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 District of Columbia Circuit**

## PETITIONER'S REPLY BRIEF

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## QUESTION PRESENTED

Must the *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) (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)(l)?

## 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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## INTRODUCTION

Petitioner Pacific Legal Foundation (PLF) respectfully submits this Reply to the Brief for the Federal Respondents in Opposition (Fed. Opp.), and to the Consolidated Brief in Opposition of Environmental Organization Respondents (Enviro. Opp.), filed on July 22, 2013. The Brief in Opposition for Respondents the States of New York, et al., does not respond to the sole question presented by PLF's Petition for Writ of Certiorari, and those Respondents are therefore deemed to have waived opposition. Supreme Court Rule 15.2.

## I

## EPA VIOLATED A CONGRESSIONAL MANDATE BY FAILING TO MAKE THE ENDANGERMENT FINDING AVAILABLE TO THE SCIENCE ADVISORY BOARD FOR PEER REVIEW, AND THIS ISSUE IS PROPERLY BEFORE THE COURT

As was fully set forth in the Petition for Writ of Certiorari (Pet.), Respondent Environmental Protection Agency (EPA) had a statutory duty under 42 U.S.C. § 4365(c)(1) to submit the Endangerment Finding to the Science Advisory Board for peer review, prior to promulgating the final findings. Pet. at 13-16. The Federal Respondents advance no argument to the contrary, while the Environmental Organization Respondents merely repeat an assertion made by EPA in the court below that has already been rebutted in the Petition, that the Endangerment Finding was supposedly not subject to interagency review and comment. Enviro. Opp. at 26; *but see* Pet. at 6-7, 14-16.

While offering little or nothing by way of substantive argument on this point, both Briefs in Opposition misleadingly quote a snippet from the opinion below, to the effect that Petitioner "failed to respond" to EPA's assertion that it was not required to submit the Endangerment Finding for peer review—as if this purported "failure" constitutes some sort of waiver, insulating the Agency's actions from certiorari review. *See* Fed. Opp at 25; Enviro. Opp. at 26 (both quoting the court of appeals' ruling at Pet. App. A-41).

This Court must not allow the Agency to evade its statutory responsibilities so easily.

The issue of whether EPA was statutorily required to make the Endangerment Finding available for SAB review was squarely raised and fully briefed in the court below. *See Coalition for Responsible Regulation, et al., v. EPA, et al.*, United States Court of Appeals for the District of Columbia Circuit, No. 09-1322 and consolidated cases, Joint Opening Brief of Non-State Petitioners and Supporting Intervenors at 59-61; *id.*, Brief for Respondents at 120-21. The court of appeals declined to rule on this question, finding it was "not clear" whether EPA had violated its congressional mandate. Pet. App. A-40. In so doing, the court made the peculiar observation that Petitioner, having raised the issue, "did not respond" to EPA's denial—in other words, that Petitioner did not revisit the question *in its reply brief*, despite the fact that the government had raised no new issue for which a reply would have been required or even proper. Pet. App. A-41.

Since EPA did not raise a new issue in its opposition below, but merely denied its responsibility for complying with section 4365(c)(1), there was no reason for Petitioner to revisit the matter in the consolidated reply brief. The inference which Respondents clearly wish this Court to draw—that Petitioners somehow waived this argument through a procedural "failure"—has no basis in the full context of the litigation below.

Beyond seeking to evade this issue by citing a nonexistent procedural flaw, none of the Respondents substantively address Petitioner's argument. As was demonstrated in the Petition for Writ of Certiorari, ordinary principles of statutory interpretation as well as EPA's own prior practices lead to the conclusion that the Agency was required to submit the Endangerment Finding for SAB review during the time for public comments on the proposed regulation. Pet. at 13-16. The Agency's failure to seek scientific peer review cannot be excused on the face of Section 4365(c)(1), under which such submission is mandatory.

