Team # 12

THIRTY-THIRD ANNUAL
JEFFREY G. MILLER PACE
NATIONAL ENVIRONMENTAL LAW
MOOT COURT COMPETITION

C.A. No. 20-000123

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.

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

Brief of Appellant, United States Environmental Protection Agency

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

STATEMENT OF JURISDICTION

Climate Health and Welfare Now (CHAWN); Coal, Oil, and Gas Association (COGA); and the United States Environmental Protection Agency (EPA) appeal from an Opinion and Order granting CHAWN's motion for summary judgment in part and granting intervenor COGA's cross motion for summary judgment in part, entered on August 15, 2020, by the honorable Judge Remus in the U.S. District Court for the District of New Union, No. 66-CV-2019. The District Court did not have subject matter jurisdiction to review CHAWN's citizen suit filed under 42 U.S.C. § 7604(a) because citizen suits are only permitted when an action by the EPA is non-discretionary, and EPA has discretion over whether to list greenhouse gases as a criteria pollutant under 42 U.S.C. § 7408. The District Court did not have subject matter jurisdiction to review CHAWN's unreasonable delay claim because the rule sought would be nationally applicable, subject to review exclusively in a district court in the D.C. Circuit under 42 U.S.C. § 7607(b). All parties filed a timely Notice of Appeal pursuant to Fed. R. App. P. 4 (2018). This Court of Appeals has jurisdiction over the appeal under 29 U.S.C. § 1291 (2018).

STATEMENT OF ISSUES

I. Does the EPA have a non-discretionary duty to designate GHGs as a criteria pollutant under CAA § 108 based on the 2009 Endangerment Finding?

II. Did the District Court have jurisdiction over CHAWN's unreasonable delay claim under CAA § 304(a) where the rule sought would be a rule of nationwide applicability subject to review exclusively in the D.C. Circuit under CAA § 307(b)?

III. Does EPA's ten-year delay in taking any action on listing GHGs as criteria pollutants under CAA § 108(a) constitute an unreasonable delay?

IV. Is the 2009 Endangerment Finding valid with respect to an endangerment of public welfare?

V. Is the 2009 Endangerment Finding valid with respect to an endangerment of public health?

STATEMENT OF THE CASE

I. Factual Background

In 1999, several environmental groups petitioned EPA to make a finding that GHG emissions ("GHGs") from vehicles pose a danger to human health and the environment under Clean Air Act (CAA) section 202. 42 U.S.C. §7521; Record (R.) at 6. A so-called "Endangerment Finding" under section 202 would trigger EPA regulation of GHGs from automobiles and other mobile sources. *Id*. EPA denied the petition in 2003, stating that GHGs were not "air pollutants" under the CAA. 68 Fed. Reg. 52,922 (Sept. 8, 2003).

Litigation followed, and in *Massachusetts v. EPA*, the Supreme Court found that GHGs were "air pollutants" subject to potential regulation under the CAA. *Mass. v. EPA,* 549 U.S. 497 (2007). It ordered EPA to respond to the 202 Petition by making a finding as to whether GHGs endanger public health or public welfare. *Id.*

In 2009, EPA issued a formal finding of endangerment under section 202 (the "Endangerment Finding"). Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66, 496–546 (Dec. 15, 2009) (to be codified at 40 C.F.R. Ch. I). The Endangerment Finding defined a group of GHGs as a single air pollutant, recognized that many mobile sources emit GHGs, and found that GHGs may endanger both public health and public welfare by increasing global temperatures and altering storm frequency and precipitation patterns. *Id.* EPA found that climate change endangers public welfare by harming agricultural productivity, water supply, property, and other environmental features and economic values. *Id.* It also found that climate change endangers public health by increasing ozone pollution, causing a rise in heat-related deaths, and contributing to a higher incidence of insect

borne diseases, among other negative health impacts. *Id.* After issuing the Endangerment finding, EPA sought to reduce GHGs by regulating vehicles and power plants. R. at 7. However, EPA did not exercise its power to classify GHGs as criteria pollutants under CAA section 108. *Id.*

If EPA were to designate a pollutant as a criteria pollutant under section 108, it would trigger a series of enormously significant regulatory actions. EPA is required to establish primary and secondary National Ambient Air Quality Standards (NAAQS)—limits on concentrations of a pollutant in the atmosphere—for a criteria pollutant within twelve months of listing it. 42 U.S.C. §§ 7408(b), 7409(a). Whereas primary NAAQS are established to protect human health, secondary NAAQS are concerned with protecting the environment to safeguard public welfare. 42 U.S.C. § 7409. Establishing primary NAAQS has major consequences—if EPA promulgates primary NAAQS, states are required to submit a State Implementation Plan showing how they will meet the primary NAAQS concentrations within ten years. 42 U.S.C. § 7502(a)(2)(A). If a state fails to submit a satisfactory plan or fails to meet compliance deadlines, it is subject to direct EPA regulation of emissions within the state, *see* 42 U.S.C. § 7410(c)(1), and it faces loss of its federal highway funding. 42 U.S.C. §7509(a), (b)(1).

II. Procedural History

After the 2009 Endangerment Finding was issued, CHAWN and a number of other environmental organizations filed a petition with EPA demanding that it list GHGs as criteria pollutants under CAA section 108. R. at 7. EPA did not take any action in response to the petition, and on October 15, 2019, CHAWN filed a complaint against EPA in the U.S. District Court for the District of New Union. R. at 2. The Complaint invoked the citizen suit provision of CAA section 304(a)(2) and asserted claims against EPA for failure to comply with its alleged non-discretionary duty to regulate GHGs as criteria pollutants, and for unreasonable delay in doing so.

