CASE NO. 20–000123

MEASURING BRIEF

IN THE
UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

CLIMATE HEALTH AND WELFARE NOW,
Plaintiff-Appellee-Cross Appellant,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Defendant-Appellant

—and—

COAL, OIL, AND GAS ASSOCIATION,
Intervenor-Defendant-Appellant-Cross Appellee

On Appeal from the United States District Court
for the District of New Union in
No. 66–CV–2019, Judge Romulus N. Remus

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ENVIRONMENTAL PROTECTION AGENCY,
Respondent

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TEAM 11

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GLOSSARY

Act	Clean Air Act
Agency	U.S. Environmental Protection Agency
APA	Administrative Procedure Act, 5 U.S.C. § 500 *et seq.*
CAA	Clean Air Act, 42 U.S.C. § 7401 *et seq.*
CHAWN	Climate Health and Welfare Now, *Citizen Plaintiff*
COGA	Coal, Oil, and Gas Association, *Industry Intervenor-Defendant*
Endangerment Finding	Final Rule, Endangerment and Cause or Contribute Findings for GHGs under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496 (Dec. 15, 2009)
EPA	U.S. Environmental Protection Agency
GHG(s)	Greenhouse gas(es)
NAAQS	National Ambient Air Quality Standards
Title I	Clean Air Act §§ 101–193, 42 U.S.C. §§ 7401–7515
Title II	Clean Air Act, §§ 202–250; 42 U.S.C. §§ 7521–7590
Title V	Clean Air Act, §§ 501–507; 42 U.S.C. §§ 7661–7661f

JURISDICTION

The Twelfth Circuit Court of Appeals has jurisdiction over final decisions of the United States District Court for the District of New Union. 28 U.S.C. § 1291. The final judgment of the New Union District Court in case number 66-CV-2019 was entered August 15, 2020.

The federal question statute provides subject-matter jurisdiction for claims of unreasonable delay arising under the Administrative Procedure Act. 28 U.S.C. § 1331; 5 U.S.C. § 702. CHAWN failed to provide proper notice of its intent to sue EPA for its delay in responding to its 2009 petition. Thus, the Twelfth Circuit does not have jurisdiction over CHAWN's procedural delay claim.

Clean Air Act Section 307 grants the D.C. Circuit Court exclusive jurisdiction over petitions that challenge nationally applicable actions of the EPA Administrator. *See* 42 U.S.C. § 7607(b)(1). Listing GHGs as a criteria pollutant under CAA Section 108 is a nationally applicable EPA action. Section 307 also contains a venue provision. EPA has not raised a challenge to venue in the Twelfth Circuit.

ISSUES PRESENTED

I. Clean Air Act (CAA) Section 307(b) grants exclusive jurisdiction to the D.C. Circuit, over rules of nationwide applicability, such as the listing of GHGs as a criteria pollutant under Section 108. CAA's citizen suit provision, Section 304(a), grants jurisdiction to district courts to resolve claims of agency procedural delay. CHAWN filed a citizen suit alleging unreasonable delay in listing GHGs as a criteria pollutant. Was jurisdiction proper in the district court?

II. Challenges to the 2009 Endangerment Finding must be brought under Section 307(b)(1) by February 16, 2010. COGA intervened to challenge the Endangerment Finding 3,577 days past the deadline. CHAWN challenges future agency NAAQS regulatory action arising from the 2009 Endangerment Finding.

   A. Does COGA's challenge to the administrative record invalidate EPA's public welfare finding?

   B. Does EPA have discretion to interpret the public health finding as applied to future NAAQS regulation?

III. Under CAA Section 108, once a finding of endangerment is made, EPA is compelled to list GHGs as a criteria pollutant if EPA "plans to issue air quality criteria." EPA does not plan to issue air quality criteria for GHGs. The listing of GHGs under Section 108 is a complex and scientifically dense decision.

   A. Did the 2009 Endangerment Finding trigger EPA's duty to list GHGs as a criteria pollutant under Section 108?

   B. Did the district court err when it ordered EPA to publish a final rule designating GHGs as a criteria pollutant?

STATEMENT

1. Triggering the Duty to Regulate Greenhouse Gas Emissions. In *Massachusetts v. E.P.A.*, 549 U.S. 497 (2007), the U.S. Supreme Court held that the "sweeping definition of 'air pollutant'" in the Clean Air Act (Act), 42 U.S.C. 7401 *et seq*., unambiguously covers GHGs. In response to the *Massachusetts* decision, EPA invited the public to engage in dialogue about a proposed rule to regulate GHG emissions under the CAA. *See* Regulating Greenhouse Gas Emissions Under the Clean Air Act; Proposed Rule, 73 Fed. Reg. 44,353, 44,367–371 (Apr. 24, 2009).

2. **Considering Criteria Pollutant Listing.** In its proposed rule, EPA questioned if the proposed endangerment finding should trigger a duty to list GHGs as a criteria pollutant under CAA § 108. *See* 42 U.S.C. § 7408. After reviewing public comments, EPA decided three major difficulties would make this course of action unadvisable: First, it would be nearly impossible to determine what GHG concentration level is requisite to protect public health and welfare; Second, the unique nature of GHGs have long atmospheric lifetimes, making the gases evenly dispersed throughout the world; and Third, "GHG concentrations in the ambient air are virtually the same throughout the world meaning that they are not higher near major emissions sources than in isolated areas with no industry or major anthropogenic sources of GHG emissions." *See* 73 Fed. Reg. at 44,367. On December 2, 2009, despite EPA's position, CHAWN petitioned EPA to list GHGs as a criteria pollutant under CAA § 108. R. at Intro. para. 1.

3. The Endangerment Finding. On December 15, 2009, thirteen days after CHAWN filed its petition for rulemaking, EPA issued its extensive scientific and technical finding concluding that GHGs, taken together, endanger both the public health "and/or" welfare. Endangerment and Cause or Contribute Findings for GHGs under Section 202(a) of the Clean Air Act, 74 Fed. Reg.

66,496, 66,524 (Dec. 15, 2009); *see also* R. at Section II.A. para. 1. Although the Endangerment Finding itself did not create legal obligations on regulated parties, the Endangerment Finding was the predicate for triggering the duty to regulate mobile source GHG emissions under CAA Title II. R. at Section I. para. 2. Various industry and citizen groups challenged the finding within the period of judicial review under CAA § 307(b)(1). *See* 42 U.S.C. § 7607(b)(1). The period of review ended February 16, 2010. *See* 74 Fed. Reg. 66,496. These groups included neither CHAWN nor COGA. *See* R. at Section I.

