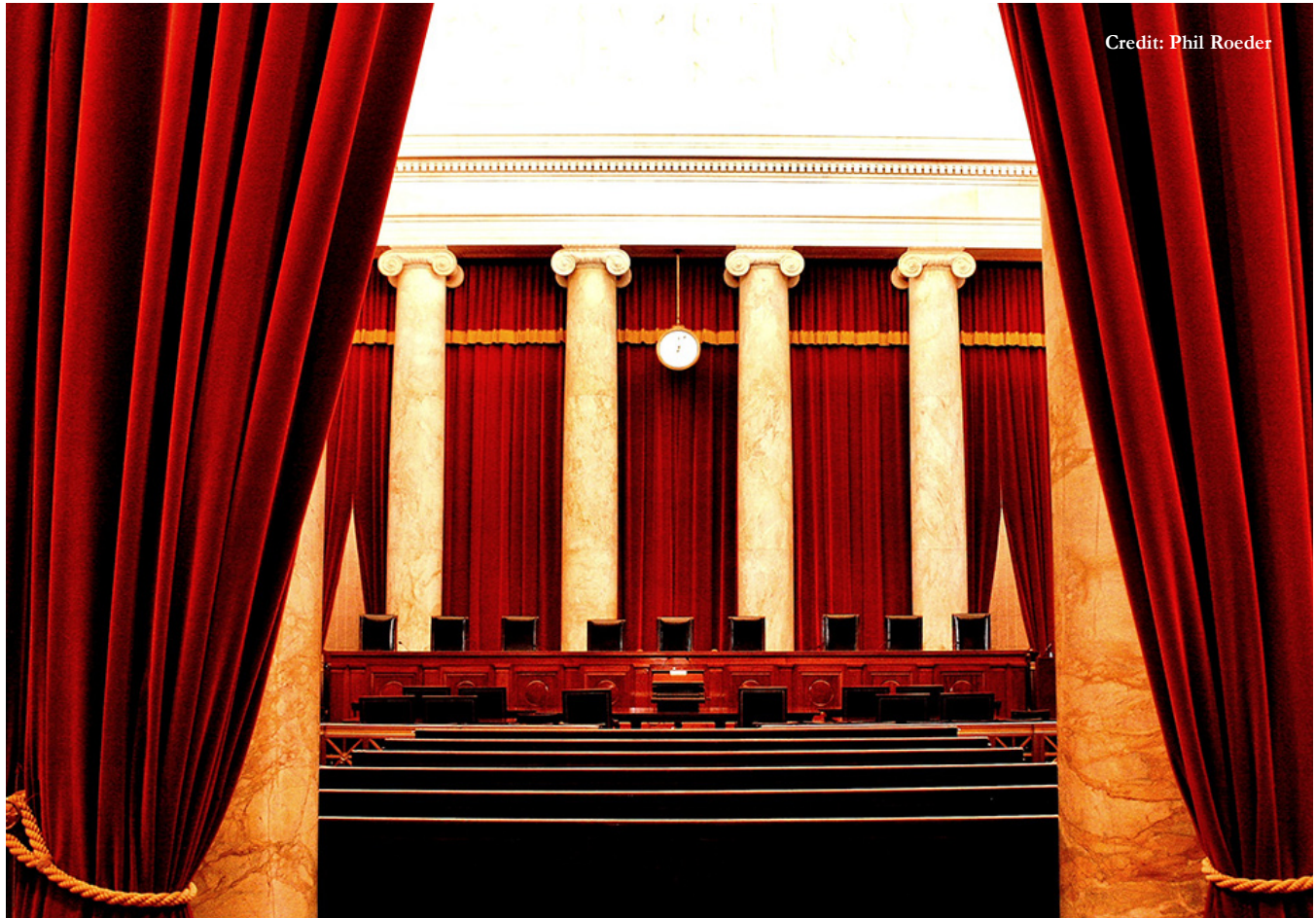


# Supreme Court Keeps Biden Administration's Social Cost of Carbon Plan in Place

— Lauren Wilson —



Credit: Phil Roeder

## Intro

On May 26, 2022, the Supreme Court allowed the Biden Administration to continue to use its metric for determining the Social Cost of Carbon.<sup>1</sup> Many lawsuits have been filed over the belief that the government has a responsibility to monitor how the United States' emissions are contributing to climate change.<sup>2</sup> However, this suit arises from a different sentiment than most: that the government has gone too far in its attempts to calculate and regulate emissions. Louisiana, Mississippi, Alabama, and seven other states sued the Biden Administration in an effort to block the enforcement of a new policy regarding the Social Cost of Carbon and the role it plays in establishing environmental policy.