R. at 5. COGA filed a motion to intervene as a defendant on the side of EPA, and this motion was granted on November 30, 2019. *Id.* COGA also filed a cross-claim against EPA asserting that the 2009 Endangerment Finding is unsupported by the record and is contrary to law. *Id.*

On August 15, 2020, Judge Remus issued an Opinion and Order granting CHAWN's motion for summary judgment in part, finding that: (1) the Endangerment Finding is valid with respect to public welfare, (2) EPA has a non-discretionary duty to designate GHGs as a criteria pollutant, and (3) EPA unreasonably delayed its response to CHAWN's petition and unreasonably delayed designating GHGs as a criteria pollutant. R. at 13. It ordered EPA to publish notice of a proposed rule designating GHGs as a criteria pollutant within 90 days and to publish a final rule designating GHGs as a criteria pollutant within 180 days thereafter. R. at 13–14. The District Court also granted COGA's cross motion for summary judgment in part, finding that the application of EPA's Endangerment Finding to human health is contrary to law, and vacating the Endangerment Finding to the extent that it declares GHGs to endanger human health. R. at 14. All parties filed a timely Notice of Appeal, granted by this Court. R. at 2.

SUMMARY OF ARGUMENT

EPA has discretion over whether to list GHGs as a criteria pollutant under CAA section 108. This stems directly from the discretionary "plans to" language in subsection (C). *See* 42. U.S.C. § 7608(a)(1)(C). By denying EPA discretion to list new criteria pollutants, *Train* and its progeny contravened a fundamental principle of statutory interpretation and rendered subsection (C) superfluous. *See Nat. Res. Def. Council, Inc. v. Train*, 545 F.2d 320, 325 (2d Cir. 1976). Moreover, section 108 does not impose a date-certain deadline for EPA action, which is an essential element of a non-discretionary duty. *See Sierra Club v. Thomas*, 828 F.2d 783, 791 (D.C. Cir. 1987). The Endangerment Finding under section 202 did not trigger regulation under section

108, because section 108 contains a discretionary provision that section 202 lacks. *See* 42 U.S.C. §§ 7408, 7521. As a citizen suit under section 304 can only challenge a non-discretionary action by the EPA Administrator, the District Court did not have subject matter jurisdiction over CHAWN's suit. *See* 42 U.S.C. § 7604(a)(2).

Next, the District Court did not have jurisdiction over CHAWN's unreasonable delay claim because EPA's decision whether to list GHGs as a criteria pollutant is discretionary, and "a delay cannot be unreasonable with respect to action that is not required." *See Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 n.1 (2004). Even if this Court finds that EPA has a non-discretionary duty to list GHGs, a U.S. District Court within the D.C. Circuit would have exclusive jurisdiction over this unreasonable delay claim. *See* 42 U.S.C. §§ 304(a), 307(b).

If this Court finds a non-discretionary duty, EPA did not unreasonably delay listing GHGs as a criteria pollutant under section 108. EPA's deliberation has been consistent with the rule of reason given the immense gravity and complexity of GHG regulation, and forcing EPA action would delay matters that imminently endanger public health. *See Telecomms. Research and Action Ctr. (TRAC) v. FCC*, 750 F.2d 70, 79–80 (D.C. Cir. 1984). Taking away EPA's control over its timetable would have perverse public health impacts and do much more harm than good.

EPA agrees with the District Court that the 2009 Endangerment Finding is valid with respect to public welfare because GHGs contribute to climate change and Congress explicitly included effects on climate in the definition of public welfare. *See* 42 U.S.C. § 7602(h). Moreover, courts give a high degree of deference to agency decisions based on scientific evidence. *Balt. Gas and Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983).

However, the Endangerment Finding is invalid with respect to public health because GHGs do not *directly* impact human health. Congress did not intend for the CAA to apply to secondary

health effects from air pollutants. *See* 42 U.S.C. §7602(h). If it had intended to delegate power to EPA over such a major question of policy and economics, it would have done so explicitly in the statute. *See, e.g., FDA. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 123 (2000).

STANDARD OF REVIEW

This case concerns the district court's grant of summary judgment, which is a question of law. An appellate court reviews the grant of summary judgment de novo, applying the same legal standard as a district court. *E.g., Pierce v. Underwood*, 487 U.S. 552, 557–58 (1988).

ARGUMENT

I. THE EPA HAS DISCRETION OVER WHETHER TO DESIGNATE GREENHOUSE GASES AS A CRITERIA POLLUTANT UNDER SECTION 108.

A district court may exercise jurisdiction over a citizen suit filed under CAA section 304(a)(2) only when EPA has a non-discretionary duty to act. 42 U.S.C. § 7604(a)(2). Here, EPA has discretion over whether to designate GHGs as a criteria pollutant because: (1) section 108 itself gives the Administrator discretion regarding which pollutants to list, (2) section 108 does not impose a date-certain deadline, and (3) the determination that GHGs are a pollutant under CAA section 202 does not trigger regulation under section 108. Therefore, the District Court did not have subject matter jurisdiction over CHAWN's suit.

A. Subsection (C) Gives the Administrator Discretion Over Which Pollutants to List.

CAA section 108(a)(1) gives the Administrator discretion over whether or not to list criteria pollutants through its "plans to" language in subsection (C). *See* 42 U.S.C. § 7408(a)(1). Section 108(a)(1) reads:

> (1) For the purpose of establishing national primary and secondary ambient air quality standards, the Administrator shall within 30 days after December 31, 1970, publish, and shall from time to time thereafter revise, a list which includes each air pollutant--
>
> (A) emissions of which, in his judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare;
>
> (B) the presence of which in the ambient air results from numerous or diverse mobile or stationary sources; and
>
> (C) for which air quality criteria had not been issued before December 31, 1970 but for which he plans to issue air quality criteria under this section. *Id.*

Here, the Administrator is deliberating whether to designate GHGs as criteria pollutants under section 108, so he does not yet "plan[] to issue air quality criteria under this section." *See id.* § 7408(a)(1)(C). Therefore, the Administrator does not have a non-discretionary duty to list GHGs as a criteria pollutant. If Congress did not wish to give the Administrator discretion, it would not have included subsection (C) at all.