4. Congress remains silent. In the years following the Endangerment Finding, EPA and the courts worked to define the boundaries of EPA's delegated lawmaking powers and the court's scope of judicial review. *See* R. Section I. para. 5–6. From 2010 to 2020, Congress delayed passing comprehensive legislation speaking directly to regulating the climate change impacts of greenhouse gas emissions. *See id.* Although presidential administrations have prioritized mitigating climate change impacts with variability, these partisan policy differences are negligible compared to Congress's failure to pass climate change legislation. *See id.*

5. CHAWN petitions EPA in 2009 to regulate GHGs under Title I. Frustrated with the Trump rollback of the Obama administration's Clean Power Plan and armed with concrete harms resulting from failure to regulate GHGs, CHAWN decided to revisit its 2009 petition to list GHGs as a criteria pollutant. *See* R. at Intro. para. 5; Section I para. 5–7. On October 1, 2019, CHAWN invoked the CAA § 304 citizen suit provision to sue EPA for what CHAWN perceives to be an "unreasonable delay." Specifically, in its intent to sue, CHAWN alleged EPA had "unreasonabl[y] delay[ed] in carrying out its non-discretionary duty to designate GHGs as a criteria pollutant as demanded in the December 15, 2009 petition for rulemaking." *See id.*; *see also* 42 U.S.C. § 7604.

Concerned that listing would destroy the market for its products, COGA intervened in CHAWN's lawsuit as of right.

6. The district court's opinion. Judge Romulus N. Remus of the U.S. District Court for the State of New Union, presided over CHAWN's case, No. 66–CV–2019. Despite CHAWN's styling its action as one to enforce a ministerial duty, Judge Remus heard the substantive portion of CHAWN's unreasonable delay claim. *See* R. at Section II.B.2 para. 1. The district court entered summary judgment in part for CHAWN. The court held that the Endangerment Finding was valid concerning public welfare, but vacated its public health finding, as requested by COGA. *Id.* at Section III. The court also concluded that the 2009 Endangerment Finding triggered EPA's duty to list GHGs as criteria pollutants under CAA § 108 and EPA's ten-year delay in the listing was unreasonable. *See id.* The district court ordered EPA to publish a proposed rule to list GHGs as a criteria pollutant by November 15, 2020 and publish a final rule by February 15, 2020. Disagreeing in part with the district court's opinion and order, EPA seeks appellate review.

SUMMARY OF ARGUMENT

The district court's opinion and grant of summary judgment suffers from numerous flaws. Here, EPA will address the three most significant problems.

First, challenges to agency inaction implicating issues of national concern are reviewed exclusively in the D.C. Circuit. CHAWN raises a claim that looks merely procedural yet challenges EPA's technical and scientific expertise and decision-making processes. CHAWN's substantive challenge was disguised in its notice of intent to sue EPA for an unreasonable delay. Not only was CHAWN's notice inadequate to waive EPA's sovereign immunity, but the citizen suit provision also did not give the district court with jurisdiction to preside over the intricacies of greenhouse gas regulation. This ground alone warrants vacatur.

Second, a challenge to the 2009 Endangerment Finding must be timely raised and indicate a failure in EPA's decision-making process. COGA's challenge to the public welfare finding is not new—the D.C. Circuit and the Supreme Court have already decided EPA did not act arbitrarily and capriciously. Concerning the public health finding, EPA has discretion when it interprets the past Endangerment Finding to future and novel NAAQS regulatory situation. This presents a case for significant deference to EPA under *Auer*. If not *Auer*, then *Chevron* via *Barnhart*.

Finally, a duty for to list a criteria pollutant under Section 108 triggers only when EPA decides to issue air quality criteria. EPA has not decided to list air quality criteria for GHGs. Therefore, the duty has not been triggered. The Second Circuit's opinion in *Train* misconstrued the CAA statute. Because there is no duty, there can be no holding of unreasonable delay. Even if there is a duty to list, the *TRAC* factors weigh in EPA's favor.

These grounds, combined with the reasons that follow, warrants vacatur.

ARGUMENT

I. JURISDICTION OVER CHAWN'S UNREASONABLE DELAY CLAIM IS EXCLUSIVE TO THE D.C. CIRCUIT.

The Clean Air Act (CAA) provides federal district courts with a narrow scope of judicial review limited to hearing cases alleging failures of the agency to carry out its mandatory ministerial duties as the CAA prescribes. 42 U.S.C. § 7604(a)(2); *see Am. Rd. & Transp. Builders Ass'n v. E.P.A.*, 865 F. Supp. 2d 72 (D.D.C. 2012), *aff'd*, No. 12–5244, 2013 WL 599474 (D.C. Cir. Jan. 28, 2013). Any person invoking this "citizen suit" provision must provide proper notice to the Environmental Protection Agency (EPA) 180 days before initiating such action. 42 U.S.C. § 7604(a). Outside this narrow scope of district court review, the D.C. Circuit hears cases involving final agency action on issues of nationwide applicability. 42 U.S.C. § 7607(b)(1). Parties in suits implicating local or regional interests can request an alternate venue in the Circuit that geographically encompasses the locality or region under review. *Id.* The New Union District Court improperly presided over CHAWN's unreasonable delay claim. *See* 42 U.S.C. § 7408. Because CHAWN raises both procedural and substantive challenges to EPA's agency delay, jurisdiction is exclusive to the D.C. Circuit Court of Appeals. *See* R. at Intro. para. 1. CHAWN failed to provide EPA with adequate notice of its intent to sue in this matter implicating national interests. Thus, the district court did not have jurisdiction over this case and its judgment, therefore, should be vacated.

A. EPA is immune from suit; CHAWN did not provide proper notice and even if they did, their claim belongs in the D.C. Circuit.

