No. 12-1153

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 Federal Circuit

Motion for Leave to File Brief Amicus Curiae and Brief Amicus Curiae of California Construction Trucking Association as Amicus Curiae In Support of Petitioner

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to this Court's Rule 37.2(b), the California Construction Trucking Association ("CCTA") respectfully requests leave of the Court to file this brief amicus curiae in support of Petitioner.

The opinion below, Coalition for Responsible Regulation, Inc., et al. v. Environmental Protection Agency, 684 F.3d 102 (D.C. Cir. 2012) was a consolidated opinion for approximately 80 different cases challenging four different rules promulgated by the United States Environmental Protection Agency. There were approximately 60 different counsel of record for the various parties, and not all of their consent could be obtained prior to filing the instant brief, which necessitated the filing of this motion.

In an effort to obtain the consent of all parties, CCTA sent requests for consent via electronic mail and the United States Postal Service to all counsel in the proceedings below for whom contact information could be obtained.

Written consent was obtained from the U.S. Solicitor General, the U.S. Department of Justice, the States of Michigan, Nebraska, Virginia and Texas, the Utility Air Regulatory Group, the American Farm Bureau Federation, the National Mining Association, and the Peabody Energy Company.

In addition, the following parties sent a letter to this Court on April 8, 2013 giving blanket consent to the filing of amicus briefs in support of any party or no party in three cases, including the instant

case: Center for Biological Diversity; Conservation Law Foundation; Environmental Defense Fund; Georgia ForestWatch; Indiana Wildlife Federation; Michigan Environmental Council; National Wildlife Federation; Natural Resources Council of Maine; Natural Resources Defense Council; Ohio Environmental Council; Sierra Club; Wetlands Watch, Wild Virginia, the States of California, Connecticut, Delaware, Illinois, Iowa, Maine, Maryland, Minnesota, New Hampshire, New Mexico, New York, North Carolina, Oregon, Rhode Island, Vermont, and Washington, the Commonwealth of Massachusetts, and the City of New York.

None of the remaining parties expressly withheld consent, but no response to the request for consent was received from the American Chemistry Council, the Coalition for Responsible Regulation, Inc., the Chamber of Commerce of the United States of America, the Association of Global Automakers, the Municipal Gas Commission of Missouri, the States of Alabama, Florida, Georgia, Indiana, Kansas, Kentucky, Louisiana, North Dakota, Oklahoma, South Carolina, South Dakota, or Utah.

Thus, while consent was obtained from approximately three-quarters of the parties to the consolidated cases below, achieving a 100% response rate was simply not possible given the high number of parties and the narrow window of time within which CCTA had to obtain consent.

CCTA has a strong interest in this Court granting review in this case because the economic burdens which will flow from the regulations promulgated by EPA are enormous.

For the foregoing reasons, CCTA respectfully requests leave of the Court to file this brief amicus curiae in support of the grant of certiorari.

Respectfully submitted,

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TABLE OF CONTENTS

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. ALL PROPOSED RULES MUST BE SUBMITTED TO THE SAB 3

II. THE MANDATORY DUTY TO SUBMIT THE PROPOSED RULE TO SAB WAS TRIGGERED .. 5

III. THE FAILURE TO SUBMIT THE REGULATION TO SAB WAS NOT HARMLESS . 7

IV. THE IMPACT OF THE ERROR HAS GRAVE CONSEQUENCES FOR THE TRANSPORTATION INDUSTRY 9

A. EPA Promulgated Emissions Standards for Heavy Duty Trucks 9

B. CCTA Members Will Begin Purchasing these New Trucks and Bearing the Increased Costs .. 11

V. THIS COURT SHOULD GRANT CERTIORARI REVIEW 13

CONCLUSION 14

TABLE OF AUTHORITIES

Federal Cases

American Petroleum Institute v. Costle, 665 F.2d 1176, 1187 (1981) 8

Bennett v. Spear, 520 U.S. 154, 172 (1997) 4

Coalition for Responsible Regulation, Inc., et al. v. Environmental Protection Agency, 684 F.3d 102, 124 (D.C. Cir. 2012) 5, 7