## What Is the Social Cost of Carbon?

The Social Cost of Carbon (SCC) is a measurement in dollars of how much damage results from emitting one metric ton (mt) of carbon dioxide into the atmosphere.<sup>3</sup> This dollar amount enables policy makers to use a cost-benefit analysis to show when the benefits of preventing global warming are greater than the costs. The number plays an important role in determining the scope of specific environmental policies and regulations.

The SCC is calculated by analyzing the damage climate change has on the economy and human welfare. These damages include changes in agricultural productivity, human health, and cost of living.<sup>4</sup> There are four main steps in

making the calculation: 1) Predicting future emissions; 2) Calculating the effect these emissions will have on climate variables such as temperature; 3) Estimating the physical impacts on the climate and human welfare as well as monetizing those impacts; and 4) Discounting monetary damages to their respective year of emission.<sup>5</sup>

The fourth step in the calculation, applying the discount rate, greatly influences the SCC. A discount rate places a present value on costs that will occur in the future. The SCC discount rate is used to compare the value of future impacts on the environment to impacts experienced today. Some of the damages caused by climate change are expected not to become visibly problematic for decades. Therefore, according to the Environmental Protection Agency (EPA), the discount rate is needed in order to calculate the value of those future damages.<sup>6</sup> Considering the SCC is used to conduct a cost-benefit analysis regarding where and how to place regulations, the discount rate enables policy makers to quantify what should be spent today to avoid greater monetary damages in the future. The higher the discount rate, the lower the value of future damages are estimated to be.

Another factor affecting the SCC estimate is whether to consider how the United States' emissions contribute to climate change damage on a global scale. The EPA included the global impact because climate change itself is a global issue. However, some argue that the United States should not base its policies and regulations on global considerations.<sup>7</sup> Over the course of the past three administrations, there have been changes to exactly what the equation is and what is taken into consideration to form the estimates.

### Administrative History of the SCC

In 2009, President Obama created the Interagency Working Group (IWG) and tasked it with calculating estimates for the Social Cost of Carbon and other greenhouse gases. Among other things, these estimates took into consideration the global impact that the United States' emissions had on the rest of the world. The estimates also applied a discount rate of around three percent. In 2010, the Obama Administration released its last estimate of the SCC to be \$51 per metric ton, and in 2016 issued estimates for the Social Cost of Methane and Nitrous Oxide, two other greenhouse gases.<sup>8</sup>

When President Trump took office, he dismantled the IWG and instated new criteria for calculating the SCC.<sup>9</sup> Specifically, the Trump Administration removed global

considerations from the equation to focus only the United States' emissions. Additionally, a higher rate of discount, around seven percent, was used to estimate future impacts of emissions. The change in formula caused the SCC to drop to as low as \$1 mt. This low SCC allowed the Trump Administration to justify rolling back many of the environmental regulations set by prior administrations.<sup>10</sup> One example was replacing the Obama era Clean Power Plan (CPP), which was designed to reduce power plant carbon dioxide emissions by 32 percent.<sup>11</sup> The Affordable Clean Energy Rule which took the place of the CPP reduced greenhouse gas emissions from power plants by one percent.<sup>12</sup>

On January 20, 2021, President Biden issued Executive Order 13990.<sup>13</sup> This order reinstated the IWG and adopted the same method of calculation that the Obama Administration used. The Order also required the IGW to publish interim estimates for the Social Cost of Carbon. The IGW's interim estimates matched the 2016 calculation of \$51 mt for the SCC.

### Why Did Some States Sue?

The increase in the SCC estimates from \$1 to \$51 prompted the states to sue the federal government. Because the SCC is used to regulate carbon-emitting industries such as oil and gas drilling, the states believe that the estimates will be used to place heavy regulations on their most economically productive projects. The Attorney General for Louisiana, the nation's number two producer of oil and natural gas, stated that the new policy for estimates would "drive up the cost side of every regulatory action even touching greenhouse gas emissions."<sup>14</sup>

To bring suit, the states had to establish that they suffered an injury which was caused by the federal government and could be redressed by a ruling in their favor. For this injury, the states cited the negative impact to their revenues and economies that new regulations, justified by the SCC estimates, would cause. They also sought relief on the grounds that the interim estimates violate the requirements of the Administrative Procedure Act, that the President and IWG do not have authority to enforce the estimates, and that the federal government acted beyond its authority by basing the estimates on global considerations.<sup>15</sup>

### The Trial Court's Opinion

The trial court ruled in favor of the states. As a result, the trial court restored the SCC to the estimates from the

Trump Administration and blocked the Biden Administration from enforcing its interim estimates and calculation policy. The court found that Biden's executive order and the new method for calculating the SCC did not comply with the Administrative Procedure Act or Circular A-4 (a guide on how to perform proper regulatory analysis). Additionally, the court sided with the states' position that global considerations were not enforceable since Congress has established that agencies should only consider national effects. The court cited various acts such as the Clean Air Act, the Energy Policy and Conservation Act, the Outer Continental Shelf Leasing Act, and more; none of which appear to authorize the use of global effects in their considerations.

