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

AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL RIGHTS UNION IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE* [1]

The American Civil Rights Union is a non-partisan, non-profit, 501(c)(3), legal/educational policy organi-zation dedicated to defending all of our constitutional rights, not just those that might be politically correct or fit a particular ideology. It was founded in 1998 by long time policy advisor to President Reagan, and the architect of modern welfare reform, Robert B. Carleson. Carleson served as President Reagan's chief domestic policy advisor on federalism, and originated the concept of ending the federal entitlement to welfare by giving the responsibility for those programs to the states through finite block grants. Since its founding, the ACRU has filed *amicus curiae* briefs on constitutional law issues in cases nationwide.

Those setting the organization's policy as members of the Policy Board are former U.S. Attorney General, Edwin Meese III; former Assistant Attorney General for Civil Rights, William Bradford Reynolds; former Assistant Attorney General for the Office of Legal Counsel, Charles J. Cooper; John M. Olin Distinguished Professor of Economics at George Mason University, Walter E. Williams; former Ambassador Curtin Winsor, Jr.; former Assistant Attorney General for Justice Programs, Richard Bender Abell and former Ohio Secretary of State J. Kenneth Blackwell.

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[1] Peter J. Ferrara authored this brief for the American Civil Rights Union (ACRU). No counsel for either party authored the brief in whole or in part and no one apart from the ACRU made a monetary contribution to the preparation or submission of this brief. All parties were timely notified and have consented to the filing of this brief.

This case is of interest to the ACRU because we are concerned to protect the constitutional rights of all Americans, regardless of political correctness, including the right to Due Process of Law in adoption and implementation of regulatory requirements.

STATEMENT OF THE CASE

On December 9, 2009, the Environmental Protection Agency (EPA) issued a formal Endangerment Finding regarding carbon dioxide (CO2) and its potential to cause catastrophic, man-caused, global warming.[2] That triggered the authority of the EPA to regulate CO2 emissions under the Clean Air Act.

Regulatory restrictions and burdens for vehicles have already been issued under this authority.[3] Moreover, the EPA has determined that requirements for stationary sources under Title V of the Clean Air Act, 42 U.S.C. § 7602(j), have been triggered.[4]

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[2] *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).

[3] *Light Duty Vehicle Greenhouse Gas Emissions Standards and Corporate Average Fuel Economy Standards: Final Rule*, 75 Fed. 4 Reg. 25,324 (May 7, 2010); *Greenhouse Gas Emissions Standards and Fuel Efficiency Standards for Medium-and Heavy-Duty Engines and Vehicles*, 76 Fed. Reg. 57,106 (Sept. 15, 2011).

[4] *Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule*, 75 Fed. Reg. 31,514 (June 3, 2010); *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).

CO2 is a natural substance in the environment essential to all life on the planet. It is effectively oxygen for plants, on which all animal life is dependent for food. Atmospheric concentrations of CO2 were much, much higher earlier in the Earth's history.[5]

The EPA is required by law to submit to its own Science Advisory Board (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 [the 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). That requirement is triggered at the time of the public comment period for EPA regulatory proposals. *Lead Industries Ass'n v. EPA*, 647 F.2d 1130, 1137 (1980); *Mo. Coalition v. United States EPA*, No., 04-cv-00660, 2005 U.S. Dist. LEXIS 42186, at *5 (E.D. Mo. Sept. 14, 2005); 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.

The role and purpose of the SAB is to provide "expert and independent advice to the [EPA] on the

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[5] Craig Idso and S. Fred Singer, *Climate Change Reconsidered: 2009 Report of the Nongovernmental Panel on Climate Change (NIPCC)*, Chicago, IL: The Heartland Institute, 2009; Craig D. Idso, Robert M. Carter, and S. Fred Singer, Eds. *Climate Change Reconsidered: 2011 Interim Report of the Nongovernmental Panel on Climate Change (NIPCC)*, Chicago, IL: The Heartland Institute, 2011.

scientific and technical issues facing the Agency" and to assist the EPA "in identifying emerging environmental problems." 40 C.F.R. § 1.25(c). The SAB "functions as a technical peer review panel for [the 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). The SAB's job is to render advice to the 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)(emphasis added). *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). The point of requiring the EPA to submit proposed regulatory findings and actions to the SAB is to provide an independent evaluation of "the adequacy of the scientific and technical basis of the [regulatory proposals]," 42 U.S.C. § 4365(c)(2).