Lead Industries Association, Inc. v. Environmental Protection Agency, 647 F.2d 1130, 1145 (DC Cir. 1980) 13

Lopez v. Davis, 531 U.S. 230, 241 (2001) 4

National Association of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 661 (2007) 4

Federal Statutes

42 U.S.C. § 4365(a) 3

42 U.S.C. § 4365(c)(1) 4, 5

42 U.S.C. § 4365(c)(2) 2, 4

42 U.S.C. § 7607(d) 7

49 U.S.C. §13102 1

Provisions of the Federal Register

58 Fed. Reg. 51735 (Sept. 30, 1993) 6

74 Fed. Reg. 66496 (Dec. 15, 2009) 2
74 Fed. Reg. 66497 (Dec.15, 2009) 7
74 Fed. Reg. 66500 (Dec.15, 2009) 7
74 Fed. Reg. 66501 (Dec.15, 2009) 8
74 Fed. Reg. 66545 (Dec. 15, 2009) 5
76 Fed. Reg. 57106 (Sept. 15, 2011) 9
76 Fed. Reg. 57109 (Sept. 15, 2011) 9
76 Fed. Reg. 57114 (Sept. 15, 2011) 10
76 Fed. Reg. 57318 (Sept. 15, 2011) 11
76 Fed. Reg. 57321 (Sept. 15, 2011) 11

State Regulations

Cal. Code Regs. tit. 13, § 2025 12

INTEREST OF AMICUS CURIAE[1]

The California Construction Trucking Association ("CCTA") is a nonprofit trade association that represents nearly 1,000 construction industry related trucking companies ranging in size from 1 truck to over 350 trucks whose business constitutes over 75% of the hauling of dirt, rock, sand, and gravel operations in California. The mission of CCTA is to advance the professional interests of construction trucking companies in California. The vast majority of members are motor carriers as that term is defined in 49 U.S.C. §13102. Materials hauled by members include dirt, sand, rock, gravel, asphalt and heavy equipment. CCTA members typically transport construction material from aggregate plants, asphalt and cement plants to construction sites. Dirt is primarily hauled from a barrow or construction site to another construction site.

CCTA advocates on behalf of its members, all of whom have a strong interest in regulations that affect the transportation industry. Virtually all members of CCTA own and/or operate diesel-powered trucks to haul their various trailers and construction equipment. The diesel engines emit

[1] Pursuant to Rule 37.6, amicus affirms that no counsel for a party authored this brief in whole or in part and that no person other than amicus and its counsel made a monetary contribution to its preparation or submission.

carbon dioxide as a byproduct of their combustion process.

Because this case may determine the validity of EPA's endangerment finding regarding carbon dioxide, which in turn may result in extensive regulations of the trucking industry, CCTA has a strong interest in ensuring that the endangerment finding is subjected to adequate scientific review.

SUMMARY OF ARGUMENT

Certiorari should be granted because the decision below was manifestly incorrect and the consequences of the error are enormous.

The United States Environmental Protection Agency promulgated a regulation that found vehicular carbon dioxide emissions were a danger to public health. 74 Fed. Reg. 66496 (Dec. 15, 2009) (hereafter the "Endangerment Finding"). This rule has far reaching consequences for the transportation industry. In promulgating the rule, the EPA utilized its normal rulemaking process, but failed to adhere to an important and mandatory statutory obligation. Specifically, it failed to submit the proposed rule to the Science Advisory Board ("SAB") established by Congress to provide the EPA Administrator with advice and comments on the adequacy of the scientific and technical basis of the proposed rule. 42 U.S.C. § 4365(c)(2). This failure resulted in the promulgation of a rule with profound national impacts that bypassed an important step in the scientific review necessary for any rule, but

critical for one with such drastic implications as the Endangerment Finding.

The court below minimized the fundamental error, with two arguably alternative holdings. First, the court questioned whether the mandatory duty to provide the rule to the SAB was even triggered. Second, it determined that the failure to adhere to the mandatory procedural duty was harmless. Both holdings were erroneous.

CCTA members will be directly harmed by this procedural defect, because the rules promulgated under the Endangerment Finding will result in a wholesale disruption of their industry that will impose exorbitant costs on businesses, interfere with their ability to provide important construction services, and generally dampen the fragile national economy.