CAA Section 7604(a) requires claimants invoking the citizen suit provision to provide notice to the EPA prior to commencing action. The notice must be in the manner the Administrator prescribed by regulation. *See* 42 U.S.C. §§ 7604(a); *see also id.* § 7604(b)(1)(A). EPA's regulations require a notice of intent to sue under the Act to both identify the duty and "describe

with *reasonable specificity* the action taken or not taken by the Administrator which is claimed to constitute a failure to perform such act or duty." 40 C.F.R. 54.3(a) (emphasis added). A notice that is not reasonably specific fails to waive EPA's sovereign immunity and must be dismissed for lack of subject matter jurisdiction. *See Am. Rd. & Transp. Builders Ass'n*, 865 F. Supp. 2d at 81.

1. CHAWN's notice of intent to sue was not reasonably specific. CHAWN's notice, here, is not reasonably specific. The notice stated EPA was being sued for its "unreasonable delay in carrying out its non-discretionary duty to designate GHGs as [a] criteria pollutant as demanded in the December 15, 2009 petition for rulemaking." R. at Intro. para. 1. There is no dispute that CHAWN provided proper notice for challenging when EPA should list GHGs as criteria pollutants, (as this was in the plain language of the intent to sue and petition provisions and timing was appropriate). The dispute here concerns CHAWN's failure to provide EPA with notice on its procedural claim; or in other words, CHAWN's claim that EPA's delayed action on responding to its petition for rulemaking, an issue upon which the district court considered and issued judgment. R. at Section III para. 1. As such, EPA was improperly denied an opportunity to voluntarily comply or administratively settle the claims CHAWN had pending against it while flooding the court with "precipitate litigation." *People of State of Cal. ex rel. State Air Res. Bd. v. Dep't of Navy*, 431 F. Supp. 1271, 1278 (N.D. Cal. 1977), *aff'd sub nom. People of State of Cal. v. Dep't of the Navy*, 624 F.2d 885 (9th Cir. 1980).

CHAWN's notice is distinguishable from the proper notice citizens plaintiffs gave to EPA in *Center for Biological Diversity v. E.P.A.*, 794 F. Supp. 2d 151 (D.D.C. 2011). In *Center for Biological Diversity*, the court found the citizen group's intent to sue was reasonably specific when the notice unequivocally announced their intent to sue. In their notice, *Center for Biological Diversity* included two separate claims: First, a claim for an unreasonable delay in responding to

its rulemaking petition; and Second, a claim for an unreasonable delay in responding to the legal substance of their petition. *Id.* at 155. The *Center for Biological Diversity* distinguished the notice provided to EPA in their case with the notice provided in *Conservation Force v. Salazar*, 715 F. Supp. 2d 99 (D.D.C. 2010). In *Conservation Force*, citizen plaintiff's notice of intent to sue EPA was inadequate when it failed to mention EPA's procedural delay in responding to its petition. *Center for Biological Diversity*, 794 F. Supp. 2d at 156 (citing *Conservation Force*, 715 F. Supp. 2d at 101–04).

The *Conservation Force* inadequate notice is the same as the inadequate notice CHAWN provided here. CHAWN's failure to provide EPA with proper notice for its delay in responding to their petition fails to waive EPA's sovereign immunity. This means the New Union District Court did not have the power to adjudicate on this issue. This court should therefore vacate the district court's grant of summary judgment for want of subject-matter jurisdiction.

2. Notice cannot be waived as a procedural requirement. CHAWN may contend that notice can be waived because notice is a procedural, and not jurisdictional, requirement. *See Arbaugh v. Y&H Corp.*, 546 U.S. 500, 510 (2006). This argument, however, would be premature. Although CHAWN would be correct that the notice requirement is a time prescription that, under *Arbaugh*, no matter "how emphatic, are properly typed 'jurisdictional,'" CHAWN would fail to consider how the Supreme Court has held in environmental precedents. The Supreme Court has stated that, in environmental cases, notice requirements are "mandatory conditions precedent to commencing suit" while observing that "experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law." *Hallstrom v. Tillamook Cnty.*, 493 U.S. 20 (1989); *see also Friends of Animals v. Ashe*, 13–

1607 2014 WL 2812313 at *8 (D.D.C. June 23, 2014). Thus, CHAWN's attempt to waive notice under *Arbaugh* and the like would be futile. Jurisdiction in the district court was not proper.

3. Notice cannot be waived under Section 702 of the Administrative Procedure Act. If CHAWN's waiver fails under the citizen suit provision of CAA Section 304(a), CHAWN may allege that the Administrative Procedure Act (APA) Section 702 provides alternative grounds to waive notice and consequently, EPA's sovereign immunity. *See* 42 U.S.C. § 7604(a); 5 U.S.C. § 702; *see also Am. Road & Transp. Builders Ass'n. v. E.P.A.*, 865 F. Supp. 2d at 80–81. When the APA provides a cause of action for the plaintiff and waives EPA's sovereign immunity, courts have subject matter jurisdiction under 28 U.S.C. § 1331, the general federal question statute. *Id.*; *see also* 28 U.S.C. § 1331. This argument is unavailing, however, because the APA is clear—when another statute provides an adequate remedy in court, APA cannot supply the cause of action and thus, cannot serve as a waiver of sovereign immunity. *See* 5 U.S.C. § 704; *Fornaro v. James*, 416 F.3d 63, 66 (D.C. Cir. 2005). Further, the Supreme Court has interpretated the APA to not itself act as a grant of subject-matter jurisdiction. *Califano v. Sanders*, 430 U.S. 99, 105–07 (1977). Therefore, CHAWN cannot use the APA to waive EPA's immunity under the guise of § 1331. Accordingly, the district court remains without subject matter jurisdiction.

B. Appellate review of agency decisions involving technical and scientific expertise is exclusive to the D.C. Circuit.

When no deadline is readily ascertainable from the Clean Air Act, but is merely inferred from the overall statutory scheme, a claim alleging unreasonable delay under the CAA must come to the D.C. Circuit Court of Appeals. *See* 42 U.S.C. § 7607; *Mexichem Specialty Resins, Inc. v. E.P.A.*, 787 F.3d 544, 553 n. 6 (D.C. Cir. 2015) (citing *Sierra Club v. Thomas*, 828 F.2d 783, 791–92 (D.C. Cir. 1987)). While it is true that Congress amended the CAA citizen suit provision in 1990 to shift to the district court the power to compel EPA action, Congress also anticipated that

the D.C. Circuit should have exclusive jurisdiction over claims where the complaint implicating the agency's expertise is "embedded" in a claim of procedural injury, such as the claim CHAWN raises here. *Mexichem*, 787 F.3d at 554 n. 6. The district court improperly characterized the issue when it debated over a date-certain deadline. The issue here is that CHAWN presents a mixed claim; one with a deadline, one without a deadline. Thus, this court should look to the Act and its precedents to resolve this issue. This investigation will lead to one reasonable conclusion—jurisdiction over CHAWN's unreasonable delay claim is exclusive to the D.C. Circuit.

