No. _____

In the
Supreme Court of the United States

PACIFIC LEGAL FOUNDATION,
Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Carbon dioxide is a ubiquitous natural substance that is essential to life on Earth. Certain prominent scientific organizations have concluded that atmospheric emissions of carbon dioxide from man-made sources contribute to global climate change. Relying on such conclusions, the United States Environmental Protection Agency (EPA) promulgated a regulation, *Endangerment and Cause or Contribute Findings for Greenhouse Gasses under Section 202(a) of the Clean Air Act*, 74 Fed. Reg. 66,496 (Dec. 15, 2009) (the Endangerment Finding), in which it determined that carbon dioxide and related substances pose a danger to human health and welfare, thereby establishing a springboard for comprehensive federal regulation of carbon dioxide emissions under the Clean Air Act. Because carbon dioxide is virtually everywhere and in everything, the Endangerment Finding confers upon EPA unprecedented authority to direct and control the Nation's physical, economic, and social infrastructure. Congress requires that a wide variety of regulations promulgated by EPA be made available for peer review by a panel of independent scientists known as the Science Advisory Board (SAB), whose function is to ensure the scientific credibility of EPA's regulatory proposals. 42 U.S.C. § 4365(c)(1). EPA promulgated the Endangerment Finding without providing the SAB with the opportunity for scientific peer review.

The question presented is: Must the Endangerment Finding be set aside because EPA violated the congressional mandate to submit the proposed Finding to the Science Advisory Board for peer review, as required by 42 U.S.C. § 4365(c)(1)?

LIST OF ALL PARTIES

Many petitioners challenged the Endangerment Finding in the United States Court of Appeals for the District of Columbia Circuit, and many others challenged EPA regulations that depended upon the Endangerment Finding. The D.C. Circuit consolidated all the challenges into four sets of cases as follows: **(1) Lead Case No. 09-1322** (including Case Nos. 10-1024, 10-1025, 10-1026, 10-1030, 10-1035, 10-1036, 10-1037, 10-1038, 10-1039, 10-1040, 10-1041, 10-1042, 10-1044, 10-1045, 10-1046, 10-1234, 10-1235, 10-1239, 10-1245, 10-1281, 10-1310, 10-1318, 10-1319, 10-1320, 10-1321); **(2) Lead Case No. 10-1073** (including Case Nos. 10-1083, 10-1099, 10-1109, 10-1110, 10-1114, 10-1118, 10-1119, 10-1120, 10-1122, 10-1123, 10-1124, 10-1125, 10-1126, 10-1127, 10-1128, 10-1129, 10-1131, 10-1132, 10-1145, 10-1147, 10-1148, 10-1199, 10-1200, 10-1201, 10-1202, 10-1203, 10-1206, 10-1207, 10-1208, 10-1210, 10-1211, 10-1212, 10-1213, 10-1216, 10-1218, 10-1219, 10-1220, 10-1221, 10-1222; **(3) Lead Case No. 10-1092** (including Case Nos. 10-1094, 10-1134, 10-1143, 10-1144, 10-1152, 10-1156, 10-1158, 10-1159, 10-1160, 10-1161, 10-1162, 10-1163, 10-1164, 10-1166, 10-1182); and **(4) Lead Case No. 10-1167** (including Case Nos. 10-1168, 10-1169, 10-1170, 10-1173, 10-1174, 10-1175, 10-1176, 10-1177, 10-1178, 10-1179, 10-1180). The D.C. Circuit issued one opinion in connection with the referenced consolidated cases. Pacific Legal Foundation, the petitioner herein, was the petitioner in Case No. 10-1310, which was among the cases addressed by the consolidated judgment below. Other parties in the consolidated cases include the following:

The petitioners in related cases addressed by the consolidated judgment below, which are not petitioners herein, included Greg Abbott, Attorney General of Texas; Alpha Natural Resources, Inc.; American Farm Bureau Federation; Michele Bachmann, U.S. Representative, Minnesota 6th District; Haley Barbour, Governor of the State of Mississippi; Marsha Blackburn, U.S. Representative, Tennessee 7th District; Kevin Brady, U.S. Representative, Texas 8th District; Paul Broun, U.S. Representative, 10th District; Dan Burton, U.S. Representative, Indiana 5th District; Chamber of Commerce of the United States of America; Coalition for Responsible Regulation, Inc.; Collins Industries, Inc.; Collins Trucking Company, Inc.; Commonwealth of Virginia; Competitive Enterprise Institute; Nathan Deal, U.S. Representative, Georgia 9th District; Energy-Intensive Manufacturers' Working Group on Greenhouse Gas Regulation; Freedom Works; The Science and Environmental Policy Project; Georgia Agribusiness Council, Inc.; Georgia Coalition for Sound Environmental Policy, Inc.; Georgia Motor Trucking Association, Inc.; Gerdau Ameristeel US Inc.; Phil Gingrey, U.S. Representative, Georgia 11th District; Great Northern Project Development, L.P.; Industrial Minerals Association - North America; J&M Tank Lines, Inc.; Kennesaw Transportation, Inc.; Steve King, U.S. Representative, Iowa 5th District; Jack Kingston, U.S. Representative, Georgia 1st District; Landmark Legal Foundation; Langboard, Inc. - MDF; Langboard, Inc. - OSB; Langdale ChevroletPontiac, Inc.; The Langdale Company; Langdale Farms, LLC; Langdale Ford Company; Langdale Forest Products Company; Langdale Fuel Company; Mark R. Levin; John Linder, U.S. Representative, Georgia 7th District;