ARGUMENT

I. ALL PROPOSED RULES MUST BE SUBMITTED TO THE SAB

Congress directed the EPA Administrator to establish the SAB. 42 U.S.C. § 4365(a). While the SAB has a variety of duties and performs several different functions, federal statute mandates that for "any proposed criteria document, standard, limitation, or regulation," the Administrator "shall make available to the 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." 42 U.S.C. § 4365(c)(1). Upon receipt of that material, the SAB may then provide "advice and comments on the adequacy of the scientific and technical basis of the proposed criteria document, standard, limitation, or regulation, together with any pertinent information in the Board's possession." 42 U.S.C. § 4365(c)(2).

It is beyond dispute that the duty to submit proposed rules and regulations to the SAB is a mandatory procedural requirement. *Bennett v. Spear*, 520 U.S. 154, 172 (1997). In an analogous context, this Court determined that Congress' use of the word "shall" in the Clean Water Act imposed a mandatory and discretionless oblation. *National Association of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 661 (2007), citing *Lopez v. Davis*, 531 U.S. 230, 241 (2001). In *Lopez*, this Court noted the significance of the fact that Congress, in the same statute, used "may" and "shall" to denote different obligations, such that "may" creates discretionary obligations, while "shall" creates discretionless obligations. The same is true in the instant case, as 42 U.S.C. § 4365(c)(1) mandates that the Administrator "shall" submit the material to SAB for review, but then in the very next paragraph, 42 U.S.C. § 4365(c)(2) provides that the SAB "may" provide advice and comments on the material submitted to it. Accordingly, the mandatory nature of the duty is undeniable.

II. THE MANDATORY DUTY TO SUBMIT THE PROPOSED RULE TO SAB WAS TRIGGERED

By its terms, the mandatory duty to provide the rule to SAB arises when it "is provided to any other Federal agency for formal review and comment. . . ." 42 U.S.C. § 4365(c)(1). In this case, EPA expressly acknowledged that it submitted the rule to the Office of Management and Budget:

> Under Executive Order (EO) 12866 (58 FR 51735, October 4, 1993), this action is a "significant regulatory action" because it raises novel policy issues. Accordingly, EPA submitted this action to the Office of Management and Budget (OMB) for review under EO 12866 and any changes made in response to Office of Management and Budget (OMB) recommendations have been documented in the docket for this action.

74 Fed. Reg. 66545 (Dec. 15, 2009). The court below appeared to accept EPA's contention that this submission was not for "formal review." *Coalition for Responsible Regulation, Inc., et al. v. Environmental Protection Agency*, 684 F.3d 102, 124 (D.C. Cir. 2012). The notion that the submission was "informal" is belied by the text of the executive order cited by EPA. Specifically, that Executive Order declares that

> Coordinated review of agency rulemaking is necessary to ensure that regulations are consistent with applicable law, the President's priorities, and the principles set forth in this Executive order, and that decisions made by one agency do not conflict with the policies or actions taken or planned by another agency. The Office of Management and Budget (OMB) shall carry out that review function.

58 Fed. Reg. 51735 (Sept. 30, 1993).

Ensuring consistency and avoiding conflict between regulations of different agencies is not merely an "informal" review. The Executive Oder specifies in painstaking detail exactly what must be submitted to OMB, and prescribes a "regulatory plan" that must consist "at a minimum" of a statement of the agency's regulatory objectives, a summary of each planned significant regulatory action including anticipated costs and benefits, a summary of the legal basis for each such action, a statement of the need for each action, the agency's schedule for action, and other data. 58 Fed. Reg. 51735 (Sept. 30, 1993). The level of detail required indicates that the review is very formal.

Indeed, the submission requirements are taken so seriously that within 10 days of receiving the submission from EPA, OMB circulates it with other federal agencies to check for possible conflicts. *Id.* Thus, the suggestion that the OMB review was merely "informal" is untenable.