The SAB submission requirement is not discretionary. *American Petroleum Inst. v. Costle*, 665 F.2d 1176, 1188 (D.C. Cir. 1981) (*API*); Joint Explanatory Statement of the Committee on Conference, The Environmental Research, Development, and Demonstration Authorization Act of 1978, Conf. Rep. 96-722, 3296 (1977)

Roger O. McClellan, who served on the SAB for years, stated in a declaration in the court below, "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.

But there is no dispute that the EPA failed to submit its Endangerment Finding to the SAB. Petitioner Pacific Legal Foundation (PLF) filed an administrative petition for reconsideration of the Endangerment Finding on the grounds that the EPA had failed to comply with the federal statute requiring it to do so. But the EPA summarily dismissed the petition.

Consequently, on Oct. 4, 2010, 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). But the D.C. Circuit held that "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, et al. v. Environmental Protection Agency*, 684 F.3d 102, 124 (D.C. Cir. 2012). The statute and the governing precedents, however, do not recognize any escape hatch granting the EPA discretion to decide that SAB peer review is not necessary.

Petitioner timely filed it Petition for a Writ of Certiorari to this Court, docketed on March 22, 2013,

seeking this Court's review of the D.C. Circuit's decision.

SUMMARY OF ARGUMENT

The EPA was subject to a mandatory duty under federal statute to submit its proposed Endangerment Finding to peer review by the Agency's own Science Advisory Board. But there is no dispute that the EPA failed to do so, violating federal law. This is actually a violation of Due Process of Law that would render the EPA's CO2 regulations issued pursuant to the Endangerment Finding unenforceable.

For the court below to rule that the EPA's failure to comply with federal law requiring submission of the Endangerment Finding to SAB peer review is harmless error is a ruling on the science of the Endangerment Finding. To rule that the violation of law is "harmless" is to say that the science of the Endangerment Finding is so obviously flawless that submitting it for peer review could not conceivably have made any difference.

But the court below declined to take any evidence on the science of the Endangerment Finding. The court consequently had no basis for finding EPA's violation of the law requiring peer review harmless error.

The science of the Endangerment Finding is, in fact, hotly disputed among scientists. Moreover, legislative efforts to impose CO2 regulation have failed to pass Congress for several years, regardless

of party control. That indicates Congress sees some scientific justification for not imposing such regulation. That compels the federal courts not to empower EPA to bypass peer review mandated by Congress in federal law, enabling it to bypass Congress altogether in imposing that same regulation itself.

This case presents crucially important questions of law that merit this Court's review. The EPA's CO2 regulation would all add up to an immense impact on our economy. Yet, under the decision of the court below, all of this would be imposed on our economy without peer review, through politically correct decisionmaking, rather than based on established, peer reviewed science.

Moreover, because that regulation would have been adopted in violation of the law requiring peer review, enforcement would be subject to due process defenses.

In *Massachusetts v. EPA*, 549 U.S. 497, 506 (2007), this Court said, "[T]he unusual importance of the underlying issue persuaded us to grant the writ." That applies to the closely related issues in this case as well.

The decision below creates not only a split among the circuits, but within the D.C. Circuit itself, and conflicts with all other prior decisions on this issue, including prior decisions of this Court.

For all of the foregoing reasons, this Court should grant the Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

I. EPA's FAILURE TO COMPLY WITH THE GOVERNING STATURE REQUIRING PEER REVIEW OF ITS ENDANGERMENT FINDING VIOLATES DUE PROCESS OF LAW.

A. Submission of the Proposed Endangerment Finding to the SAB Was Mandatory Under Federal Law.

Under the federal statute creating the SAB, the EPA is required to submit to the SAB for peer review "any proposed criteria document, standard, limitation, or regulation under the Clean Air Act," or under any other act authorizing EPA regulation. 42 U.S.C. § 4365(c)(1).