Louisiana Department of Environmental Quality; Missouri Joint Municipal Electric Utility Commission; National Cattlemen's Beef Association; National Environmental Development Association's Clean Air Project; National Mining Association; Ohio Coal Association; Peabody Energy Company; Rick Perry, Governor of Texas; Tom Price, U.S. Representative, Georgia 6th District; Dana Rohrabacher, U.S. Representative, California 46th District; Rosebud Mining-Co.; John Shadegg, U.S. Representative, Arizona 3rd District; John Shimkus, U.S. Representative, Illinois 19th District; South Carolina Public Service Authority; Southeast Trailer Mart, Inc.; Southeastern Legal Foundation, Inc.; State of Alabama; State of Nebraska; State of North Dakota; State of South Carolina; State of South Dakota; State of Texas; Texas Agriculture Commission; Texas Commission on Environmental Quality; Texas General Land Office; Texas Public Utilities Commission; Texas Railroad Commission; Utility Air Regulatory Group; Lynn Westmoreland, U.S. Representative, Georgia 3rd District; The American Chemistry Council; American Frozen Food American Fuel & Petrochemical Manufacturers; American Iron and Steel Institute; American Petroleum Institute; Brick Industry Association; Clean Air Implementation Project; Corn Refiners Association; Glass Association of North America; Glass Packaging Institute; Independent Petroleum Association of America; Indiana Cast Metals Association; Michigan Manufacturers Association; Mississippi Manufacturers Association; National Association of Home Builders; The National Association of Manufacturers; National Federation of Independent Business; National Oilseed Processors Association; North American Die Casting Association;

Portland Cement Association; Specialty Steel Industry of North America; Tennessee Chamber of Commerce and Industry; Western States Petroleum Association; West Virginia Manufacturers Association; and Wisconsin Manufacturers and Commerce.

Respondent herein, which was also the respondent in this case below, is the Environmental Protection Agency.

The respondents in related cases addressed by the consolidated judgment below included the U.S. Environmental Protection Agency (EPA), and Lisa P. Jackson, Administrator, U.S. Environmental Protection Agency. Lisa Perez Jackson ceased to hold the office of Administrator, U.S. Environmental Protection Agency, on February 15, 2013; that office is currently held in an acting capacity by Robert Perciasepe, Acting Administrator, U.S. Environmental Protection Agency.

CORPORATE DISCLOSURE STATEMENT

Pacific Legal Foundation is a nonprofit organization and it is not a publicly held corporation or entity; nor is it the parent, subsidiary, or affiliate of any publicly held corporation or entity.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Pacific Legal Foundation (PLF) respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit denying PLF's Petition for Review of the Endangerment Finding, entered on June 26, 2012, in the case of *Coalition for Responsible Regulation, et al. v. Environmental Protection Agency*, 684 F.3d 102 (D.C. Cir. 2012).

OPINIONS BELOW

The opinion of the D.C. Circuit is reported as *Coalition for Responsible Regulation, et al. v. Environmental Protection Agency*, 684 F.3d 102. The slip opinion is reproduced in Appendix A. The judgment of the D.C. Circuit was entered on June 26, 2012, and is reproduced in Appendix B. The order of the D.C. Circuit denying a panel rehearing is reported as *Coalition for Responsible Regulation, et al. v. Environmental Protection Agency*, No. 09-1322, 2012 U.S. App. LEXIS 26315 (Dec. 20, 2012). The order is reproduced at Appendix C. The order of the D.C. Circuit denying rehearing en banc is reported as *Coalition for Responsible Regulation v. Environmental Protection Agency*, No. 09-1322, 2012 U.S. App. LEXIS 26313 (Dec. 20, 2012). The order is reproduced at Appendix D. The challenged administrative rule is set forth in *Endangerment and Cause or Contribute Findings for Greenhouse Gasses under Section 202(a) of the Clean Air Act*, 74 Fed. Reg. 66,496 (Dec. 15, 2009), and is reproduced in Appendix F.

JURISDICTION

The D.C. Circuit had jurisdiction to review this case pursuant to 42 U.S.C. § 7607 (b), (d). The decision of the D.C. Circuit was entered on June 26, 2012. Appendix (App.) B. On December 20, 2012, the D.C. Circuit denied Petitioner's Petition for Panel Rehearing, App. E, as well as the Petitioner's Petition for Rehearing En Banc, App. D. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

42 U.S.C. § 4365(c)(1) states as follows:

> The [EPA] Administrator, at the time any proposed criteria document, standard, limitation, or regulation under the Clean Air Act, the Federal Water Pollution Control Act, the Resource Conservation and Recovery Act of 1976, the Noise Control Act, the Toxic Substances Control Act, or the Safe Drinking Water Act, or under any other authority of the Administrator, is provided to any other Federal agency for formal review and comment, shall make available to the [Science Advisory] Board such proposed criteria document, standard, limitation, or regulation, together with relevant scientific and technical information in the possession of the Environmental Protection Agency on which the proposed action is based.

STATEMENT OF THE CASE

Because carbon dioxide is ubiquitous, this case presents a rare instance in which an administrative agency's promulgation of a rule in violation of a statutory mandate will have profound societal impacts. This Court has repeatedly held that courts must "give effect, if possible, to every clause and word of a statute." *See*, *e.g.*, *Moskal v. United States*, 498 U.S. 103, 109 (1990); *United States v. Menasche*, 348 U.S. 528, 538-39 (1955); *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883). Yet the D.C. Circuit's holding below disregards the plain language of 42 U.S.C. § 4365(c)(1) and authorizes the United States Environmental Protection Agency (EPA) to ignore its nondiscretionary, statutory duty to submit to the Science Advisory Board for peer review its administrative finding that carbon dioxide and related compounds endanger human health and welfare. The holding is in conflict with decisions of this Court, a decision of the Ninth Circuit, and prior decisions of the D.C. Circuit.