CHAWN marshals a facially similar argument, suggesting that finding discretion in subsection (C) would render the command "shall" meaningless. *See id.* § 7408(a)(1)(C); R. 13. Indeed, it may superficially appear that the Legislature contradicted itself in employing both mandatory and discretionary language in the same provision. The District Court's analysis stopped here and it elected to simply follow *Train*. 545 F.2d at 325; R. 13. However, the proper course is to "interpret the statute as a symmetrical and coherent regulatory scheme" and "fit, if possible, all parts into a harmonious whole." *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. at 133. This Court must therefore determine which specific phrases "shall" and "plans to" modify, seeking a harmonious interpretation. *See* 42 U.S.C. § 7408(a)(1); *Id.*

1. *A Harmonious Interpretation of the Provision Gives the Administrator Discretion Over Which Pollutants to List.*

Upon a more careful reading, the term "shall" imposes a duty on the Administrator, though it is a more limited one than CHAWN proposes. *See* 42 U.S.C. § 7408(a)(1). The command "shall"

only modifies "publish" and "revise," mandating that the Administrator publish a list of criteria pollutants and revise it from time to time. *See id.* Next, the discretionary "plans to" language in subsection (C) provides the Administrator a choice about which pollutants to include on the list. *See id.* If the Administrator is deliberating whether to list GHGs as a criteria pollutant and does not yet "plan[] to issue air quality criteria under this section," he or she has the discretion not to list them. *See id.* This interpretation imbues "shall" with meaning without rendering the discretion provided in subsection (C) nugatory, thereby harmonizing the provision. *See id.* It is strengthened by the pertinent part of section 108(a)'s title: "publication and revision by Administrator." *See id.* § 7408(a). This interpretation also has a clear functional advantage: Administrator discretion is critical when listing a criteria pollutant would have enormous policy implications, as is the case here.

2. Train*'s Interpretation Rendered Subsection (C) Superfluous, Ignored the Statutory Structure, and Relied Almost Exclusively on Legislative History.*

In *Train*, the Second Circuit upheld the District Court's determination that the phrase "but for which he plans to issue air quality criteria" is directed only to the initial list which was issued early in 1971. 545 F.2d at 325 (interpreting 42 U.S.C. § 7408(a)(1)(C)). But *Train* and its followers wrongly interpreted this statute because they rendered subsection (C) superfluous, ignored the statute's structure, and relied on legislative history to the detriment of the statutory language. *See* 42 U.S.C. § 7408(a)(1); 545 F.2d at 325; *see, e.g.*, *Zook v. McCarthy*, 52 F. Supp. 3d 69, 74 (D.D.C. 2014) (affirming *Train*'s interpretation in dicta).

The District Court in *Train* read subsection (C) to mean "that the Administrator must include on the *initial list* to be issued 30 days after December 31, 1970, all those pollutants 'for which air quality criteria had not been issued before (that date)' but which pollutants he has already

found in his judgment to have an adverse effect on public health or welfare and to have come from the requisite sources." *Nat. Res. Def. Council, Inc. v. Train*, 411 F. Supp. 864, 868 (S.D.N.Y. 1976) (emphasis added). In other words, the court stated that the purpose of subsection (C) was to apply the requirements of (B) and (C) to the initial list of criteria pollutants, published early in 1971. *See id.* The Second Circuit agreed with this interpretation. *Train*, 545 F.2d at 325.

However, the language of section 108(a)(1) already makes clear that the requirements of (B) and (C) apply to the initial list. *See* 42 U.S.C. § 7408(a)(1). To paraphrase the relevant part of subsection (a)(1), the Administrator must publish a list within 30 days of December 31, 1970—the initial list—and include "each air pollutant" on that list that meets the requirements of (A), (B), and (C). *See id.* Therefore, *Train* interprets subsection (C) to mean something that the statute clearly already states, rendering subsection (C) superfluous. *See* 545 F.2d at 325.

Subsection (C) must be read to contribute something novel to the statute. *See Corley v. United States*, 556 U.S. 303, 314 (2009) (relying on the "basic interpretive canon that a statute should be construed to give effect to all its provisions, so that no part will be inoperative or superfluous, void or insignificant."). The clear "operative" meaning of subsection (C) is that the Administrator has discretion whether to list criteria pollutants. *See* 42 U.S.C. § 7408(a)(1); *Id.*

Train's interpretation is also incongruous with the provision's conditional three-part structure. *See* 42 U.S.C. § 7408(a)(1); 545 F.2d at 325. By using this formulation, Congress clearly intended that the Administrator list a pollutant only when subsections (A), (B), *and (C)* are met. *See id.* The *Train* court and courts that followed it were wrong to determine that only (A) and (B) must be met. *See id.* at 325; *see, e.g.*, *Zook*, 52 F. Supp. 3d at 74.

Finally, the *Train* court relied on legislative history to the detriment of the statutory language. *See* 545 F.2d at 326–27. Although the court determined that the statute's "literal

language is somewhat ambiguous," it did not adhere to traditional methods of statutory interpretation to interpret the provision. *See id.* at 327. Instead, it sought to resolve this ambiguity by examining the Act's legislative history, distilled a theme that Congress intended to impose mandatory health guidelines to strengthen air pollution regulation, and concluded that giving the Administrator discretion in listing criteria pollutants would "vitiate the public policy underlying the 1970 Amendments . . . ." *Id.* at 324, 326–27.

However, in statutory interpretation disputes, "a court's proper starting point lies in a *careful* examination of the ordinary meaning and structure of the law itself." *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019) (emphasis added). The *Train* court and the District Court in this case failed to carefully examine the statute, resorting too early to legislative history and precedent, respectively. *See* 545 F.2d at 326–27; R. 13. Moreover, finding that section 108(a)(1) gives the Administrator discretion over listing criteria pollutants would actually *align* with the public policy underlying the 1970 Amendments, by allowing the Administrator to carefully weigh far-reaching regulatory options and make the best choice. *See Train*, 545 F.2d at 324. In conclusion, *Train*'s analysis was faulty in numerous respects and should not be relied upon by this Court. *See id.*

B. EPA Has Discretion Over Whether to List New Criteria Pollutants Because Section 108 Does Not Impose a Date-Certain Deadline.