The Endangerment Finding is a legislative-type "rule" under the Administrative Procedure Act, 5 U.S.C. § 551(4), which states that a "'rule' means… an agency statement of general . . . applicability and future effect designed to . . . prescribe law or policy". The Endangerment Finding is precisely that under *Massachusetts v. EPA*, 549 U.S. 497, 533 (2007), where this Court said, "[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." (emphasis added). (Of course, a "rule" under the APA is a regulation).

The Endangerment Finding consequently binds the EPA to undertake the regulation of CO2. When the Endangerment Finding was first proposed,

therefore, it constituted a regulatory proposal. That made the EPA's duty to submit the proposed Endangerment Finding to SAB "mandatory."

The federal statute creating the SAB states that the EPA "shall" submit regulatory proposals and other related documents to the SAB for peer review. 42 U.S.C. § 4365(c)(1). As this Court has previously observed, when a statute uses the term "shall" in prescribing a duty, the agency 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" connotes a mandatory command.) The legislative history of the federal statute creating the SAB also made clear that submitting regulatory proposals to the SAB for peer review is mandatory, with the Conference Report stating,

> "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). Joint Explanatory Statement of the Committee on Conference, The Environmental Research, Development, and Demonstration Authorization Act of 1978, Conf. Rep. 96-722, 3296 (1977).

As the court stated in *American Petroleum Inst. v. Costle*, 665 F.2d 1176, 1188 (D.C. Cir. 1981), "The language of the statute indicates that making a [regulatory proposal] . . . available to the SAB for comment is mandatory . . . ." *Accord: Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 522 (D.C. Cir. 1983); *Lead Industries Ass'n v. EPA*, 647 F.2d 1130 (D.C. Cir. 1980); *Mo. Coalition v. United States EPA*, No., 04-cv-00660, 2005 U.S. Dist. LEXIS 42186 (E.D. Mo. Sept. 14, 2005).

Roger O. McClellan is a scientist who served on the SAB for over 20 years, including long term service on the SAB's Executive Committee and as Co-Chair of the SAB's Clean Air Scientific Advisory Committee. He stated in a Declaration in support of the PLF's challenge to the Endangerment Finding in the court 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 EPA's failure to comply with federal law governing its regulatory procedures is actually a violation of Due Process of Law that would render its regulations unenforceable.

B. Holding EPA's Failure to Submit to Mandatory Peer Review Harmless Error Would Be A Ruling on the Science While the Court Below Declined to Take Evidence on the Science.

SAB peer review is a modern manifestation of the long American tradition of checks and balances. It helps to assure that the science on which the EPA bases its regulatory costs and restrictions is not just a matter of political correctness, but true science that has been proven reliable.

That is what Congress intended in establishing the SAB and requiring EPA to submit to its peer review. Congress established the SAB to provide "expert and independent advice to the [EPA] on the scientific and technical issues facing the Agency," 40 C.F.R. § 1.25(c), serving "as a technical peer review panel for [the 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). As with all peer review, the SAB's role is to provide an independent evaluation of "the adequacy of the scientific and technical basis of the [regulatory proposals]," 42 U.S.C. § 4365(c)(2). As the court explained in *Meyerhoff*, that helps to maintain "the integrity of the EPA's research." 958 F.2d at 1499. McClellan adds, "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.

For the court below to rule that the EPA's failure to comply with federal law requiring submission of the Endangerment Finding to SAB peer review is harmless error is a ruling on the science of the Endangerment Finding. To rule that the violation of law is "harmless" is to say that the science of the Endangerment Finding is so obviously flawless that submitting it for peer review could not conceivably have made any difference.

But the court below declined to take any evidence on the science of the Endangerment Finding, deciding to defer to agency expertise. How can the court defer to agency expertise when the agency bypassed its own Congressionally created panel of experts, declining even to submit its work to peer review as required by law? The agency's work, which the court below decided to rubber stamp as a matter of science, consequently was not even peer reviewed. Why did the EPA not follow the legal requirement for peer review if its science was so obviously flawless? What was it afraid of? Is the EPA revealing that inwardly it knows that the science of the Endangerment Finding is deeply flawed?