A. The Endangerment Finding and its Practical Implications

The Endangerment Finding is set forth in *Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act*, 74 Fed. Reg. 66,496 (Dec. 15, 2009), reproduced in Appendix F. The finding has sparked EPA's promulgation of mobile source emissions limitations for carbon dioxide, which depend entirely on the Endangerment Finding. *See Light Duty Vehicle Greenhouse Gas Emissions Standards and Corporate Average Fuel Economy Standards; Final Rule*, 75 Fed.

Reg. 25,324 (May 7, 2010), and *Greenhouse Gas Emissions Standards and Fuel Efficiency Standards for Medium-and Heavy-Duty Engines and Vehicles*, 76 Fed. Reg. 57,106 (Sept. 15, 2011). In turn, EPA determined that the mobile source rules trigger regulatory programs for stationary sources of carbon dioxide emissions under the Clean Air Act, including the Prevention of Significant Deterioration of Air Quality Program, under which permits are issued pursuant to 42 U.S.C. §§ 7475, 7479. Further, EPA determined that requirements for stationary sources under Title V of the Clean Air Act, 42 U.S.C. § 7602(j), are triggered. EPA's interpretations of the regulatory triggers engendered by the Endangerment Finding have resulted in the promulgation of EPA's *Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule*, 75 Fed. Reg. 31,514 (June 3, 2010), which governs certain stationary source emissions of carbon dioxide throughout the nation. Additional carbon dioxide emissions controls are on EPA's regulatory agenda. *See*, *e.g.*, *Proposed Standards of Performance for Greenhouse Gas Emissions for New Stationary Sources, Electric Utility Generating Units*, 77 Fed. Reg. 22,392, *et seq*. (Mar. 27, 2012).

Roger O. McClellan is a former long-standing member of the Science Advisory Board (SAB) who served for years as a member of the SAB's Executive Committee and Co-Chair of the SAB's Clean Air Scientific Advisory Committee. He filed a declaration in the court below in support of Pacific Legal Foundation's challenge to the Endangerment Finding. Among other things, Mr. McClellan's declaration states that the Endangerment Finding "can have a profound impact on society." Declaration of Roger O. McClellan

¶ 8, Exhibit 1 of PLF's Petition for Rehearing En Banc Under Rule 35 and, In the Alternative, Petition for Rehearing Under Rule 40, reproduced in Appendix E-4. EPA has never contested the fact that the Endangerment Finding will have a profound societal impact.

B. The Science Advisory Board and Its Role in EPA Rulemaking

The SAB's mission is to provide "expert and independent advice to the [EPA] on the scientific and technical issues facing the Agency" and to assist EPA "in identifying emerging environmental problems." 40 C.F.R. § 1.25(c). SAB "functions as a technical peer review panel for [EPA]." Lynn E. Dwyer, *Good Science in the Public Interest: A Neutral Source of Friendly Facts?,* 7 Hastings W.-N.W. J. Envtl. L. & Pol'y 3, 6 (Fall 2000). A key purpose of SAB is to render advice to EPA "on a wide range of environmental issues and the integrity of the EPA's research." *Meyerhoff v. United States EPA*, 958 F.2d 1498, 1499 (9th Cir. 1992). *See* Joint Explanatory Statement of the Committee on Conference, The Environmental Research, Development, and Demonstration Authorization Act of 1978, Conf. Rep. 96-722, 3296 (1977) (Congress gave SAB the job "of advising the [EPA] on the adequacy of scientific information supporting proposed regulations.")

EPA is required by statute to submit to SAB any proposed "criteria document, standard, limitation, or regulation under the Clean Air Act . . . together with relevant scientific and technical information in the possession of [EPA] on which the proposed action is based" at the time the proposal is made available to other federal agencies "for formal review and

comment." 42 U.S.C. § 4365(c)(1). Such "formal review and comment" occurs during the public comment period for regulatory proposals. *Lead Industries Ass'n v. EPA*, 647 F.2d 1130, 1137 (1980) (proposed criteria documents prepared by EPA under the Clean Air Act were properly submitted to SAB during public comment period). *See Mo. Coalition v. United States EPA*, No., 04-cv-00660, 2005 U.S. Dist. LEXIS 42186, at *5 (E.D. Mo. Sept. 14, 2005) ("drafts should be made available for public review and comment and review by . . . the EPA's Science Advisory Board."). A scientist who served on the Science Advisory Board for over 20 years has stated in a declaration filed below, "I have always understood that EPA's proposed regulations under the Clean Air Act would be made available to the SAB for review at the earliest possible time and no later than the date the regulations are first published in the Federal Register for comment by other federal agencies and the general public." McClellan Decl. ¶ 7, App. E-4.

The purpose of the submittal requirement is to provide SAB an opportunity to make available "its advice and comments [to EPA] on the adequacy of the scientific and technical basis of the [regulatory proposals]," 42 U.S.C. § 4365(c)(2), and the submittal duty is nondiscretionary. *American Petroleum Inst. v. Costle*, 665 F.2d 1176, 1188 (D.C. Cir. 1981) (*API*) ("The language of the statute indicates that making a [regulatory proposal] . . . available to the SAB for comment is mandatory . . . ."). *See* Joint Explanatory Statement, H.R. Conf. Rep. 96-722, 3296 (1977) ("The first paragraph of this subsection *requires* the Administrator of EPA to make available to the [Science Advisory] Board any proposed criteria, document, standard, limitation or regulation together with

scientific background information in the possession of the Agency on which the proposed action is based." (emphasis added)).

"SAB essentially serves a critical gatekeeper role whose mission is to ensure that EPA's regulatory proposals are based upon sound scientific and technical principles." McClellan Decl. ¶ 11, App. E-5. EPA has often "changed its regulatory proposals and schedules based on review and comment by SAB. This has been the rule rather than the exception . . . as SAB was created to provide an expert reality check for EPA scientific and technical determinations that inform policy judgments." McClellan Decl. ¶ 10, App. E-5.