To impose a "clear-cut" non-discretionary duty, a statute must categorically mandate that "*all* specified action be taken by a date-certain deadline." *Thomas*, 828 F.2d at 791 (emphasis in original); *Sierra Club v. Wheeler*, 956 F.3d 612, 616 (D.C. Cir. 2020). Date-certain deadlines allow a court to "readily determine whether a violation occurred" such that "the only question for the district court to answer is whether the agency failed to comply with that deadline." *Thomas*, 828

F.2d at 791. In the absence of a date-certain deadline, a deadline may be inferred from the overall statutory scheme only "if it is readily-ascertainable by reference to a fixed date or event." *Id.* at 783, 799 n. 58. However, inferable deadlines impose only a "general duty" of timeliness, and "it is highly improbable that a deadline will ever be nondiscretionary, i.e. clear-cut, if it exists only by reason of an inference drawn from the overall statutory framework." *Id.* at 791–92. Federal courts have generally applied this 'date-certain doctrine' to cases brought under CAA section 304(a)(2). *See, e.g., Thomas*, 828 F.2d at 791; *WildEarth Guardians v. Jackson*, 885 F. Supp. 2d 1112, 1116 (D.N.M. 2012).

Here, the lack of a date-certain deadline makes EPA's decision to list GHGs as a criteria pollutant discretionary. Section 108 demands only that EPA "publish, and . . . from time to time thereafter revise, a list which includes each air pollutant . . . ." 42 U.S.C. § 7408(a)(1). The phrase "from time to time" does not impose a deadline on EPA for the listing of air pollutants; rather, it provides EPA considerable discretion to create its own timeline for action. *See id.*

Nor does the overall statutory scheme plausibly suggest an inferable deadline for EPA to list new pollutants. Although CHAWN may attempt to infer a deadline from CAA section 109(d)(1), this provision clearly only applies to pollutants that have *already* been listed. Section 109(d)(1) states, in pertinent part, that:

> Not later than December 31, 1980, and at five-year intervals thereafter, the Administrator shall complete a thorough review of the criteria published under section 7408 of this title and the national ambient air quality standards promulgated under this section and shall make such revisions in such criteria and standards and promulgate such new standards as may be appropriate in accordance with section 7408 of this title and subsection (b) of this section. 42 U.S.C. § 7409(d)(1).

In other words, when criteria and standards for existing pollutants are outdated, EPA must revise them and promulgate new standards every five years. *See id.* The phrase "new standards" clearly does not refer to pollutants which have not been listed; indeed, the title of § 109(d) refers

to the "[r]eview and revision of criteria and standards." *See* 42 U.S.C. § 7409(d). Moreover, the specific use of the phrase "from time to time" in section 108 evinces legislative intent to give EPA discretion over adding new criteria pollutants. *See* 42 U.S.C. § 7408(a)(1). Here, there is no plausible interpretation of the overall statutory scheme that would allow a court to reasonably infer a deadline to add new criteria pollutants.

In the absence of a date-certain deadline or Congressional intent to create a mandatory duty in the statutory scheme, EPA's decision to regulate GHGs as a criteria pollutant is discretionary. Holding otherwise would mark a major departure from the traditional role of courts in settling citizen suits, as usually "the only question for the district court to answer is whether the agency failed to comply with th[e] deadline." *See Thomas*, 828 F.2d at 791. Despite stating that a date-certain deadline "is indeed an essential element of a pure non-discretionary duty action under CAA § 304(a)(2)," *Train* "notwithstanding," and conceding that there is no date-certain deadline under section 108(a), the District Court still chose to follow *Train* and found a non-discretionary duty. R. at 11. This analysis was self-contradictory. Therefore, we ask that this Court reverse the District Court.

C. The Determination That GHGs Are a Pollutant Under Section 202 Did Not Trigger Regulation Under Section 108.

The 2009 Endangerment Finding was issued under CAA Title II, section 202, and CHAWN argues that it triggered a non-discretionary duty to designate GHGs as a criteria pollutant under Title I, section 108. 42 U.S.C. §§ 7408, 7521 (2018); Endangerment Finding, 74 Fed. Reg. 66,496 (Dec. 15, 2009); R. 5. This argument is flawed because section 108 gives the Administrator discretion while section 202 does not. *See* 42 U.S.C. §§ 7408, 7521.

The District Court was incorrect in determining that section 108 uses "identical language to describe the endangerment trigger for regulation" as section 202. R. 8. Section 202 states, in pertinent part, that:

> The Administrator shall by regulation prescribe (and from time to time revise) in accordance with the provisions of this section, standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare. 42 U.S.C. § 7521(a)(1).

While section 202 employs very similar language to section 108 subsection (A), it notably does not provide a discretionary equivalent to subsection (C). *See* 42 U.S.C. §§ 7408(a)(1), 7521(a)(1). Therefore, the Administrator does not have discretion regarding whether to regulate pollutants that meet the criteria under section 202, but the Administrator *does* have discretion in designating criteria pollutants under section 108. *See id.* As such, triggering regulation under section 202 does not also trigger regulation under section 108.

As the language of section 108 gives the Administrator discretion regarding which pollutants to list and the statute does not impose a date-certain deadline, the Administrator has discretion whether to list GHGs as a criteria pollutant. Because a district court only has jurisdiction over a citizen suit filed under CAA section 304(a)(2) when there is a non-discretionary duty, the District Court did not have jurisdiction over CHAWN's suit.

II. THE DISTRICT COURT DID NOT HAVE JURISDICTION OVER CHAWN'S UNREASONABLE DELAY CLAIM UNDER CAA § 304(a) WHERE THE RULE SOUGHT WOULD BE A RULE OF NATIONWIDE APPLICABILITY SUBJECT TO REVIEW EXCLUSIVELY IN THE D.C. CIRCUIT UNDER CAA § 307(b).