1. The text, purpose, and history of the Act grant primary jurisdiction to the D.C. Circuit.

In cases where there is a conflict of jurisdiction between federal district and federal circuit courts, and the agency's technical expertise is under question, courts have held that the jurisdictional balance should tip in the D.C. Circuit's favor. *Mexichem*, 787 F.3d at 554 n. 6 (citing S. Rep. No. 101–228, at 374 (1989) and applying the factors from *Ind. & Mich. Electric Co*, 733 F.2d 489, 490 (7th Cir. 1984)). CHAWN's claim, here, invokes EPA's substantive expertise on a nationally applicable rule, although on its face, it seems to be a procedural complaint under the APA. *Compare* 42 U.S.C. § 7607(b) and § 7604(a) *with* 5 U.S.C. §§ 702, 706. If a court were to compel EPA to list GHGs as a criteria pollutant, it would trigger the creation of National Ambient Air Quality Standards (NAAQS). Setting NAAQS would then, arguably,[1] place on EPA a duty to regulate industry. *See* 42 U.S.C. § 7409; R. at Intro. para. 6. CHAWN's goal, here, is clear—this is a claim about the impacts of climate change on their citizen group. R. at Intro. para. 5. This is not a claim invoking mere procedure; this is a substantive issue of nationwide applicability disguised as procedure. Resolution of this case requires investigation into a particularly

[1] While CHAWN argues CAA § 108 criteria pollutant listing triggers a duty to set NAAQS and regulate GHGs from stationary sources, EPA's position is that they have a window of discretion—mere listing of a criteria pollutant under Section 108 does not trigger a duty to set NAAQS. *See* discussion *infra* Section III.

complicated issue that Congress has committed to the EPA. *See infra* discussion Section II. Because courts have deferred to agency expertise and regulatory responsibilities to provide the D.C. Circuit with its expert views, jurisdiction is exclusive in the D.C. Circuit.

2. **Indiana *confirms primary jurisdiction in the D.C. Circuit***. In *Indiana & Michigan Electric*, the Seventh Circuit considered four factors to resolve a conflict of jurisdiction between federal courts. *Ind. & Mich. Electric Co*, 733 F.2d at 490. The court in *Indiana* held that the Court of Appeals has exclusive jurisdiction when four factors balanced in EPA's favor: First, when a complaint about agency inaction is "embedded" in a challenge to agency action; Second, when an action was announced in order based on administrative record; Third, where judicial economy was fostered by direct review in Court of Appeals; and Fourth, if the citizen plaintiff was asking EPA's action to be set aside. *Id.* at 490–91. The *Indiana* court also noted that in doubtful cases, there is a judge-made presumption in favor of Court of Appeals review where the trial court had no purpose as there were no additional facts to be found. *Id.* The court should find similarly that the Court of Appeals jurisdiction is warranted here: CHAWN claims EPA has failed to act in a challenge to its Endangerment Finding final action; the Endangerment Finding is based on administrative record; the facts presented in the case are not subject to the nuance of local or regional preferences; and even if this case seems doubtful, the trial court has no role in additional fact-finding that would be useful to determining the outcome of this case as the administrative record has been closed and sealed.[2]

3. **TRAC *confirms exclusive jurisdiction in the D.C. Circuit***. Further, the jurisdictional holding in *Telecommunications Research & Action Center v. FCC* (*TRAC*), 750 F.2d 70 (D.C. Cir.

[2] *See infra* discussion Section II.A and II.B (the Endangerment Finding was and continues to be valid, further interpretations of the final rule are subject to EPA's regulatory enforcement discretion).

1984), echoes the application of the *Indiana* factors to hold jurisdiction exclusive in the D.C. Circuit. The D.C. Circuit in *TRAC* held that all APA § 706(1) actions are within the exclusive jurisdiction of the court that has jurisdiction to review the agency action that is the subject of the § 706(1) proceeding. *See id.*; 5 U.S.C. § 706(1). The *TRAC* court reinforced its formal reasoning with a policy analysis concluding that exclusive jurisdiction in the D.C. Circuit is preferred. In its reasoning it relied on the D.C. Circuits "preexisting knowledge of the agency's responsibilities that would be helpful in assessing the claim that the agency as "unreasonably delayed" its action.

II. THE ENDANGERMENT FINDING IS VALID AS TO PUBLIC WELFARE; EPA HAS DISCRETION TO INTERPRET THE PUBLIC HEALTH FINDING AS IT APPLIES TO FUTURE NAAQS REGULATION.

A. COGA is engaged in an untimely collateral attack as a means to invalidate the public welfare finding.

The public welfare finding was valid and should continue to be valid as a matter of procedure. COGA had an opportunity to challenge the Endangerment Finding when th rule was promulgated in 2009. *See* 42 U.S.C. § 7607 (b)(1) (requiring petitions for review to be filed within 60 days of rule publication). COGA failed to do so. *See generally* R. at II.A.1. Permitting COGA to reopen any rule for purposes of judicial review would "stretch the notion of 'final agency action' beyond recognition." *Envtl. Def. v. E.P.A.*, 46 F.3d 1329, 1333–34 (D.C. Cir 2006). Although COGA claims that their untimely challenge to the Endangerment Finding is permitted because an order from this court requiring listing of GHGs under Section 108 would reopen the validity of the predicate for regulation, this court should not entertain COGA's collateral attempt to invalidate EPA's extensive finding. Even if this court holds that EPA's application of the Endangerment Finding to a new area of NAAQS regulation would constitute a new "direct, final agency action" triggering a new period for judicial review, COGA's intervention is unripe. *See Styrene Information & Research Center, Inc. v. Sebelius*, 944 F. Supp. 2d 71, 78–79 (D.D.C. 2013.

