starting in 1993 with its landmark *Daubert* decision:

“[I]n order to qualify as ‘scientific knowledge,’ an inference or assertion must be derived by the scientific method,” “any and all scientific testimony or evidence admitted [must be] ...reliable,” “tested,” and “supported by

appropriate validation.” *Daubert v. Merrell Pharmaceutical, Inc.*, 509 U.S. 579 (1993) (emphasis added).

As to peer review, the Supreme Court similarly explained that peer review can be helpful but "does not necessarily correlate with reliability" because "in some instances well-grounded but innovative theories will not have been published." *Daubert, supra*, p. 593.

Accordingly, applying fundamental principles of scientific method and reliable scientific evidence endorsed by the Supreme Court, the SCC TSD Rules and Executive Order 13990 section 5 are scientifically invalid for the reasons Professors Happer and Lindzen detailed above.

B. The President’s Order Violates Congressional Directive on assessing costs and benefits of programs.

Plainly and simply stated, federal law requires an agency to weigh costs and benefits of a project. For example, in order to fully comply with the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C.S. §§ 4321-4347, an Environmental Impact Statement (EIS) must include a benefit-cost study taking into account environmental considerations.

However, Executive Order 13990 by its express terms, directs the Task Force only to weigh the “costs” and to use them “when monetizing the value” of changes in greenhouse gas emissions, including carbon dioxide. This is a plain and egregious evasion of the Congressional mandate, because, as the further statement of the CO2

Coalition Amici above shows, there are enormous and essential benefits to human life, enterprise, and the planet Earth derived directly from increased CO2 emissions.

Specifically, by Executive Order No. 13990 in January 2021, the President directed as follows:

Section 5: Accounting for the Benefits of Reducing Climate Pollution. (a) *It is essential that agencies capture the full costs of greenhouse gas emissions as accurately as possible, including by taking global damages into account. Doing so facilitates sound decision-making, recognizes the breadth of climate impacts, and supports the international leadership of the United States on climate issues. The “social cost of carbon” (SCC), “social cost of nitrous oxide” (SCN), and “social cost of methane” (SCM) are estimates of the monetized damages associated with incremental increases in greenhouse gas emissions. They are intended to include changes in net agricultural productivity, human health, property damage from increased flood risk, and the value of ecosystem services. An accurate social cost is essential for agencies to accurately determine the social benefits of reducing greenhouse gas emissions when conducting cost-benefit analyses of regulatory*

and other actions.

...(b) There is hereby established an Interagency Working Group on the Social Cost of Greenhouse Gases (the “Working Group”). The Chair of the Council of Economic Advisers, Director of OMB, and Director of the Office of Science and Technology Policy shall serve as Co-Chairs of the Working Group.

*(iii) Mission and Work. The Working Group shall, as appropriate and consistent with applicable law: publish an interim SCC, SCN, and SCM within 30 days of the date of this order, **which agencies shall use when monetizing the value of changes in greenhouse***

gas emissions *resulting from regulations and other relevant agency actions until final values are published;*

(emphasis added)

Although the President's Order decrees that his administration wishes to honor science and be consistent with applicable law, the detail in his Order contradicts and forecloses that, imposes new law upon agencies never before directed to use a fixed measure of cost-benefit that assumes and includes only costs, and usurps legislative power by decreeing on its face that "agencies shall use" the Interagency Task Force recommendations in making their decisions. This Order not only creates new duties, it also eliminates any independent expertise or discretion the agencies might themselves have to evaluate the economic impact of carbon use on the projects they must review.

C. The President's Order Violates the Constitution

The President has required the entire panoply of executive branch agency Defendants to ascribe to an unproven and, as Amici demonstrate above, invalid assertion that the emissions of carbon dioxide impose social costs that will have overall significant damaging effects in this country, worldwide and long term.

The President has thus improperly exercised executive power by using the device of a so-called interagency work group to create new law, which is beyond his Presidential authority to do under the Constitution. All this is occurring on a subject

of profound social importance by imposing a distorted and incorrect view of the natural environment on all federal agencies respecting the concept of SCC.

The trial court, after thorough hearing of testimony and review of evidence, concluded that the Task Force itself is an “agency” under the Administrative Procedures Act and as such is bound to hold notice and comment rulemaking before making rules.

Amici urge this Court to reinstate the Preliminary Injunction, lest it acquiesce in a fundamental breach of the Constitution’s provisions that maintain the separation of the powers of the executive, legislative and judicial branches.

As Mr. Justice Brandeis once wrote: “The doctrine of the separation of powers was adopted by the convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of governmental powers among three departments, to save the people from autocracy.” *Myers v. United States*, 272 U.S. 52 (1926) (*Brandeis, J., dissenting*). Cf. 1 Administrative Law § 3.01 (2021) (Matthew Bender & Co. Publisher).

The President has no more right to invade the province of the legislature, than the legislature or judiciary have to invade the President’s Constitutionally delegated tasks, such as the conduct of foreign affairs or the command of the armed forces of the country.

It is essential to American well-being and security that the courts not allow the federal executive branch, without constitutional or statutory authority, to alter

the free market rights of the people and impede the interests of states to regulate and foster commerce and industry within their borders.

CONCLUSION

For the foregoing reasons, Dr. Happer, Dr. Lindzen, and the CO2 Coalition urge this Court to grant the relief sought by the Plaintiff States, lift the Court's stay upon the trial court's preliminary injunction, affirm the preliminary injunction, and reinstate it pending the outcome of a full merits hearing.

DATED: June 22, 2022

Respectfully Submitted,

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/s/ Lexi Holinga
Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

Counsel hereby certifies that, in accordance with Federal Rule of Appellate Procedure 32(a)(7)(C), the foregoing brief contains 6,174 words, as counted by counsel's word processing system, and this complies with the applicable word limit established by the Court. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

DATED: June 22, 2022

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CERTIFICATE OF SERVICE

Counsel hereby certifies that on this 22nd day of June, 2022, a true and correct copy of the foregoing amicus curiae brief was filed with the Clerk of the United States Court of Appeals for the Fifth Circuit through the Court's CM/ECF system.

DATED: June 22, 2022

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