## II

## EPA'S FAILURE TO COMPLY WITH 42 U.S.C. § 4365(c)(1) CANNOT BE EXCUSED AS HARMLESS ERROR

Both the Federal Respondents and Environmental Organization Respondents argue that, even if it is given that EPA failed to comply with a congressional mandate by failing to submit the Endangerment Finding for scientific peer review, this failure should be excused as harmless error. Fed. Opp. at 24-25; Enviro. Opp. at 26 n.11. But adopting these Respondents' sweeping interpretation of the rule of prejudicial error

would effectively wipe 42 U.S.C. § 4365(c)(1) off the books, rendering EPA's responsibilities under this statute wholly discretionary.

The Federal Respondents correctly note that 42 U.S.C. § 7607(d)(8), implies the possibility of "procedural errors" that can be assumed to have no significant impact on Agency decisions. Fed. Opp. at 24. But even if section 7607(d)(8) applies to the Endangerment Finding (*contra*, Pet. at 25-26), the mere existence of the concept of non-prejudicial error says nothing about the magnitude of EPA's omission in the context of this case.

Neither Brief in Opposition disputes the overwhelming impact the Endangerment Finding will have on the American economy, or that the Finding rests *entirely* on scientific data and interpretations of the sort that Congress mandated the Agency "***shall*** make available" to the Science Advisory Board for peer review. 42 U.S.C. § 4365(c)(1) (emphasis added). EPA's failure to comply with this mandate was not some trifling matter of neglecting to dot an "i" or cross a "t," as the government now implies. The Agency's failure to make the Endangerment Finding available for independent peer review goes to the very core of Congress's intention in adopting section 4365(c)(1). Simply *assuming*, as did the court of appeals, that complying with the law would have had no effect on EPA's ultimate findings, negates the importance Congress assigned to peer review in cases such as this, and renders section 4365(c)(1) a nullity.

Finally, it is significant that neither Brief in Opposition responds to Petitioner's citation to *Kennecott Corp. v. EPA*, 684 F.2d 1007 (D.C. Cir. 1982), in which the court below previously held that EPA's

failure to make available for comment certain material that should have been included in the record constituted reversible error, because "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 (citations omitted). If the generation of uncertainty by failing to include all legally relevant information is grounds for reversing the Agency's determinations, EPA's failure to obtain (and provide for public comment) independent peer review of the data underlying the Endangerment Finding clearly mandates such reversal.

## III

## PETITIONER'S OBJECTION TO EPA'S FAILURE TO MAKE ITS PROPOSED FINDING AVAILABLE FOR SAB REVIEW WAS TIMELY RAISED AND IS PROPERLY BEFORE THIS COURT

The Environmental Organization Respondents assert that PLF's objection to EPA's failure to seek SAB review was "not timely raised during the public comment period," and that this supposed failure comprises a "fatal procedural barrier" to certiorari review. Enviro. Opp at 25-26. This assertion is meritless.

First, the court below did not address the timeliness of Petitioner's objection, which is therefore not before this Court. Second, Petitioner fully complied with the provisions of 42 U.S.C. § 7607(d)(7)(B) in its initial Petition for Reconsideration filed with the Agency, by demonstrating that the petition was "based upon new information of central relevance not

available during the public comment period." *See* Pacific Legal Foundation's Petition for Reconsideration of Endangerment and Cause or Contribute Findings for Greenhouse Gases Under section 202 of the Clean Air Act, filed Feb 5, 2010, at 1. Finally, the Agency's failure to submit the Endangerment Finding for peer review by the SAB was in fact raised during the public comment period. *See* Dkt. 3722, Comment No. 3722, at 10 n.4 (June 22, 2009) ("EPA also failed to make available to the Science Advisory Board for review and comment the Endangerment Finding.").

Far from identifying a "fatal procedural barrier," the Environmental Organization Respondents have merely advanced a red herring.

## CONCLUSION

For all the reasons set forth above, the Petition for Writ of Certiorari should be granted.

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Respectfully submitted,

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