III. THE FAILURE TO SUBMIT THE REGULATION TO SAB WAS NOT HARMLESS

Perhaps aware of the slender reed upon which the determination that the review was merely "informal" was based the court below went on to hold, alternatively, that the failure to submit the regulation to SAB was not "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, Inc., et al. v. Environmental Protection Agency, supra*, 684 F.3d at 124, citing 42 U.S.C. § 7607(d)(8). However, even a cursory review of EPA's own statements about the regulations reveals how critical and necessary it was to have the SAB perform a thorough evaluation of the scientific basis of the proposed rule.

The EPA began its overview of the rule by declaring that "[t]he Administrator has determined that the body of scientific evidence compellingly supports this finding." 74 Fed. Reg. 66497 (Dec.15, 2009). However, the EPA does not specify how that determination was made. The input of the SAB would undoubtedly have been of major influence on the evaluation of the body of scientific evidence. EPA goes on to admit that it "has been examining the scientific and technical basis for the endangerment and cause or contribute decisions under CAA section 202(a) since 2007." 74 Fed. Reg. 66500 (Dec.15, 2009). EPA even acknowledges that "[p]ublic review and comment has always been a major component of EPA's process." *Id.* EPA is silent, however, as to why, during that two-year

period, it failed to comply with the mandatory obligation to let the experts at SAB opine on the science underlying the rule. EPA even claimed that, based on its own review, "the science is sufficiently certain." 74 Fed. Reg. 66501 (Dec.15, 2009). Such an assertion would seem to require, at a minimum, that EPA comply with the mandatory duty to submit the science to review by the statutorily established panel charged with making such determinations.

The utter failure of EPA to submit the proposed rule and supporting material to SAB at any stage distinguishes this case from others where failures have been found to be harmless. For example, in *American Petroleum Institute v. Costle*, 665 F.2d 1176, 1187 (1981), procedural challenges were raised against the ozone standards established by EPA. In that case, EPA submitted two drafts of the criteria document to the SAB and made changes to the criteria based on SAB's recommendations. *Id.*, at 1188. The proposed ozone standard, which was based upon the previously submitted criteria, was not submitted to the SAB. In rejecting the challenge, the court found that because SAB had reviewed the criteria, which contained the scientific and technical basis for the standard, it was unlikely that review of the actual standard would have had much impact. *Id.*, at 1189. In this case, however, SAB never had the opportunity to review anything. Accordingly, there was no basis for the court below to conclude that the input of the SAB would have been inconsequential. More importantly, a determination that the input of the SAB would have had no impact, on a rule of this magnitude, is a license for EPA to completely bypass the EPA in

virtually any rule it promulgates. As a result, the decision below makes the mandatory duty completely discretionary, and turns the statutory language on its head.

IV. THE IMPACT OF THE ERROR HAS GRAVE CONSEQUENCES FOR THE TRANSPORTATION INDUSTRY

As set forth in the Petition for Writ of Certiorari filed by the Pacific Legal Foundation at pp. 3-5, the Endangerment Finding has profound consequences for the entire national infrastructure. From CCTA's perspective, the Endangerment Finding and the rules promulgated in light of the finding are nothing short of disastrous, with huge economic impacts on an already struggling industry.

A. EPA Promulgated Emissions Standards for Heavy Duty Trucks

In 2011, the EPA finalized its Greenhouse Gas Emissions Standards and Fuel Efficiency Standards for Medium- and Heavy Duty Engines and Vehicles rule. 76 Fed. Reg. 57106 (Sept. 15, 2011). That rule was expressly based on the earlier Endangerment Finding. 76 Fed. Reg. 57109 (Sept. 15, 2011). The rule covers all new heavy-duty trucks starting with the 2014 model year and imposes stringent new fuel consumption standards on such vehicles. 76 Fed. Reg. 57106 (Sept. 15, 2011). In order to reduce greenhouse gas emissions, EPA determined it could not simply impose requirements for the truck engine; the rule requires

fundamental changes to the entirety of the truck. As EPA stated,

> Addressing GHG emissions and fuel consumption from heavy-duty trucks, however, requires a different approach. Reducing GHG emissions and fuel consumption requires increasing the inherent efficiency of the engine as well as making changes to the vehicles to reduce the amount of work demanded from the engine in order to move the truck down the road. A focus on the entire vehicle is thus required. For example, in addition to the basic emissions and fuel consumption levels of the engine, the aerodynamics of the vehicle can have a major impact on the amount of work that must be performed to transport freight at common highway speeds. For this first rulemaking, the agencies proposed a complementary engine and vehicle approach in order to achieve the maximum feasible near-term reductions.