COGA's claim here will be ripe when EPA either issues a Criteria Document pursuant to CAA § 108 or when EPA proposes and adopts NAAQS under CAA § 109. Both processes involve publication in the Federal Register and solicitation of public comments. COGA's intervention is premature and thus, any challenge to the Endangerment Finding is time-barred.

B. The district court correctly declined a de novo review of the public welfare finding under the principle of stare decisis.

In challenging the administrative record supporting the Endangerment Finding, the district court properly declined COGA's invitation to embark on a de novo review of the absurd regulatory impacts and competing scientific theories EPA considered when it published its Endangerment Finding. *See* R. at Section II.A.1. The arbitrary-and-capricious standard requires the court not to look at EPA's decision as a scientist, but instead exercise a narrow duty to hold agencies to minimum standards of rationality. 42 U.S.C. §§ 7607(d)(9)(A), (C). *Murray Energy Corp. v. E.P.A.*, 936 F.3d 597 (D.C. Cir. 2019); *see also Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983). This court should afford EPA great deference in resolution of scientific issues related to greenhouse gas endangerment of public welfare. *Util. Air Regulatory Grp. v. E.P.A.* (*UARG*), 573 U.S. 302, 315 (2014) (citing *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)). Absent such deference, lower courts would be free to question and reassess scientific decisions that EPA and other agencies are in the best position to make. *See id.*

1. EPA engaged in rational decision making on the relevant issues. This court should not accept COGA's invitation to reopen an investigation that has already reached a conclusion. The D.C. Circuit in *Coalition for Responsible Regulation, Inc. v. E.P.A.*, 684 F.3d 102 (D.C. Cir. 2012) held EPA engaged in rational decision making concerning the absurdity and scientific uncertainty

arguments that COGA recycles in an attempt to relitigate issues. R. at Section II.A.1; *Coalition*, 684 F.3d at 118–23; *see also* 74 Fed. Reg. 66,496.

As to COGA's first argument, the *Coalition* court pointed out that the plain language of the statute does not leave room for the EPA to consider whether regulation triggered by the endangerment finding might be absurd. *Coalition*, 684 F.3d at 119. The CAA language also forecloses COGA's second argument concerning scientific uncertainties. *Id.* at 122. In *Coalition*, the D.C. Circuit court relied on the Supreme Court's reasoning in *Massachusetts v. EPA* concerning the "wait-and-see policy" to hold that EPA could still move forward with greenhouse gas regulations, in spite of "some residual uncertainty." *See id.*; *Massachusetts*, 549 U.S. 497, 508 (2007). Just as the *Coalition* court rejected the industry petitioners' scientific uncertainty arguments, so must the court here reject COGA's arguments challenging the scientific basis of EPA's Endangerment Finding.

EPA's reasons for finding GHGs endanger public welfare were well explained and consistent with the precautionary principle that allows EPA to regulate to prevent potentially grave harms in the face of uncertainty. *See id.*; *see also Ethyl Corp. v. E.P.A.*, 541 F.2d 1, 28 (D.C. Cir. 1978). EPA's finding that GHGs endanger the public welfare has been sealed and closed. Further inquiries into the validity of the Endangerment Finding are void. The Rule with respect to public welfare, therefore, should be sustained.

2. The Supreme Court agreed with* Coalition*; EPA's finding was not arbitrary and capricious. Although COGA may argue the Supreme Court overruled *Coalition* in its 2014 *UARG* decision, COGA's argument would fail to discern the scope of judicial review under the *UARG* holding. The Supreme Court, in *UARG*, declined to review the D.C. Circuit's holding that EPA had acted reasonably when it made its endangerment finding. *Id.* at 314. Instead, the Supreme

Court reviewed two other issues: First, EPA's regulation of the Title V Prevention of Significant Deterioration (PSD) permitting requirements; and Second, EPA's interpretation of regulatory requirements under the Best Available Control Technology (BACT) that would include greenhouse gas emissions from sources who would already in the program based on their emission of conventional pollutants.

C. EPA's interpretation of public health, to the extent the Endangerment Finding applies to future potential NAAQS regulatory action, is entitled to deference under *Auer*.

If the Endangerment Finding triggers NAAQS regulatory action,[3] EPA has discretion to select a course of regulation that it deems "necessary and sufficient to protect public health with an adequate margin of safety, taking into account both the available evidence and the inevitable scientific uncertainties." *See Am. Trucking Ass'n v. E.P.A.*, 283 F.3d 355, 378 (D.C. Cir. 2002). Since Congress properly delegated legislative authority to EPA to develop NAAQS, EPA is able to set NAAQS in a way that makes regulatory sense and permits realistic enforcement. *See Whitman v. American Trucking Ass'n*, 531 U.S. 457 (2001). Given that the Endangerment Finding would be the trigger for setting NAAQS, EPA's interpretation is entitled to deference under *Auer v. Robbins*, 519 U.S. 452 (1997). To receive *Auer* deference, courts engage in a two-step inquiry: First, the court must determine that the regulation is "genuinely ambiguous"; and Second, the court makes an independent inquiry into whether the "character and context" to determine the reasonableness of the agency's reading to ensure it reflects the agency's "fair and considered judgment." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2314–417 (2019).

1. The term "public health" is genuinely ambiguous. Step one of *Auer* requires courts to exhaust all tools of statutory interpretation via an examination of the rule's text, structure, purpose,

[3] EPA does not concede this point. *See* discussion *infra* Part III.

and history. *Id.* at 2415. Examining the text, structure, purpose, and history of the Endangerment Finding final rule does not resolve many seeming ambiguities. The climate change impacts determined to endanger public health include indirect effects such as hotter temperatures, an increase in heat related deaths, an increase in ozone pollutants, and increased prevalence of insect borne diseases. R. at Section I para. 3. The Endangerment Finding recognized the inherent ambiguity of the subject matter when noting that human-induced climate change is "multi-dimensional" and the Administrator must "use her judgment to . . . ultimately judge whether these risks and benefits, when viewed in total, are judged to be endangerment to public health *and/or* welfare." 74 Fed. Reg. 66,496 at 66,524 (emphasis added). Unlike the term public welfare, which expressly includes "climate" impacts in the text of the CAA statute, the term public health is not defined under the CAA. "Public health" has been ambiguously defined in the Endangerment Finding via the designation "and/or." *See id.*; 42 U.S.C. § 7602(h) (defining welfare as climate impacts as well as effects on "personal comfort and wellbeing").