Far more importantly, however, how can the court rule that peer review would not have made any difference without even taking any evidence on the science of the Endangerment Finding? The court consequently had no basis for finding EPA's violation of the law requiring peer review harmless error. As a matter of basic logic, the federal courts can only avoid wading into the hotly disputed science regarding the Endangerment Finding by enforcing federal law

requiring peer review of that Endangerment Finding by the SAB. In failing to do so without even considering any scientific basis for its ruling, the court below allowed the Endangerment Finding to bypass judicial review as well as peer review.

The science of the Endangerment Finding is, in fact, hotly disputed among scientists. Two volumes authored by dozens of pedigreed scientists together covering well over a thousand pages carefully and dispassionately discuss hundreds if not thousands of peer-reviewed studies that dispute what served as the scientific foundation of the Endangerment Finding.[6] Another volume authored by top scientists published by a different institution carefully rebuts virtually line by line the actual foundation of the Endangerment Finding, citing hundreds if not thousands of peer-reviewed studies as well.[7] Several organizations exist solely to marshal the scientific evidence contrary to the foundations of the

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[6] Craig Idso and S. Fred Singer, *Climate Change Reconsidered: 2009 Report of the Nongovernmental Panel on Climate Change (NIPCC)*, Chicago, IL: The Heartland Institute, 2009; Craig D. Idso, Robert M. Carter, and S. Fred Singer, Eds. *Climate Change Reconsidered: 2011 Interim Report of the Nongovernmental Panel on Climate Change (NIPCC)*, Chicago, IL: The Heartland Institute, 2011.

[7] Patrick J. Michaels, Robert C. Balling, Mary J. Hutzler, Robert E. Davis, Paul C. Knappenberger, & Craig D. Idso, *Global Climate Change Impacts in the United States,* Center for the Study of Science, Cato Institute, Washington, DC, 2009; *See Also* Patrick J. Michaels, Paul C. Knappenberger, Robert C. Balling, Mary J. Hutzler & Craig D. Idso, *The Missing Science from the Draft National Assessment on Climate Change*, Center for the Study of Science, Cato Institute, Washington, DC, 2012

Endangerment Finding.[8] The argument that the scientific foundation of the Endangerment Finding reflects an overwhelming consensus among scientists in its favor is public relations spin that should not be allowed to intimidate the federal courts from enforcing the law.

Indeed, legislative efforts to impose CO2 regulation have failed to pass Congress for several years, regardless of party control. That indicates Congress sees some scientific justification for not imposing such regulation. That compels the federal courts not to empower EPA to bypass peer review mandated by Congress in federal law, enabling it to bypass Congress altogether in imposing that same regulation itself. That would threaten and destabilize the very fabric of our democracy.

McClellan explains that 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. It is neither sound science nor sound law for the federal courts to allow

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[8] These include the Nongovernmental International Panel on Climate Change (NIPCC); The Science and Environmental Policy Project (SEPP); Climate Depot; The Center for a Constructive Tomorrow (CFACT); The Center for the Study of Carbon Dioxide and Global Change, and several others.

the EPA to foreclose that possible result here, contrary to federal law.

II. THIS CASE PRESENTS CRUCIALLY IMPORTANT QUESTIONS OF FEDERAL LAW THAT MERIT THIS COURT'S REVIEW

It is true that CO2 is naturally ubiquitous in the environment, and regulatory restrictions on it would involve ubiquitous EPA control of human activity and the economy.[9] Consequently, EPA regulation of carbon dioxide would, indeed, involve the most burdensome, costly, and far-reaching regulation in world history.

Such regulation would involve raising the price of the energy that drives the modern, industrial age economy. In the case of the traditional fossil fuels, it would involve restricting access to those fuels. The alternative energy from wind, solar and biofuels are

[9] Craig Idso and S. Fred Singer, *Climate Change Reconsidered: 2009 Report of the Nongovernmental Panel on Climate Change (NIPCC)*, Chicago, IL: The Heartland Institute, 2009; Craig D. Idso, Robert M. Carter, and S. Fred Singer, Eds. *Climate Change Reconsidered: 2011 Interim Report of the Nongovernmental Panel on Climate Change (NIPCC)*, Chicago, IL: The Heartland Institute, 2011; Patrick J. Michaels, Paul C. Knappenberger, Robert C. Balling, Mary J. Hutzler & Craig D. Idso, The Missing Science from the Draft National Assessment on Climate Change, Center for the Study of Science, Cato Institute, Washington, DC, 2012

comparatively quite expensive, and inherently so.[10] So the price of the energy needed to fuel the modern, industrial economy would soar in any event.