A. The District Court Did Not Have Jurisdiction Over This Unreasonable Delay Claim Because it Challenges a Discretionary Agency Action.

An unreasonable delay claim requires that the action the plaintiff seeks to compel be non-discretionary, since "a delay cannot be unreasonable with respect to action that is not required." *Norton*, 542 U.S. at 64 n.1.

In *Sierra Club v. Thomas*, the D.C. Circuit held that the district court did not have jurisdiction over the plaintiff's claim that EPA had unreasonably delayed enacting regulations governing emissions from strip mines, because EPA was not required to comply with a specific deadline. 828 F.2d at 792. The court reasoned that "[w]here Congress has established no date-certain deadline . . . but EPA must nevertheless avoid unreasonable delay, it does not follow that EPA is, for the purposes of section 304(a)(2) under a nondiscretionary duty to avoid unreasonable delay. Instead, this type of duty is discretionary . . . ." *Id.* The CAA Amendments of 1990 abrogated part of *Thomas*'s jurisdictional holding—that the D.C. Circuit has exclusive jurisdiction over unreasonable delay claims—and conferred jurisdiction upon certain district courts. *See Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 553 n.6 (D.C. Cir. 2015). However, it did not abrogate *Thomas*'s holding that without a date-certain deadline, there is no non-discretionary duty, and thus no subject matter jurisdiction under section 304. *See id.*

Here, section 108 gives the Administrator discretion regarding which pollutants to list. *See supra* Section I. Just as in *Thomas*, where the district court did not have jurisdiction over an unreasonable delay claim under section 304(a)(2) because there was no date-certain deadline to enact regulations for strip mine emissions, here CHAWN embedded an unreasonable delay claim in its citizen suit filed under section 304(a)(2), and there is no date-certain deadline to list new

criteria pollutants. *See* 828 F.2d at 792. Therefore, the District Court did not have jurisdiction over this claim. *See* 42 U.S.C. § 7408. More broadly, no court would have jurisdiction over CHAWN's unreasonable delay claim because it challenges a discretionary action. *See id.*

B. If This Court Finds that EPA has a Non-Discretionary Duty to List GHGs as a Criteria Pollutant, Only a U.S. District Court In the District Of Columbia Circuit Would Have Jurisdiction to Hear CHAWN's Unreasonable Delay Claim, Because the Rule Sought Would be Nationally Applicable.

CAA section 304(a) provides that "[t]he district courts of the United States shall have jurisdiction to compel (consistent with paragraph (2) of this subsection) agency action unreasonably delayed, except that an action to compel agency action referred to in section 7607(b) of this title which is unreasonably delayed may only be filed in a United States District Court within the circuit in which such action would be reviewable under section 7607(b) of this title." 42 U.S.C. § 7604(a). Section 7607(b), in turn, provides that "nationally applicable" regulations or final actions "may be filed only in the United States Court of Appeals for the District of Columbia." 42 U.S.C. § 7607(b). Therefore, an unreasonable delay claim to compel agency action where the rule sought would be nationally applicable can only be heard by a district court in the D.C. Circuit, because the final rule would only be reviewable in the D.C. Circuit. *See* 42 U.S.C. §§ 7604(a), 7607(b).

The District Court incorrectly held that CAA section 307(b) is merely a venue provision. *See* R. at 12. Although it has some of the trappings of a venue provision, the Supreme Court made clear forty years ago in *Harrison v. PPG Industries, Inc.* that section 307(b)(1) is a "conferral of jurisdiction upon the courts of appeals." 446 U.S. 578, 593 (1980); *Sierra Club v. EPA*, 955 F.3d 56, 61 (D.C. Cir. 2020).

In *Harrison*, the Supreme Court clarified how a modification of CAA section 307(b)(1) in the CAA Amendments of 1977 expanded the jurisdiction of the D.C. Circuit and the regional Courts of Appeal "in parallel fashion." 446 U.S. at 593. The Court explained that the Amendments expanded the jurisdiction of the regional Court of Appeal to include "any other final action" of the Administrator "which is locally or regionally applicable," and expanded the jurisdiction of the D.C. Circuit to include final actions that are "nationally applicable." *Id.* at 590.

The CAA Amendments of 1990 did not eliminate this parallel, non-overlapping jurisdictional scheme when it conferred jurisdiction to certain district courts in unreasonable delay claims. *See* 42 U.S.C. §§ 7604(a), 7607(b); *Id.* Recently, a district court in the D.C. Circuit supported this proposition in the context of an unreasonable delay claim. *See Envtl. Integrity Project v. EPA*, 160 F. Supp. 3d 50, 52 (D.D.C. 2015). In that case, the court stated that the D.C. Circuit has "exclusive *jurisdiction*" to review nationally applicable final actions by the EPA Administrator under section 307(b)(1). *Id.* (emphasis added). The district court had subject matter jurisdiction over the unreasonable delay claim because it is stationed within the D.C. Circuit, and the D.C. Circuit had exclusive jurisdiction over the final action sought because it concerned a petition for nationally-applicable ammonia gas regulation. *See id.*

Despite *Harrison*'s clear admonition that section 307(b)(1) gives non-overlapping jurisdiction to Courts of Appeal based on whether a final action is regionally or locally applicable, Courts of Appeal have subsequently rendered conflicting decisions. *See, e.g.*, *Dalton Trucking, Inc. v. EPA*, 808 F.3d 875, 877 (D.C. Cir. 2015) (holding that section 307(b) confers jurisdiction to all courts of appeal but venue lies exclusively with the D.C. Circuit or with the appropriate regional court of appeals depending on whether the action is nationally or regionally applicable); *S. Ill. Power Coop. v. EPA*, 863 F.3d 666, 668, 670 n.2 (7th Cir. 2017) (holding that the "venue

and filing provisions of § 7607(b) are not jurisdictional," but the venue provision is a "binding rule.").