C. The D.C. Circuit's Decision

PLF filed its Petition for Review in the D.C. Circuit on Oct. 4, 2010, pursuant to Clean Air Act Section 307(b)(1), 42 U.S.C. § 7607(b)(1), on the grounds that EPA improperly denied PLF's administrative petition for reconsideration of the Endangerment Finding. The petition for reconsideration was based on EPA's failure to comply with the requirement set forth in 42 U.S.C. § 4365(c)(1) to submit the Endangerment Finding to SAB before the finding was promulgated.

In the D.C. Circuit, PLF argued that EPA's failure to submit the Endangerment Finding to SAB for peer review prior to promulgating the finding required vacatur and remand under *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 522 (D.C. Cir. 1983) and *Lead Industries Ass'n v. EPA*, 647 F.2d at 1137. Without addressing the specific arguments raised by PLF, the D.C. Circuit concluded that EPA did not violate the SAB submittal requirement because

(1) it was "not clear" whether the Endangerment Finding was submitted "to any other Federal agency for formal review and comment," thereby triggering the SAB submittal duty, *Coalition for Responsible Regulation*, 684 F.3d at 124, and (2) "even if EPA violated its mandate by failing to submit the Endangerment Finding to the SAB, Industry Petitioners have not shown that this error was 'of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such errors had not been made.'" *Coalition for Responsible Regulation*, 684 F.3d at 124 (citations omitted).

PLF now timely petitions this Court to resolve a question of exceptional nationwide importance: whether an administrative agency may ignore a statutory mandate to obtain independent peer review of a scientific finding that serves as the trigger for a cascade of federal regulations that will have substantial impacts on the Nation for years to come.

REASONS FOR GRANTING THE WRIT

THE COURT SHOULD GRANT THE WRIT TO ADDRESS AN ISSUE OF NATIONAL IMPORTANCE: ALLOWING EPA TO EVADE THE CONGRESSIONAL MANDATE OF SCIENTIFIC PEER REVIEW OPENS THE DOOR TO A TORRENT OF REGULATIONS THAT WILL PROFOUNDLY IMPACT THE NATION'S ECONOMY

A. The Endangerment Finding Will Have An Extraordinary Effect Upon The Nation's Physical, Economic, and Social Infrastructure

EPA has never disputed the fact that the Endangerment Finding embodies one of the most burdensome, costly, and far-reaching regulatory programs ever adopted by a federal administrative agency. The Endangerment Finding is the springboard for EPA's regulation of an entirely new category of emissions under the Clean Air Act, including the ubiquitous natural substance carbon dioxide. Because carbon dioxide is everywhere and in everything, the Endangerment Finding confers upon EPA unparalleled authority to regulate virtually every aspect of the Nation's economy. Indeed, EPA itself reached the conclusion that the Endangerment Finding could lead to "absurd" economic and regulatory impacts. 75 Fed. Reg. at 31,517 ("costs to sources and administrative burdens to permitting authorities . . . so severe that they bring the judicial doctrine of 'absurd results' into play.").

EPA relies on the Endangerment Finding to support a series of new and costly federal regulations, including the Auto Rule, 75 Fed. Reg. 25,324 (May 7, 2010), under which it regulates carbon dioxide emissions from automobiles and SUVs, and the Truck Rule, 76 Fed. Reg. 57,106 (Sep. 15, 2011), under which it regulates such emissions from medium- and heavy-duty trucks. In turn, those rules have triggered the Prevention of Significant Deterioration of Air Quality Program for carbon dioxide, under which permits are issued for stationary sources pursuant to 42 U.S.C. §§ 7475, 7479. Also triggered are EPA's permitting requirements for stationary sources under Title V of the Clean Air Act, 42 U.S.C. § 7602(j). These regulations and interpretations led EPA to promulgate its Tailoring Rule, 75 Fed. Reg. 31,514 (June 3, 2010), by which EPA in effect rewrote the Clean Air Act's emissions thresholds for regulating stationary sources, because EPA deemed them unmanageable in light of its Endangerment Finding. Remarkably, EPA has stated that the additional paperwork costs alone from adding carbon dioxide and related substances to the Title V permitting program could reach $22.5 billion. *See* 75 Fed. Reg. at 31,540 & Table V-I. This only adds to EPA's own characterization of the "absurd" regulatory impacts stemming from the Endangerment Finding. *Id*. at 31,517. The genesis of the regulatory absurdity is EPA's arrogation of power over the Nation's economic life through the Endangerment Finding.

A scientist who served on the Science Advisory Board for over two decades, including years of service as Co-Chair of SAB's Clean Air Advisory Committee, offered written testimony in this case:

> I am familiar with EPA's finding made in December of 2009 that greenhouse gases pose a threat to human health and welfare (the "Endangerment Finding"). The Endangerment Finding is certainly the type of regulatory action that SAB was created to review. It deals with novel, cutting edge scientific and technical issues that can have a profound impact on society. Those issues require the type of detailed expert scrutiny that SAB review was intended to provide.

McClellan Decl. ¶ 8, App E-4.

As this Court observed in connection with the issue of whether EPA had legal authority under the Clean Air Act to even consider making an Endangerment Finding for carbon dioxide, "[T]he unusual importance of the underlying issue persuaded us to grant the writ." *Massachusetts v. EPA*, 549 U.S. 497, 506 (2007). Here, the "underlying issue" is comparable in scope and effect, and is no less important: Whether EPA may refuse to comply with a nondiscretionary duty to submit to the Science Advisory Board for peer review its Endangerment Finding for carbon dioxide, the same substance at issue in *Massachusetts v. EPA*. Because of the pervasive presence of carbon dioxide, the Endangerment Finding opens the door to EPA regulation of aspects of national life that heretofore have remained untouched by federal statute or rule.