Economists remember the recessions of the 1970s as caused by oil price spikes. Now those spikes would be engineered by the EPA's carbon dioxide regulation.

Bryce correlates the use of electricity closely with modern prosperity in his book, *Power Hungry*. *Id.* The EPA's carbon dioxide regulation causing the price of electricity necessarily to skyrocket would fundamentally threaten that prosperity.

As we have already begun to see, the regulation would apply to all sorts of moving vehicles. It would apply as well to tens of thousands of stationary sources of CO2 use as well, including hospitals, offices, schools, retail outlets, even fast food restaurants, not to mention any manufacturing facility. Even the EPA has claimed that is impossibly burdensome, seeking relief under its proposed Tailoring Rule, 75 Fed. Reg. 31,514 (June 3, 2010), that is also in violation of federal law.

It would all add up to an immense impact on our economy. Yet, under the decision of the court below, all of this would be imposed on our economy without peer review, through politically correct decisionmaking, rather than based on established, peer reviewed science.

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[10] Robert Bryce, *Power Hungry: The Myths of Green Energy and the Real Fuels of the Future* (New York: Public Affairs, 2010)

Moreover, because that regulation would have been adopted in violation of the law requiring peer review, enforcement would be subject to due process defenses. That would only create even more uncertainty, further hampering the economy. After years of litigation, the EPA would have to go back and submit its Endangerment Finding to the SAB for peer review after all, after this Court is forced to revisit the issue over and over again, through regulatory enforcement actions.

Moreover, the DC Circuit is the court of first resort for appeals involving federal administrative agency regulations. The decision below if not reviewed will stand as a precedent for all such regulations that federal agencies do not have to follow legally mandated procedures for adopting regulations. That would produce a hornet's nest of unnecessary litigation and regulatory do overs regarding what is and is not harmless error.

Indeed, are traffic violations unsanctionable as harmless error where no traffic accident is caused?

In *Massachusetts v. EPA*, 549 U.S. 497, 506 (2007), this Court said, "[T]he unusual importance of the underlying issue persuaded us to grant the writ." That applies to the closely related issues in this case as well.

III. THE DECISION BELOW REPRESENTS NOT ONLY A SPLIT AMONG THE CIRCUITS, BUT WITHIN THE D.C. CIRCUIT AS WELL, AND WITH ALL PRIOR DECISIONS ON THIS ISSUE

The decision of the court below that the EPA does not have to comply with regulatory procedures required by federal law creates a split even within the D.C. Circuit, as the decision is in conflict with *American Petroleum Inst. v. Costle*, 665 F.2d 1176 (D.C. Cir. 1981); *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506 (D.C. Cir. 1983); *Lead Industries Ass'n v. EPA*, 647 F.2d 1130 (D.C. Cir. 1980); *Sugar Cane Growers Coop. of Fla. v. Veneman*, 289 F.3d 89 (D.C. Cir. 2002); *Kennecott Corp. v. EPA*, 684 F.2d 1007 (D.C. Cir. 1982); *New Jersey Dep't of Envtl. Prot. v. EPA*, 626 F.2d 1038, 1039, 1049-50 (D.C. Cir. 1980); *Defenders of Wildlife v. Jackson*, 284 F.R.D. 1 (D.D.C. 2012);

Moreover, the decision of the court below creates a conflict with the Ninth Circuit as well. *Our Children's Earth Fund v. EPA*, 527 F.3d 842 (9th Cir.), cert. denied, 555 U.S. 1045 (2008). And with a decision from the Eighth Circuit. *Mo. Coalition v. United States EPA*, No. 04-cv-00660, 2005 U.S. Dist. LEXIS 42186 (E.D. Mo. Sept. 14, 2005).

And it conflicts with decisions of this Court also. *Bennett v. Spear*, 520 U.S. 154 (1997); *Alabama v. Bozeman*, 533 U.S. 146 (2001).

CONCLUSION

For all of the foregoing reasons, the Writ of Certiorari should be granted.

Respectfully submitted,

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