### The Court of Appeals Opinion

The federal government appealed, and the 5th Circuit Court of Appeals ruled to allow the Biden Administration to continue using its interim estimates and calculation policy. In its reasoning, the Court of Appeals stated that the Circular A-4 guidelines on proper regulatory analysis are not binding on any agency.<sup>16</sup> Therefore, the trial court should not have relied on this to stop the Biden Administration from enforcing its SCC policy.

Additionally, the Court of Appeals stated that the states' claimed economic injury resulting from the estimates was merely hypothetical and had not manifested. In other words, the method for calculating the estimates did not directly or immediately harm the states. There would need to be regulatory action taken as a direct result of the estimates for there to be sufficient injury. Agencies use many more factors than just the Social Cost of Green House Gases when determining when and how to regulate. So, to say that the interim estimates by themselves were directly responsible for any possible future injury was not accurate, according to the court.

Lastly, the Court of Appeals found that the federal defendants were harmed by the trial court's decision to ban the Biden Administration from using the interim estimates. As a result of the trial court's order to restore the estimates to those of the Trump Administration's, federal agencies were forced to comply with guidance from the previous administration. The court noted that it is beyond the authority of the federal courts to instruct a current administration's agencies to adhere to a previous administration's policies. The Court of Appeals did not comment as to the issue of including global considerations in the estimates.

### The Supreme Court's Order and its Implications

The decision was appealed up to the Supreme Court which ultimately sided with the Court of Appeals. The Supreme Court, in a single sentence order, denied the states' request to block the use of the interim estimates.<sup>17</sup> While the states may challenge future regulations justified by the SCC, government agencies will now use the Biden Administration's SCC estimates in their future regulatory actions. This will help the Biden Administration to reach its goal for the United States to reduce greenhouse gas pollution by 50 percent before 2030.<sup>18</sup>

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### Endnotes

1. Louisiana v. Biden, No. 21A658, 2022 WL 1671759 (U.S. May 26, 2022).
2. Massachusetts v. E.P.A., 549 U.S. 497, 127 S. Ct. 1438, 167 L. Ed. 2d 248 (2007).
3. EPA Fact Sheet, *Social Cost of Carbon* (December 2016).
4. Isabella Backman, *Stanford explainer: Social cost of carbon* (June 7, 2021).
5. National Academies of Sciences, et al., *Valuing Climate Damages: Updating Estimation of the Social Cost of Carbon Dioxide*, p. 39 (2017).
6. EPA Fact Sheet, *Social Cost of Carbon* (December 2016).
7. At What Cost? Examining the Social Cost of Carbon: Hearing Before the Subcommittee on Environment & Subcomm. on Oversight, Comm. on Science, Space, and Technology U.S. Government Publishing Office, *House Hearing*, 115 Cong. (2017).
8. Interagency Working Group on Social Cost of Greenhouse Gases, *Technical Support Document: Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis – Under Executive Order 12866* (Aug. 2016).
9. 82 Fed. Reg. 16093 (March 31, 2017).
10. Nadja Popovich, et al., *The Trump Administration Rolled Back More Than 100 Environmental Rules. Here's the Full List.* (Jan. 20, 2021).
11. Samantha Gross, *What is the Trump administration's track record on the environment?* (Aug. 4, 2020).
12. Environmental Protection Agency, *Fact Sheet: Proposed ACE Rule – CO<sub>2</sub> Emissions Trends* (2018).
13. 86 Fed. Reg. 7037 (Jan. 25, 2021).
14. Ariane de Vogue, et al., *Supreme Court Allows Biden Administration to Continue Counting the Costs of Planet-warming Emissions, for now.*
15. Louisiana v. Biden, No. 2:21-CV-01074, 2022 WL 438313, at \*6-9 (W.D. La. Feb. 11, 2022).
16. Louisiana v. Biden, No. 22-30087, 2022 WL 866282, at \*1 (5th Cir. Mar. 16, 2022).
17. Louisiana v. Biden, No. 21A658, 2022 WL 1671759 (U.S. May 26, 2022).
18. The White House Briefing Room, *FACT SHEET: President Biden Sets 2030 Greenhouse Gas Pollution Reduction Target Aimed at Creating Good-Paying Union Jobs and Securing U.S. Leadership on Clean Energy Technologies* (April 22, 2021).