Given the extraordinary societal impacts of the Endangerment Finding, the instant Petition for Writ of Certiorari provides this Court with an opportunity to re-establish and emphasize with clarity for lower courts, as well as for administrative agencies, the

salutary principle that nondiscretionary statutory rulemaking procedures may not be ignored simply because an agency wishes to ignore them. *See Bennett v. Spear*, 520 U.S. 154, 172 (1997) ("It is rudimentary administrative law that discretion as to the substance of the ultimate decision does not confer discretion to ignore the required procedures of decisionmaking.").

B. By Violating the SAB Submittal Requirement, EPA Has Illegally Arrogated to Itself Authority to Regulate The Nation's Economy

A brief summary of the genesis of the Endangerment Finding, the manner in which it was promulgated, and the D.C. Circuit's perfunctory review of EPA's violation of the SAB submittal requirement provides insight into the importance of the issues raised by this case.

1. *Massachusetts v. EPA*: The Genesis of the Endangerment Finding

In *Massachusetts v. EPA*, this Court established a limited proposition: carbon dioxide and certain other substances, referred to as greenhouse gases, are covered by the broad definition of the term "air pollutants" set forth in the Clean Air Act, 42 U.S.C. § 7602(g), 549 U.S. at 529. Accordingly, the *Massachusetts v. EPA* Court opined that section 202(a)(1) of the Act authorizes EPA to regulate emissions of such substances from new motor vehicles, *id.* at 532, *see* 42 U.S.C. § 7521(a)(1), *if* EPA first makes the requisite endangerment finding. The Court underlined that, "We need not and do not reach the

question whether on remand EPA must make an endangerment finding." 549 U.S. at 534.

In due course, EPA went on to make the Endangerment Finding, but nothing in *Massachusetts v. EPA* or any other decision of this Court authorizes EPA to refuse to comply with the requirements of any federal statute in making the finding.

2. The SAB Submittal Requirement Is Mandatory

EPA was statutorily required to submit the Endangerment Finding to SAB for review before the finding was promulgated. This follows from the fact that the Endangerment Finding is a legislative-type "rule" within the meaning of the Administrative Procedure Act, 5 U.S.C. § 551(4) ("'rule' means . . . an agency statement of general . . . applicability and future effect designed to . . . prescribe law or policy"). This Court has recognized that, "[i]f EPA makes a finding of endangerment, the Clean Air Act *requires* the Agency to regulate emissions of the deleterious pollutant from new motor vehicles." *Massachusetts v. EPA*, 549 U.S. at 533 (emphasis added). Because the Endangerment Finding binds EPA to undertake a specific action, *i.e.*, regulating motor vehicle emissions, the proposed finding constituted a regulatory proposal. Accordingly, EPA's duty to submit the proposed Endangerment Finding to SAB was "mandatory." *API*, 665 F.2d at 1188. The SAB statute states explicitly that EPA "shall" make regulatory proposals available to the SAB. 42 U.S.C. § 4365(c)(1). This Court has observed that when a statute uses the term "shall" in prescribing a duty, one is not at liberty to refuse to perform the duty. *See*, *e.g.*, *Alabama v. Bozeman*, 533 U.S. 146, 153 (2001) (Congress's specification of an

obligation that uses the word "shall" usually connotes a mandatory command.) *See also* Joint Explanatory Statement, H.R. Conf. Rep. 96-722, 3296 (SAB statute "*requires* . . . EPA to make available to the [SAB]" regulatory proposals. (Emphasis added)).

3. EPA Was Required To Submit the Endangerment Finding to SAB During the Public Comment Period

The time for SAB submittal is no later than during the public comment period on proposed regulations. *Lead Industries Ass'n v. EPA*, 647 F.2d at 1137; *API*, 665 F.2d at 1188-89; McClellan Decl. ¶ 7, App. E-4. This is because "the intent of [the SAB statute] is to ensure that the [SAB] is able to comment in a well-informed manner on any regulation that it so desires." Joint Explanatory Statement, H.R. Conf. Rep. 96-722, 3296 (1977). For such comments to be meaningful, SAB's statutory authority applies specifically to "advising [EPA] on the adequacy of scientific information supporting *proposed* regulations,"—*i.e.*, before they are promulgated. *Id.* (Emphasis added). Because EPA failed to submit the proposed Endangerment Finding to SAB before it was promulgated (or at any time, for that matter), it violated the mandatory SAB submittal requirement.

Citing 49 U.S.C. § 32902(j), the D.C. Circuit observed, without explanation, that it was "not clear" whether the Endangerment Finding was subject to a "formal review and comment . . . in which other agencies are given the opportunity to provide written comments about impacts of a proposed regulation on the reviewing agency's universe of responsibility." *Coalition for Responsible Regulation*, 684 F.3d at 124.

But the statutory provision cited by the D.C. Circuit has nothing to do with EPA or any of the statutory authorities under which it operates. Rather, 49 U.S.C. § 32902(j) requires the Secretary of *Transportation* to consult with the Secretary of *Energy* before proposing an average fuel economy standard. Of course, that duty is irrelevant to any duty of EPA.

The D.C. Circuit itself has implicitly recognized that the only "formal" review and comment period for EPA's regulatory proposals occurs during the general *public* comment period for such proposals. *Lead Industries Ass'n v. EPA*, 647 F.2d at 1143. Because SAB submittal is "mandatory," *API*, 665 F.2d at 1188-89, EPA must submit proposed regulations to SAB no later than during the public comment period. That is the only time "any other federal agency" is provided with a formal opportunity to comment on EPA's regulatory proposals. Accordingly, as a practical matter, the only way to give effect to the requirement that EPA must submit regulatory proposals to the SAB whenever they are "provided to any other Federal agency for *formal* review and comment," 42 U.S.C. § 4365(c)(1) (emphasis added), is to require SAB submittal during the formal, general public comment period on EPA's regulatory proposals. *See Moskal v. United States*, 498 U.S. at 109 (courts should give effect to every clause and word of a statute). Consistent with this analysis, before *Coalition for Responsible Regulation*, EPA's long-standing custom and standard operating procedure was to submit regulatory proposals to SAB for review during public comment periods.