***2. The character and context of the EPA's interpretation entitles it to controlling weight under* Kisor**. Step two of *Auer* requires courts to weigh factors, as stated in *Kisor*, to elicit the character and context of the agency's interpretation as it pertains to potential NAAQS regulation. *Kisor*, 139 S. Ct. at 2416–417. In upholding *Auer*, Justice Kagan laid out three factors in her *Kisor* decision that can guide courts when determining the reasonableness of an agency's position: First, the regulatory interpretation must be authoritative position of the agency; Second, the decision should reflect the agency's substantive expertise; and Third, the agency's reading of the rule must be more than just an ad hoc position. *Id.* The *Kisor* factors weigh in EPA's favor. Here, the interpretation of public health is advanced by the Administrator during the scope of litigation attempting to regulate GHGs via the highly technical NAAQS program. *See* R. at Section II.A.2

para. 2–3. EPA's interpretation of the Endangerment Finding to the extent it applies to setting NAAQS for stationary sources is not plainly erroneous or inconsistent with the regulation. EPA has "unique expertise" of a scientific or technical nature, relevant to applying this regulation "to complex or changing circumstances" of climate change. *See Kisor*, 139 S. Ct. at 2413 (citation omitted). Further, EPA has the capacity to resolve "interpretative issues by uniform administrative decision, rather than piecemeal by litigation" in this "complex and highly technical regulatory program" concerning the regulation of greenhouse gas emissions for stationary sources. *Id.* at 2413–414.

The only remaining question, therefore, is whether the EPA's change in position during the course of this litigation is entitled deference. It is. Although EPA raises this position for the first time in litigation, this should not deter the court from finding deference under *Auer*. Because the distinction between public health and public welfare has never been of consequence, EPA has not had to announce a position on this issue. *See id.* It is only now, when a challenge is raised, that EPA is confronted with interpreting what it meant by the "and/or" designation in the public welfare and health endangerment finding since the distinction between public health and public welfare defines potential sanctions under NAAQS regulations. *See id.* The *Kisor* court noted this type of scenario in footnote six, noting that reversal advanced for the first time in litigation is not dispositive. The court notes that "*Auer* itself deferred to a new regulatory interpretation presented in an *amicus curiae* brief." EPA's clarification of its position reflects its fair and considered judgment on enforceability of its regulations and as such, raising the interpretation for the first time in litigation is "not entirely foreclosed." *Kisor*, 139 S. Ct. 2418 n. 6.

***3. If not* Auer, *then* Barnhart *and* Chevron*; not* Mead *and* Skidmore**. Even if the court finds *Auer* unavailing, deference to EPA is still advised under *Barnhart v. Walton*, 535 U.S. 212

(2002). *Barnhart* stands for the proposition that policy decisions grounded in an agency's technical and scientific expertise should receive deference under *Chevron*, even if the policy decision is made through means less formal than notice and comment rulemaking. *Id.* at 1271–72 (citing 5 U.S.C. § 553). Here, the Endangerment Finding does not act with the force of law; instead, the Endangerment Finding is the predicate for NAAQS regulatory action that *will* have the force of law and regulation resting on scientific determinations within EPA's expertise. Although EPA reached its interpretation for NAAQS regulatory action with less than "notice and comment" rulemaking, this means "does not deprive that interpretation of the judicial deference otherwise its due." *Id.* at 1271 (citing *Chevron*, 467 U.S., at 843).

CHAWN may argue *Mead* and *Skidmore* apply here instead of *Barnhart* and *Chevron*. This argument is without merit. In *United States v. Mead Corp.*, the court held an agency had the burden of persuasion under *Skidmore* when it engaged in less-than-notice and comment rulemaking when changing practices to produce a tariff increase on certain classifications of goods. *U.S. v. Mead Corp.*, 535 U.S. 212, 222–23 (2001) (citing *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)). Dispositive to the court's holding was the fact that the agency was sending out 10,000 to 15,000 ruling letters per year and not employing its technical expertise when rendering classification decisions. *Id.* at 233–34. The EPA's Endangerment Finding relying on years of scientific research and technical expertise lies in stark contrast to the agency's goods classifications in *Mead*.

Thus, the finding on public health should not be vacated, as the district court improperly held; instead, this court should give deference, under *Auer*, to EPA's interpretation of public health impacts, to the extent it applies to NAAQS regulation of primary stationary sources.

***4. Deference under* Auer *does not conflict with* UARG**. CHAWN may invoke *UARG* and argue that the Supreme Court's rejection of EPA's "Tailoring Rule," modifying source thresholds

for regulated industries in the PSD and Title V programs supports a holding EPA has no power to "tailor legislation to bureaucratic policy goals" to rewrite statutory terms. *UARG*, 573 U.S. at 325–26. Contrary to CHAWN's contention, this is not the type of "tailoring rule" that *UARG* prohibited. Unlike the tailoring rule in *UARG* where EPA infringed on the private rights of industry, here, EPA asserts a tailoring rule meant to restrain EPA engaging in overregulation. As Judge Scalia observed in the *UARG* majority opinion, EPA acts unreasonably when it tailors a rule to "regulate a significant portion of the American economy." *Id.* at 324. Thus, it logically follows that EPA acts *reasonably* when it tailors a rule that *does not* impose nationwide regulations. Because EPA is not engaging in conduct creating unfair surprise to regulated parties, its interpretation of public health should be afforded deference.

III. THIS COURT SHOULD NOT ORDER EPA TO LIST GREENHOUSE GASES AS A CRITERIA POLLUTANT UNDER CAA SECTION 108.

A. The 2009 Endangerment Finding did not trigger a duty for EPA to list GHGs as criteria pollutants under Section 108(a).

When EPA's regulation of mobile-source greenhouse-gas emissions under CAA Title II took effect in 2011, GHGs became a "pollutant subject to regulation under" the CAA. 42 U.S.C. § 7475(a)(4). This includes the NAAQS program in Title I of the CAA. That conclusion is not at issue in this case. *See Massachusetts,* 549 U.S. 497. CHAWN argues, however, that because the language is Section 202 is similar to the language in Section 108(a), EPA's duty to list has been triggered. EPA challenges this second argument because it is unsound.