Here, CHAWN seeks to compel EPA to list GHGs as a criteria pollutant, which would require EPA to establish primary or secondary NAAQS. R. at 5. This Court is bound by the Supreme Court's holding in *Harrison* that section 307(b) gives the D.C. Circuit exclusive jurisdiction when a final action is nationally applicable. *See Harrison*, 446 U.S. at 590. Other Circuit decisions are not persuasive because in stating that the provision confers blanket jurisdiction or merely exclusive venue, they conflict with the Supreme Court's interpretation of section 307(b). *See id.*; *Dalton Trucking*, 808 F.3d at 877; *S. Ill. Power Coop.*, 863 F.3d at 668.

The District Court was certainly correct that the designation of a criteria pollutant would be a nationally applicable regulation. R. at 12; *see, e.g.*, *ATK Launch Sys., Inc. v. EPA*, 651 F.3d 1194, 1197 (10th Cir. 2011) (holding that an air quality rule with wide geographic reach and promulgated pursuant to a uniform process is nationally applicable and review lies exclusively in the D.C. Circuit). Just as a U.S. District Court in the D.C. Circuit had exclusive subject matter jurisdiction where the final rule sought regarding ammonia gas could only be heard in the D.C. Circuit, here a U.S. District Court in the D.C. Circuit has exclusive jurisdiction over CHAWN's unreasonable delay claim because the rule sought regarding GHGs is nationally applicable. *See Envtl. Integrity Project*, 160 F. Supp. 3d at 52. The District Court for the District of New Union lacked subject matter jurisdiction to hear this claim.

In the alternative, if this Court adopts a "blanket jurisdiction and divided venue" approach like the D.C. Circuit or an "exclusive venue" approach like the Seventh Circuit, this Court should dismiss CHAWN's suit because the D.C. Circuit is the exclusive venue for nationally applicable regulations. *See Dalton Trucking*, 808 F.3d at 877; *S. Ill. Power Coop.*, 863 F.3d at 668. EPA

acknowledges that it did not waive venue in the District Court, but it did not do so because it believed that the District Court did not have subject matter jurisdiction over this suit, consistent with the Supreme Court's parallel jurisdiction approach. *See Harrison*, 446 U.S. at 593. Finding that EPA implicitly waived venue here would be inappropriate given the Supreme Court's discussion of jurisdiction under section 307 in *Harrison*. *See id.* Other Circuit Courts have overwhelmingly dismissed or transferred similar cases when venue was improper. *See, e.g.*, *Dalton Trucking*, 808 F.3d at 877 (dismissing petitions seeking review over EPA's final rule concerning diesel engines in California because they were not nationally applicable); *ATK Launch Sys.*, 651 F.3d at 1197 (holding that petitions concerning NAAQS for fine particulate matter were nationally applicable and transferring them to the D.C. Circuit).

III. EPA HAS NOT UNREASONABLY DELAYED.

Again, a delay cannot be unreasonable if an action is not required. *Norton*, 542 U.S. at 64 n.1. However, if this Court finds that EPA has a non-discretionary duty to list GHGs as a criteria pollutant, it must determine whether EPA unreasonably delayed. The primary question is "whether the agency's delay is so egregious as to warrant mandamus." *In re Core Commc'ns, Inc.*, 531 F.3d 849, 855 (D.C. Cir. 2008). Each case must be analyzed according to its own unique circumstances, making its resolution a "complicated and nuanced task." *Air Line Pilots Ass'n, Int'l. v. Civil Aeronautics Bd.*, 750 F.2d 81, 86 (D.C. Cir. 1984).

To determine if a delay has been sufficiently egregious to warrant mandamus, many courts have adopted the D.C. Circuit's six-factor *TRAC* standard. *TRAC v. FCC*, 750 F.2d at 79–80. The first and most important factor is that "the time agencies take to make decisions must be governed by a rule of reason." *Id.* at 80; *In re Core Commc'ns.*, 531 F.3d at 855. The remaining *TRAC* factors are: (2) the rule of reason may be informed by Congress's statutory scheme; (3) delays are less

tolerable if human health and welfare are at stake; (4) delays are less tolerable when expediting delayed action would affect agency activities of a higher priority; (5) the nature and extent of interests prejudiced by the delay; and (6) no bad faith is necessary. *TRAC v. FCC*, 750 F.2d at 79–80.

In *Mexichem*, the D.C. Circuit held that EPA's four-year timeline for reconsideration of a rule limiting emissions of hazardous air pollutants from polyvinyl chloride production was not an unreasonable delay. *Mexichem*, 787 F.3d at 554. The court emphasized that four years was "reasonably proportionate to the gravity and complexity of the rulemaking." *Id.* at 555. The court also determined that the plaintiffs failed to establish that they would be irreparably harmed if the court did not change the status quo, reasoning that they failed to show any "specific, identifiable cost" they would incur. *Id.*

Similarly, in *Mashpee Wampanoag Tribal Council*, the D.C. Circuit held that the Bureau of Indian Affairs' (BIA) six-year delay to decide a petition for tribal recognition was not unreasonable. *Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094, 1102 (D.C. Cir. 2003). There, the court emphasized the BIA's limited resources and the effect on other equally deserving petitioners waiting to be recognized. *Id.* at 1101.

Likewise, in the first *Pesticide Action Network* decision, the Ninth Circuit held that EPA taking six years to respond to a petition to ban the pesticide chlorpyrifos did not constitute unreasonable delay "in light of the complexity of the issue." *Pesticide Action Network N. Am. v. EPA (In re Pesticide Action Network N. Am.)*, 532 F. App'x 649, 651 (9th Cir. 2013). There, the court highlighted that EPA had taken concrete steps since it received the petition. *Id.* Although the petitioner alleged that chlorpyrifos harmed human health, this factor was not dispositive given that EPA "regulates almost entirely in the realm of human health and welfare." *Id.* Therefore, the court

placed great weight on EPA's competing priorities, reasoning that "any acceleration here may come at the expense of delay of EPA action elsewhere." *Id.* (citing *Thomas,* 828 F.2d at 798).