> I have always understood that EPA's proposed regulations under the Clean Air Act

> would be made available to the SAB for review at the earliest possible time and no later than the date the regulations are first published in the Federal Register for comment by other federal agencies and the general public.

McClellan Decl. ¶ 7, App. E-4.

4. The D.C. Circuit's Perfunctory Review of the SAB Issue Was Inadequate in Light of the Extraordinary Results Stemming From EPA's Violation of the SAB Submittal Requirement

The broad societal implications of the Endangerment Finding merited more than the summary treatment given to the SAB issue by the decision below, which accorded to the SAB submittal obligation a total of three paragraphs. App. A-40-41. EPA should not be permitted to arrogate to itself unprecedented power to regulate the Nation's infrastructure, without careful examination of whether the Agency failed to comply with the congressional mandate of peer review. Such a careful examination was not provided by the perfunctory review of the court below, but this Court has the opportunity to do so by granting the writ.

C. The D.C. Circuit's Approval of EPA's Decision To Ignore a Statutorily Mandated Rulemaking Procedure Conflicts With Both Long-Standing Precedent of This Court and Ninth Circuit Precedent

The core holding of the opinion below was that EPA was not required to comply with its statutory duty to submit the Endangerment Finding to SAB for review "even if EPA violated its mandate." *See Coalition for Responsible Regulation v. EPA*, 684 F.3d at 124.

This holding conflicts with the fundamental rule established by this Court that an administrative agency is not permitted to disregard with impunity a mandated statutory rulemaking procedure. *Bennett v. Spear*, 520 U.S. at 172. Until the D.C. Circuit's decision in *Coalition for Responsible Regulation*, that axiomatic proposition of administrative law had not been questioned. Importantly, in a recent case involving a citizen suit brought under the Clean Water Act, the Ninth Circuit cited *Bennett v. Spear* for the proposition that federal courts must require administrative agencies to adhere to mandated decisionmaking procedures. *Our Children's Earth Fund v. EPA*, 527 F.3d 842, 847 (9th Cir.), *cert denied*, 555 U.S. 1045 (2008) ("As the Supreme Court teaches, . . . 'It is rudimentary administrative law that discretion as to the substance of the ultimate decision does not confer discretion to ignore the required procedures of decisionmaking.'"). Indeed, district courts in the D.C. Circuit have consistently followed the principle that administrative agencies must scrupulously follow statutorily mandated adminis-

trative procedures. *See*, *e.g.*, *Defenders of Wildlife v. Jackson*, 284 F.R.D. 1, 4 (D.D.C. 2012); *Sierra Club v. Leavitt*, 355 F. Supp. 2d 544, 550 (D.D.C. 2005).

Because the D.C. Circuit itself has recognized that EPA's duty to submit regulatory proposals to the SAB is nothing short of mandatory, *API v. Costle*, 665 F.2d at 1188, the decision below that EPA could ignore the SAB submittal requirement in connection with the Endangerment Finding breaks with the Circuit's own precedent, and flatly contradicts this Court's pronouncements in *Bennett v. Spear*, 520 U.S. at 172, and *Alabama v. Bozeman*, 533 U.S. at 153, as well as the Ninth Circuit's articulation in *Our Children's Earth Fund*, 527 F.3d at 847.

D. The D.C. Circuit's Decision Provides Administrative Agencies With Perverse Incentives To Disregard Statutory Rulemaking Requirements, Thereby Undermining Decisions of This Court

The decision below creates incentives for administrative agencies to ignore mandated rulemaking procedures, thereby thwarting this Court's insistence that nondiscretionary procedures be followed. *Bennett v. Spear*, 520 U.S. at 172; *Alabama v. Bozeman*, 533 U.S. at 153. *See also* McClellan Decl. ¶ 9, App. E-4 ("[By withholding the Endangerment Finding from SAB,] EPA was interfering with the purposes for which SAB had been created, namely, to provide scientific and technical credibility to EPA regulatory decisions."). Significantly, the SAB submittal requirement applies not only to EPA's regulatory proposals under the Clean Air Act but also

to its regulatory proposals under "the Federal Water Pollution Control Act, the Resource Conservation and Recovery Act of 1976, the Noise Control Act, the Toxic Substances Control Act, or the Safe Drinking Water Act, or under *any other authority* of the Administrator." 42 U.S.C. § 4365(c)(1) (emphasis added). Thus, the SAB submittal requirement applies to each and every one of EPA's regulatory programs.

By allowing EPA to ignore its mandatory duty to submit Clean Air Act regulatory proposals to SAB, the D.C. Circuit has implicitly signaled to the Agency that it may also ignore its mandatory duty to adhere to the SAB submittal requirement in connection with rulemakings under other statutes it implements, whenever it so chooses, thereby undercutting this Court's overarching rule that administrative agencies must comply with nondiscretionary rulemaking procedures, no matter how inconvenient those procedures may appear to the agency. *Bennett v. Spear*, 520 U.S. at 172.

And this Court cannot ignore the potentially broader reach of the decision below. The D.C. Circuit hears a large number of appeals from administrative agency actions. *Coalition for Responsible Regulation* could be construed as an implicit invitation for other agencies to short-change nondiscretionary rulemaking procedures, thereby undercutting to an even greater degree this Court's decisions in *Bennett v. Spear*, 520 U.S. at 172 (department of Interior must consider economic impacts before designating critical habitat for endangered or threatened species, as required by the Endangered Species Act), and *Alabama v. Bozeman*, 533 U.S. at 153-54, (violation is not "harmless" or

"technical" in light of the "absolute language" of anti-shuttling provision).