1. The plain text of Section 108 gives EPA discretion over whether to list GHGs as a criteria pollutant. The language of Section 202 declaring GHGs in the atmosphere may endanger public health or welfare has been upheld by the Supreme Court and reaffirmed by EPA. 42 U.S.C. § 7521(a)(1); *see also* discussion *supra* Section II. Congress however, via the language

of Section 108, has imposed two additional requirements for triggering a duty to list a pollutant under the NAAQS program. *Compare* 42 U.S.C. § 7521(a)(1) *with* 42 U.S.C. § 7408(a)(1). The first additional requirement, that the air pollutant is emitted by "numerous or diverse mobile or stationary sources," is not a point of contention. 42 U.S.C. § 7408(a)(1). The second additional requirement, however, that the EPA "plan . . . to issue air quality criteria," is. *See id.*

2. EPA has decided listing GHGs as a criteria pollutant would be unenforceable. To date, EPA has not planned to issue air quality criteria under Section 108. R. at Section I para. 6. EPA has already extensively considered listing GHGs as a Section 108 pollutant, prior to the adoption of the Endangerment Finding. *See* 73 Fed. Reg. 44,353, 44,367–371. In its discretion, EPA has considered and decided three major difficulties would make this court of action unadvisable. *See id.* at 44,367. First, it would be nearly impossible to determine what GHG concentration level is requisite to protect public health and welfare; Second, the unique nature of GHGs have long atmospheric lifetimes, making the gases evenly dispersed throughout the world; and Third, "GHG concentrations in the ambient air are virtually the same throughout the world meaning that they are not higher near major emissions sources than in isolated areas with no industry or major anthropogenic sources of GHG emissions." *Id.* The last point is especially critical because the CAA was designed to respond to concentrations of pollutants in specific localities called "nonattainment areas." 42 U.S.C. § 7502(a)(2); *see* CAA Title I, 42 U.S.C. §§ 7401–7431. If the GHG emissions are evenly spread throughout the world, and the entire country would be in nonattainment, regulating GHGs under Section 108 would be unworkable and run outside the Act's express purpose. *See* 73 Fed. Reg 44,343 at 44,367; 42 U.S.C. § 7401.

To avoid this impossible enforcement scenario, EPA in its discretion, has engaged in a series of regulatory actions to regulate GHGs from stationary sources under CAA provisions with

similar language. *See, e.g.*, Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514, 31,550 (June 3, 2010); Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,510 (Oct. 23, 2015); Carbon Pollution Emissions Guidelines for Existing Sources: Electric Utility Generating Units (Clean Power Plan), 80 Fed. Reg. 66,662 (Oct. 23, 2015) (regulations under Section 111 of the Act, 42 U.S.C. § 7411(d)). Industry and citizen groups have challenged much of this action and succeeded in part. *See UARG v. EPA*, 573 U.S. 302. EPA continues to engage in its work to exhaust the CAA to regulate GHGs. This work includes an express grant of discretion over whether to add GHGs to the criteria pollutant list under CAA § 108. Most experts in this area have concluded that listing under CAA § 108 is not a serious course of action; instead, they see petitions, such as a CHAWN's a "truly pointless exercise." David Bookbinder, chief climate counsel at Sierra Club says CHAWN's "view is in the minority . . . while [CHAWN's petition] may be where the planet should end up, the [NAAQS] is not the mechanism for getting there."[4]

The district court's analysis on this issue begs more nuance. Congress expressly gave EPA discretion in this area to choose when they issue air quality criteria. This discretion is necessary for all the reasons that the attempt to regulate GHGs under CAA § 108 demonstrates. Therefore, because EPA chooses not to issue air quality criteria for GHGs, EPA's duty to list GHGs as a criteria pollutant under the NAAQS program has not been triggered.

3. **Train *is inapplicable to the present controversy***. *Train* misinterpreted the CAA text and its precedent should not apply. The district court improperly relies on the holding in *Train* to

[4] Robin Bravender, Groups Petition EPA to Set Greenhouse Gas Limits Under Clean Air Act, NY TIMES: GREENWIRE (Dec. 2. 2009), https://archive.nytimes.com/www.nytimes.com/gwire/2009/12/02/02greenwire-groups-petition-epa-to-set-greenhouse-gas-limi-40485.html.

conclude that EPA does not have complete discretion over whether to list GHGs as criteria pollutants. *Natural Resources Defense Council, Inc. v. Train*, 545 F.2d 320, 328 (2d Cir. 1976). This reliance disserves the Act's text, purpose, and history. As *Train* notes, the mandatory language of 108(a)(1) would be "mere surplusage" if the "determination to list a pollutant and to issue air quality criteria would remain discretionary with the Administrator." *Id.* at 325. The surplusage is only dispositive, however, when is *possible* to give every word and every provision an effect. Here, giving every word of Section 108 obstructs, instead of furthers, the purpose of the Clean Air Act. Creating a mandatory duty to list a new pollutant would place the Administrator in a position where they would have a duty to act in instances where listing of a criteria pollutant would present an unworkable situation. *See* discussion *supra* Section III.A.2. Acting when the science is too uncertain places the Administrator in a position to make poorly reasoned decisions that would likely be overturned as arbitrary and capricious. *See State Farm*, 463 U.S. 29, 43 (1983). Because no canon of interpretation is absolute and each may be overcome by the strength of differing principles that point in other directions, this Court should choose to avoid the surplusage argument in light of the impossibility and absurdity of this interpretation.

4. The Act's legislative history gives meaning to its words. Further, an examination of the Act's legislative history is necessary to determine the meaning of the words used by the legislature. Although CHAWN relies on legislative history as espoused in *Train*, *Train*'s use of legislative history is selective. *See Train*, 545 F.2d at 327; R. at Section II.B.3. Here, examination of two additional points of legislative history brings into focus Train's hazy interpretation of Congress' true statutory intent. First, the legislature had a very narrow statutory intent in mind when it passed the Act. The Act arose from concerns over smog and other visible pollution emissions from cars and factories. *See generally* Christopher D. Ahlers, *Origins of the Clean Air Act: A New*

Interpretation, 45 ENVTL. L. 75 (2015). Second, while the CAA addresses climate concerns, the CAA was meant to address emissions of foreign particles into the troposphere—not regulate the human impacts on GHG levels in the stratosphere that contribute to human emissions of GHGs and climate changes due to global warming. Concurrent with even the most recent CAA amendments, legislators have proposed specific climate protection bills, yet these findings and protections end up dying in committee. *See* Stratospheric Ozone and Climate Protection Act of 1989, S. 491 101st Cong. (1989). Although CHAWN is impatient (with good reason) that progress has not come soon enough, the statutory intent of CAA cannot be usurped, even in the noble quest to do justice. Elected representatives are the best to carry this torch as they are politically accountable and the judiciary must remain steadfast in its task to say what the law means, and refrain from deciding what the law should be. *Marbury v. Madison*, 5 U.S. 137 (1803).