However, two years later in the second *Pesticide Action Network* decision, the Ninth Circuit held that EPA's eight-year delay in making a final decision on chlorpyrifos was unreasonable, and mandamus was necessary to "end the cycle" of incomplete responses and missed deadlines. *Nat. Res. Def. Council, Inc. v. EPA (In re Pesticide Action Network N. Am.),* 798 F.3d 809, 813 (9th Cir. 2015). The Ninth Circuit has repeatedly found unreasonable delay by EPA in situations that imminently endangered children's health. *See, e.g.*, *Cmty. Voice v. EPA (In re Cmty. Voice)*, 878 F.3d 779, 787–88 (9th Cir. 2017) (granting mandamus to compel EPA action on lead paint, which posed an immediate threat to children's health, after eight years of delay); *Nat. Res. Def. Council, Inc. v. EPA (In re NRDC)*, 956 F.3d 1134, 1138 (9th Cir. 2020) (granting mandamus to compel EPA action on a dangerous pesticide, which posed serious risks to the neurodevelopmental health of children, after more than ten years of delay).

Similarly, in *Core Communications*, the D.C. Circuit held that the Federal Communication Commission's (FCC) six-year delay to respond to the D.C. Circuit's own remand regarding dial-up Internet rules was unreasonable. *In re Core Commc'ns, Inc.*, 531 F.3d 849, 850 (D.C. Cir. 2008). The court highlighted that the FCC had to do "nothing more than state the legal justification for its rules," and reasoned that in failing to respond to its remand, the FCC "effectively nullified" its determination that the interim rules were invalid. *Id.* at 856.

Here, EPA's ten-year deliberation has not been "so egregious as to warrant mandamus." *In re Core Commc'ns*, 531 F.3d at 855. EPA's deliberation has been consistent with the rule of reason, given the unprecedented gravity and complexity of GHG regulation. *See TRAC v. FCC,* 750 F.2d at 79–80. CHAWN's interests would not be severely prejudiced if EPA deliberated further. *See id.*

And although GHGs present a risk to human welfare, mandamus would severely delay action on matters more imminently dangerous to human health. *See id.*

A. Given the Magnitude and Complexity of Regulating GHGs, EPA's Deliberation Comports with the Rule of Reason.

While ten years would constitute an unreasonable delay in simpler circumstances, here it has been appropriate deliberation. It is not hyperbole to say that the gravity and complexity of regulating GHGs is unprecedented. CHAWN is not asking EPA to set national *concentration* limits (allowable fractions of pollutants in the atmosphere) for GHGs, the way that NAAQs was designed to work. Petition to Establish National Pollution Limits for Greenhouse Gases Pursuant to the Clean Air Act, CHAWN, 4 (Dec. 2, 2009). [hereinafter P.]. Rather, because GHGs are globally dispersed, CHAWN demands that the U.S. set national *pollution* caps (allowable levels of pollution) for GHGs based on the nation's proportionate share. P. at 20, 29, 30.

Then CHAWN would have the EPA divide this burden between states to achieve the national pollution cap. P. at 30. Determining each state's proportionate share, according to CHAWN, can be simply "based on any reasonable allocation, such as on the types and numbers of emission sources within its boundaries, population numbers or some other reasonable metric or combination of metrics." *Id.* However, contrary to CHAWN's contention, finding a way to fairly disburse this burden among states is extremely complicated and difficult.

Next, EPA must make sure that each state meets their allocated pollution limit. *Id*. If states were unable to shoulder this heavy burden in a very narrow timeframe, they would risk losing federal highway funding. 42 U.S.C. § 7509(a, (b)(1). CHAWN concedes that even if states meet their target, the U.S. would not achieve the "full health and welfare benefit" of reducing GHG emissions. P. at 30. This is a major understatement. Total global emissions would outweigh U.S.

reductions, so national and statewide GHG levels would continue to climb, and climate change impacts would still get worse. P. at 22.

Just as in *Mexichem*, where the EPA's four-year timeline was "reasonably proportionate to the gravity and complexity of the rulemaking," EPA's deliberation here has been reasonably proportionate to the immense gravity and complexity of regulating GHGs under section 108. *See* 787 F.3d at 555. EPA must deeply consider how to design such a NAAQS program, set proportional targets for each state, and determine an appropriate response for those states that prove unable to meet the targets. In *Mexichem*, EPA was merely reconsidering a rule, whereas here EPA is contemplating making a very complex new rule. *See id.* at 549. And EPA has not failed to respond to a court's own remand where it was merely required to state a legal justification for its rules. *See Core Commc'ns.*, 531 F.3d at 856. Rather, it is faced with a much more expansive and time-consuming task. EPA's prior efforts to regulate GHGs were heavily litigated and none survived fully intact. R. at 7. If the agency decides that the NAAQs program is the best fit to regulate GHGs, it must meticulously design its regulations to withstand challenges so that all progress is not discarded.

Unlike dangerous pesticides and toxic lead paint that cause neurodevelopmental problems in children, GHGs do not pose an imminent danger to human health. *See Pesticide Action Network*, 798 F.3d at 813; *Cmty. Voice*, 878 F.3d at 787–88; *NRDC*, 956 F.3d at 1138. Here, mandamus is not necessary to "end [a] cycle" of missed deadlines and incomplete responses. *See In re Pesticide Action Network N. Am.*, 798 F.3d at 813. EPA has broken no promises. Instead, it has taken a series of meaningful steps to regulate GHGs since the Endangerment Finding. R. at 7. It is notable that President Obama's EPA had eight years to regulate GHGs under section 108, but it did not. This

could have been due to the byzantine complexity of such a move, or the punitive ramifications required for states that failed to meet their targets.