Before its decision in *Coalition for Responsible Regulation*, the D.C. Circuit itself had long held that, when an administrative agency utterly fails to comply with a statutory rulemaking requirement that does not by its own terms limit judicial review, the failure cannot be considered harmless error if there is any uncertainty regarding what the rule may have been but for the failure. *Sugar Cane Growers Coop. of Fla. v. Veneman*, 289 F.3d 89, 96 (D.C. Cir. 2002) (In promulgating a rule under the Food Security Act, 7 U.S.C. § 1308a, an "utter failure" by the Department of Agriculture to comply with notice and comment requirements under the Administrative Procedure Act "cannot be considered harmless if there is *any* uncertainty at all as to the effect of that failure." (emphasis added)). *Accord, New Jersey Dep't of Envtl. Prot. v. EPA*, 626 F.2d 1038, 1039, 1049-50 (D.C. Cir. 1980) (EPA's utter failure to comply with procedural requirements of the Administrative Procedure Act requires reversal of a rule promulgated under the Clean Air Act.).

The SAB statute, 42 U.S.C. § 4265, does not in any way limit judicial review of EPA's failure to comply with the mandatory SAB submittal requirement. There is a strong presumption in favor of judicial review of administrative agency actions, and there must be "clear and convincing evidence" showing Congress's intent to shield any particular administrative agency action from full judicial review. *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967). Nothing in the SAB statute evidences such a congressional intent. *See Sackett v. EPA*, 132 S. Ct.

1367, 1373 (2012) (presumption of judicial review may be overcome only by evidence of congressional intent to restrict or limit review).

Just as an utter failure to comply with the independent requirements of the Administrative Procedure Act required a reversal in *Sugar Cane* and *New Jersey*, so too did EPA's utter failure to comply with the independent requirements of the SAB statute. By ignoring its own precedent in *Sugar Cane* and *New Jersey*, the court below set the stage for federal administrative agencies to take liberties with statutorily mandated rulemaking procedures, contrary to the dictates of *Bennett v. Spear*. This Court has not hesitated to constrain administrative agencies who failed to discharge mandatory duties when it has found "agency officials zealously but unintelligently pursuing their environmental objectives." 520 U.S. at 176-77.

E. By Ignoring Its Own Precedent and Conflating Judicial Review Procedures under Two Separate Statutes, the D.C. Circuit Has Sanctioned EPA's Illegal Move to Chart the Course of the Nation's Economy

Remarkably, the D.C. Circuit did not even address the Petitioner's argument that EPA's failure to submit the Endangerment Finding to SAB violated the standards set forth by the D.C. Circuit itself in *Sugar Cane* and *New Jersey*. Rather, without analysis, the court below concluded, "Industry Petitioners have not shown that this error was 'of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such

errors had not been made.'" *Coalition for Responsible Regulation*, 684 F.3d at 124.

In absolving EPA of its duty to comply with a nondiscretionary rulemaking procedure, the D.C. Circuit not only violated the standards set down by this Court in *Bennett v. Spear*, 520 U.S. at 172, the Ninth Circuit in *Our Children's Earth Fund*, and its own standards set down in *Sugar Cane* and *New Jersey*, but also ignored its own prior decision in *Kennecott Corp. v. EPA*, 684 F.2d 1007, 1017 (D.C. Cir. 1982). In *Kennecott*, EPA had denied an administrative petition for reconsideration of a rule by asserting that its failure to include certain documents in the rulemaking record was not significant because, even if the documents had been included, EPA would have come to the same regulatory conclusion. The *Kennecott* court disagreed, stating that the "absence of those documents . . . makes impossible any meaningful comment on the merits of EPA's assertions." *Id*. at 1018. "EPA's failure to include such documents constitutes reversible error, for the uncertainty that might be clarified by those documents . . . indicates a 'substantial likelihood' that the regulations would 'have been significantly changed.'" *Id*. at 1018-19.

Because the purpose of the SAB submittal requirement is to provide SAB an opportunity to make available "its advice and comments [to EPA] on the adequacy of the scientific and technical basis of [regulatory proposals]," 42 U.S.C. § 4365(c)(2), Congress could not have contemplated that SAB review would be no more than a mere formality or a superfluous gesture. *Moskal v. United States*, 498 U.S. 103 (courts should give effect to every clause and word of a statute). In fact, Congress contemplated

that EPA's proposed Clean Air Act regulations would significantly evolve, mature, and otherwise change as a result of SAB's scientific and technical advice. Dwyer, *supra*, at 6-7 (SAB was created to function as a scientific and technical peer review panel to provide EPA with guidance, so that the Agency's rulemaking is not based on erroneous or untrustworthy data or conclusions). *See* McClellan Decl. ¶¶ 10-12, App. E-5.

In this regard, the legislative history of the statute creating SAB is instructive. SAB's role in EPA's rulemaking process is to "be able to review conflicting claims and advise the [EPA] on the adequacy and reliability of the technical basis for rules and regulations." Joint Explanatory Statement, H.R. Conf. Rep. 96-722, 3295-96. The Legislative History also states:

> Much of the criticism of the Environmental Protection Agency might be avoided if the decisions of the Administrator were fully supported by technical information which had been reviewed by independent, competent scientific authorities.
>
> . . . [T]he intent of [the SAB submittal requirement] is to ensure that the [SAB] is able to comment in a well-informed manner on any regulation that it so desires.

Id.

Thus, congressional contemplation of a "substantial likelihood" that EPA's regulatory proposals would undergo "significant change" as a result of SAB review is built into the fabric of the SAB statute, 42 U.S.C. § 4365, and that is why SAB submittal is "mandatory" under *API v. Costle*, 665 F.2d

at 1188. "[Courts] must reject administrative constructions which are contrary to clear congressional intent." *Chevron, U.S.A. v. NRDC, Inc.*, 467 U.S. 837, 843 n9 (1984).