B. In its discretion, EPA decided to not list GHGs as a criteria pollutant under Section 108(a); a reasonable decision that CHAWN disagrees with is not an unreasonable delay.

1. EPA's duty to list has not been triggered. EPA has not missed a deadline as it retains discretion over listing GHGs as a criteria pollutant. *See* discussion *supra* Section III.A. Because EPA has not yet met a condition precedent to invoke its listing duty, EPA delayed action n on CHAWN's petition is not unreasonable. *See Zook v. McCarthy*, 52 F. Supp. 3d 69 (D.D.C. 2014).

2. Even if EPA is compelled to list, this court should invoke its equitable discretion. Even if the court were to hold EPA has a duty to list GHGs under Section 108 (which EPA does not concede), which would make it proper for this court to compel EPA's listing, due to the complex and scientifically dense nature of the decision to list criteria pollutants, this court should exercise its equitable discretion. The D.C. Circuit, in particular, which retains exclusive jurisdiction over CHAWN's claim, has recognized this power of discretion over cases implicating agency scientific

and technical expertise. *In re Barr Laboratories, Inc.* 930 F.3d 72, 74 (D.C. Cir 1991) (noting that although the courts "shall compel agency action" courts still retain their traditional function of providing relief in equity); *see also* discussion *supra* Section I. The D.C. Circuit has also noted that its view, that a court retains its equitable discretion in light of a statutory date-certain deadline to compel, harmonizes the text of APA § 706 ("shall compel agency action unlawfully withheld") with the text of APA § 702 (noting the courts powers in equity). *See* 5 U.S.C. §§ 702, 706.

3.* TRAC*'s factors advise discretion to EPA. The *TRAC* factors provide the lens through which a court, in its discretion, can offer equitable relief to EPA. *See TRAC*, 750 F.2d 70. Although CHAWN may argue statutory deadlines furthers the government's interest in protecting public health and safety, and must therefore be observed, the date-certain deadline and its relevance to further public health interests is only one factor that this court should consider. The *TRAC* six-part test guides courts in its determination of unreasonable delay:

> (1) [T] he time agencies take to make decisions must be governed by a "rule of reason"; (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply context for this rule of reason; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority; (5) the court should also take into account the nature and extent of the interest prejudiced bydelay; and, (6) the court need not "find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed."
>
> *TRAC*, 750 F.2d at 80 (citations omitted).

Here, the "rule of reason" should apply due to the complexities, both scientific and political, of regulating emissions of GHGs. Congress created the CAA to be a flexible statute, that would provide EPA with the discretion to adapt the statute to its needs as scientific and technological understandings advance. *See* discussion *supra* Section II. Although EPA admits that GHGs pose a risk to public welfare, there are also other risks to public welfare such as civil unrest,

geopolitical conflict, and economic collapse. These risks, some argue, should receive priority because they are imminent. *See id.*; *see also* Reducing Regulation and Controlling Regulatory Costs, Exec. Order 13771, 82 Fed. Reg. 9,339 (Feb. 3, 2017). As such, EPA has diligently continued to regulate GHGs to the extent the CAA (and the courts) permit. *See* discussion *supra* Section II.A and III.A. The district court failed to holistically consider the national and international implications of compelling agency listing action; instead, to support its order, it relied on cases implicating discrete national concerns. *See* R. at Section II.B.2. para. 4. Because federal courts are tasked with deciding "cases" and "controversies" and *not* tasked with solving the existential crisis of climate change, this court should exercise its equitable discretion to vacate the district court's judgment and dismiss CHAWN's claim.

4. Ultimately, the CAA was not built for climate change; Congress must pass a statute.

This court should refuse CHAWN's invitation to compel EPA to act on greenhouse gas listing under Section 108. While principles of stare decisis with respect to statutory interpretation has special force, Congress remains free to alter what the Court has done. *John R. Sand & Gravel Co. v. United States*, 552 U.S. 139, 139 (2008). The CAA is a statutory vehicle with limits. EPA has worked to the limits of the CAA. When EPA exceeded the boundaries of its power, the courts have intervened. *See Coalition*, 684 F.3d 102; *UARG*, 573 U.S. 302. Here, EPA, relying on past precedent, has remained within the scope of its power to impose substantive regulations on industry. *See id.* This court should not entertain CHAWN's attempt to disguse a substnative agency action with a claim alleging mere procedure. Thus, this court should vacate the district court's order compelling EPA to act because EPA's delay is reasonable.

CONCLUSION

EPA's request is simple—EPA asks this Court to vacate the district grant of summary judgment to both CHAWN and COGA on all issues and dismiss CHAWN's claim of unreasonable delay in listing GHGs as criteria pollutants.

The five issues presented in this appeal should be answered in a straightforward fashion:

- No, the district court did not have jurisdiction. Substantive claims implicating nationally applicable rules are heard exclusively in the D.C. Circuit.
- Yes, the public welfare finding remains valid. Despite COGA's objections, EPA acted reasonably. Also, this issue was asked and answered in *Coalition* and *UARG*.
- No, the public health is valid subject to EPA's reasonable use of discretion when promulgating future NAAQS regulations. *Auer* grants deference to EPA when it interprets its own regulations. If *Auer* is inapplicable, *Barnhart* still advises judicial deference.
- No, EPA's listing duty has not been triggered. CAA § 108 expressly indicates the Administrator retains discretion. *Train* misinterpreted the statute.
- No, the district court should not compel listing. CAA § 108 implicates substantive issues of technical and scientific expertise. To expressly regulate GHGs to mitigate climate impacts, Congress must pass legislation. In the meantime, this court must defer.

If CHAWN requires a notice to its petition, CHAWN must properly waive EPA's sovereign immunity and refile or work with EPA to resolve the issue administratively.

Respectfully submitted,

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