76 Fed. Reg. 57114 (Sept. 15, 2011).

The result of imposing new mandates on both truck engines and truck bodies will be an enormous increase in the cost of trucks. EPA acknowledges costs associated with a variety of factors, including "accelerating fleet operators' scheduled fleet turnover and replacement," and "training drivers to

realize the potential fuel savings enabled by new technologies," among many others. 76 Fed. Reg. 57318 (Sept. 15, 2011). EPA determined that these costs were acceptable because the "regulation gives all new truck purchasers a level playing field, because it will require all of them to adjust on approximately the same time schedule." *Id.*

For CCTA members, the EPA estimates that the cost of the rule will be between several hundred dollars to several thousand dollars per truck, per year. 76 Fed. Reg. 57321 (Sept. 15, 2011). EPA candidly admitted that "[t]hese costs would, presumably, have some impact on new truck prices," but elected to "make no attempt at determining what the impact of increased costs would be on new truck prices." *Id.* The EPA cost estimates were remarkably incomplete, but did acknowledge that there would be research and development costs of at least $6.8 million per manufacturer per year for five years. *Id.* These costs will necessarily be passed on to the purchasers of the new trucks.

B. CCTA Members Will Begin Purchasing these New Trucks and Bearing the Increased Costs

Collectively CCTA's membership owns or leases at least 5,000 heavy duty trucks, most primarily based in California. CCTA members' primary source of livelihood is their truck. Most members purchase trucks to be used for decades, and most have lengthy mortgages on their trucks. The trucks typically cost at least $150,000 to purchase, but have a useful life of several decades if maintained properly.

Unfortunately, the California Air Resources Board promulgated a lengthy regulation entitled the "Regulation to Reduce Emissions of Diesel Particulate Matter, Oxides of Nitrogen and Other Criteria Pollutants, from In-Use Heavy-Duty Diesel-Fueled Vehicles." Cal. Code Regs. tit. 13, § 2025. Virtually all of the trucks owned and operated by CCTA members are covered by the rule. The rule requires trucks to be replaced or retrofitted beginning a phased-in schedule, with most of the impact to CCTA members occurring on January 1, 2014 and January 1, 2015. Based on the state regulation, and the lack of any financially feasible retrofit options for most members, CCTA members will be forced to purchase trucks in the next year or so. And, based on the EPA heavy duty truck rule that was triggered by the Endangerment Finding, the cost of those trucks will increase dramatically.

As a result, California's construction trucking industry will suffer because few CCTA members have the capital necessary to invest in expensive new trucks that will be in compliance with the EPA rule. It is predictable that companies will either go out of business, or will cut costs in other areas in order to afford the new trucks. This will mean layoffs for employees, higher prices for construction hauling, and fewer services. The indirect effects on the broader economy are difficult to predict, but because the Endangerment Finding triggered EPA regulations on numerous sectors of the economy beyond heavy duty trucks, those indirect effects will likely be multiplied substantially.

V. THIS COURT SHOULD GRANT CERTIORARI REVIEW

The Endangerment Finding will not only detrimentally impact CCTA members, but the entire national economy. Such a sweeping administrative action deserves careful scientific scrutiny, which was sorely lacking in this case. The judicial branch "does not serve as a mere rubber stamp for agency decisions. Rather, the function of judicial review is to ensure that agency decisions are based on a consideration of the relevant factors." *Lead Industries Association, Inc. v. Environmental Protection Agency*, 647 F.2d 1130, 1145 (DC Cir. 1980), internal quotations and citations omitted. EPA's failure to submit the rule to SAB was a violation of a mandatory duty with obviously significant consequences. This Court should not merely rubber stamp that administrative failure.

CONCLUSION

For the foregoing reasons, CCTA respectfully urges that the petition for writ of certiorari be granted.

Respectfully submitted,

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