Accordingly, even under the D.C. Circuit's own standard, uncertainty created by EPA's failure to submit the Endangerment Finding to SAB for review indicates a "substantial likelihood" that the rule would have been "significantly changed" had the procedural error not been made. *See Coalition for Responsible Regulation*, 684 F.3d at 124 ("a substantial likelihood that the rule would have been significantly changed if such errors had not been made."). *See also*, *Kennecott*, 684 F.2d at 1017. This conclusion is echoed in a declaration filed below by a long-standing member of the SAB:

> Based upon my more than two decades of experience as a member of SAB, after it was established legislatively, my more than 15 years of service as a member of the SAB Executive Committee and my knowledge of how SAB interacts with EPA, I believe there is substantial likelihood that the Endangerment Finding would have been substantially changed in response to advice made available to SAB for review prior to its promulgation.

McClellan Decl. ¶ 12, App. E-5.

At bottom, the difference between the standards set forth in *Sugar Cane* and *Kennecott*, both of which were ignored by the *Coalition for Responsible Regulation* court, is one of degree. Under *Sugar Cane*, "any" uncertainty regarding the final outcome of the

rule is sufficient to invalidate the rule. 289 F.3d at 96. Under *Kennecott*, the uncertainty must raise an inference that there is a "substantial likelihood" that the rule would have been "significantly changed" had the procedural error not been made. 684 F.2d at 1017.

Small Refiner Lead Phase-Down Task Force v. EPA, 705 F.2d 506, explains the reason for the difference. In amending the Clean Air Act in 1977, Congress "wanted to add *new* procedural protections" to EPA rulemaking beyond those set forth in the Administrative Procedure Act ("APA") and other statutes. *Id*. at 522 (emphasis in original). Congress "also wanted to minimize disputes over EPA's compliance with the *new* procedures," *id* (emphasis added), and "did not intend to cut back" on statutory procedural safeguards located outside of the Clean Air Act. *Id*. Thus, the "substantial likelihood" standard was intended to apply to procedural violations of the additional procedural protections set forth in the Clean Air Act Amendments of 1977 and not to an utter failure to abide by rulemaking procedures required in legislation other than the Clean Air Act. *Id*. at 522-24.

Especially in light of the fact that the SAB submittal requirement applies to regulatory proposals generated by *all* of EPA's regulatory programs and not just those arising under the Clean Air Act, it is important to underscore the relationship between the procedural requirements of the SAB statute and the substantive statutes that EPA administers, including the Clean Air Act. Consistent with this Court's instructions regarding statutory interpretation, all of the statutes that provide EPA with either regulatory or procedural duties, or both, should be construed in a way that makes them consistent with each other, if at

all possible. *Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518, 524 (1986) (differing statutes should be interpreted so as to be consistent). The SAB statute contains no limitations on judicial review of the SAB submittal requirement. The Clean Air Act places limitations only on judicial review of rulemaking procedures mandated by the Clean Air Act itself. Accordingly, the Clean Air Act's limitations on judicial review of violations of that Act's procedures do not and cannot apply to judicial review of violations of procedures set forth in the entirely separate SAB statute. This follows from the fact that the SAB statute's mandatory submittal requirement does not set forth an exception for rules promulgated by EPA under the Clean Air Act. Nor does the Clean Air Act provide any hint that rules promulgated thereunder need not undergo SAB review.

Because the D.C. Circuit conflated the independent judicial review standards of the two statutes, it is now the law of the D.C. Circuit that EPA may unilaterally ignore its statutory duty to submit a regulatory proposal for peer review to the Science Advisory Board, even where the regulation deals with cutting edge scientific issues that will have profound impacts on society. The decision below, which runs counter to this Court's insistence that administrative agencies comply with nondiscretionary rulemaking procedures, *Bennett v. Spear*, 520 U.S. at 172, provides EPA with an unimpeded path to control carbon dioxide emissions throughout the Nation, thereby giving EPA a green light to broadly regulate in areas of economic and social life that heretofore have been closed to federal government involvement.

F. The Extraordinary Impacts of Allowing the Endangerment Finding to Go into Effect Without Scientific Peer Review Can Be Avoided Only If This Court Grants Certiorari

It is the ubiquitous nature of carbon dioxide that makes this case one of extraordinary national importance. Accordingly, just as this Court granted certiorari in *Bennett v. Spear* in order to determine whether the Department of Interior may neglect its mandatory duty to consider the economic impacts of critical habitat designation in a case involving substantial economic impacts, so too this Court should grant certiorari here so that it may determine whether EPA may neglect its mandatory duty to submit the Endangerment Finding to SAB for scientific peer review, in a case where the economic impacts are far greater. Only this Court is in a position to address this issue of national importance.

Because carbon dioxide is everywhere, the Endangerment Finding empowers EPA to regulate the Nation's physical, economic, and social infrastructure. It bears repeating: This Court in *Massachusetts v. EPA*, which also involved carbon dioxide, determined that the writ of certiorari should be granted because of "the unusual importance of the underlying issue." 549 U.S. at 506. And as Judge Tatel stated in the D.C. Circuit's earlier denial of en banc review in that same case, if the issues arising in connection with the then-future Endangerment Finding are "not a matter of exceptional importance, then those words have no meaning." *Massachusetts v. EPA*, 433 F.3d 66 (D.C. Cir. 2005) (Tatel, J., dissenting). Because the Endangerment Finding "can have a profound impact

on society," McClellan Decl. ¶ 8, App. E-4, if ever there were an issue of exceptional importance to the Nation, it is to be found in the Endangerment Finding. The possibility that a finding of such great moment was made illegally provides ample justification for granting the writ.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

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Respectfully submitted,

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