The District Court's analysis was limited to examining the time other courts found to constitute an unreasonable reasonable delay. R. at 13. It found that eight to ten year delays were typically unreasonable, added that human welfare is at stake here, and concluded that EPA's delay was unreasonable. *Id.* However, this analysis was conclusory, not "complicated and nuanced," and the Court failed to consider the truly unique circumstances in this case. *See Air Line Pilots Ass'n*, 750 F.2d at 86; *Mashpee Wampanoag Tribal Council*, 336 F.3d at 1100.

While ten years is normally too long, it is eminently reasonable here "in light of the complexity of the issue." *See Pesticide Action Network*, 532 F. App'x at 651. The first *TRAC* factor, time must be consistent with the rule of reason, weighs forcefully against mandamus.

B. CHAWN's Interests Would Not be Severely Prejudiced if EPA Deliberates Further.

The fifth *TRAC* factor, the nature and extent of interests prejudiced by the delay, also disfavors mandamus because climate change impacts are not sufficiently imminent such that a few more years of agency deliberation will severely prejudice CHAWN's interests. *See TRAC*, 750 F.2d at 80.

Just as in *Mexichem*, where the plaintiffs did not show any "specific, identifiable cost" they would incur if the agency took more time, CHAWN has not identified any specific costs it will incur if EPA deliberates further. *See* 787 F.3d at 555. Rather, CHAWN states that some of its members have already been forced to vacate land in coastal areas, and other members are young adults whose future lives are endangered by the prospect of climate change. R. at 5. Alleging past and far-future harm does not support the notion that agency deliberation will severely prejudice

the organization's interests. *See Mexichem*, 787 F.3d at 555; *Id.* Although the group undoubtedly seeks "Climate Health And Welfare Now," it is in CHAWN's best interest for EPA to devote the proper amount of time needed to devise optimal regulations.

Unlike the pesticide and lead paint cases, where any further delay would imminently harm human health, GHGs only pose a long-term threat to welfare. *See Pesticide Action Network*, 798 F.3d at 813; *Cmty. Voice*, 878 F.3d at 787–88; *NRDC*, 956 F.3d at 1138. Commensurate with the long-term nature of the threat, it would be more efficient for EPA to exhaustively analyze potential regulatory solutions than to implement a hasty option, which could be ineffective or struck down. If EPA devotes a reasonable, additional amount of time to this matter, it will not materially prejudice CHAWN's interests.

C. Forcing EPA Action Would Delay Decisions on Matters Where Human Health is Imminently Imperiled.

The fourth *TRAC* factor also counsels strongly against judicial interference because expediting action here would negatively affect agency activities of a higher priority—matters where human health is in imminent danger. *See TRAC*, 750 F.2d at 80. This also implicates the third TRAC factor: delays are less tolerable when human health and welfare are at stake. *See id.* EPA recognizes that GHGs endanger human welfare, but a mandamus order here would perversely endanger human health, a greater priority.

As in the first *Pesticide Action Network*, the fact that GHGs endanger human welfare is not dispositive because EPA "regulates almost entirely in the realm of human health and welfare," and "any acceleration here may come at the expense of delay of EPA action elsewhere." *See* 532 F. App'x at 651 (quoting *Thomas*, 828 F.2d at 798). Just as a six-year delay was reasonable when the BIA had limited resources and expediting action would negatively impact equally deserving

petitioners, EPA too has limited resources and expediting GHG regulation would negatively impact equally deserving issues. *See Mashpee Wampanoag Tribal Council*, 336 F.3d 1094. However, it would also perniciously impact *more* deserving matters. EPA has a long list of petitions to review concerning dangerous chemicals that pose direct, imminent dangers to human health. *See, e.g.*, *NRDC*, 956 F.3d at 1141 ("the competing priorities here are the more than 300 pesticide registration reviews that must be completed by EPA by October 2022"). Judicially allocating EPA's limited resources is a zero-sum game, and a grievously unwise one when EPA has higher-priority matters to attend to.

In the pesticide and lead paint cases, it made considerable sense to move these matters to the head of EPA's queue because there was an imminent danger to health. *See Pesticide Action Network*, 798 F.3d at 813; *Cmty. Voice*, 878 F.3d at 787–88; *NRDC*, 956 F.3d at 1138. Here, it does not. Moving this action to the head of the queue would frustrate carefully considered agency priorities and have perverse public health consequences. The complexity of GHG regulation also means that it will consume considerable agency time and resources, potentially displacing many more immediately important matters. Therefore, the third and fourth *TRAC* factors counsel strongly against judicial intervention. *See TRAC*, 750 F.2d at 80.

EPA recognizes that climate change is the preeminent environmental challenge of our time and it recognizes its profound responsibility to regulate GHGs. To address climate change with the authority it is given, EPA requires time for assiduous forethought. The extraordinary gravity and complexity of GHG regulation mean that EPA has not unreasonably delayed here. CHAWN's interests will also be better served if EPA takes its time and makes an effective decision that will not get torn apart in litigation. Moreover, judicial intervention would displace critical matters presenting grave, near-term public health harms. EPA understands CHAWN's frustration at

inaction on climate change and similarly desires effective solutions. But subverting the agency's expertise is misguided and would have disastrous public health ramifications.

IV. THE ENDANGERMENT FINDING IS VALID WITH RESPECT TO PUBLIC WELFARE.

The 2009 Endangerment finding is valid with respect to public welfare because Congress explicitly included effects on climate in its definition of harm to public welfare. Moreover, there is substantial evidence demonstrating that GHGs cause climate change, and EPA has wide discretion to act upon this scientific evidence within its area of expertise.

Section 202(a) of the CAA authorizes the Administrator to "prescribe (and from time to time revise)" emissions standards for air pollutants from motor vehicles that "may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7521(a)(1). Congress broadly defined public welfare in the CAA as encompassing "effects on soils, water, crops, vegetation, manmade materials, animals, wildlife, weather, visibility, and climate," among other negative consequences of air pollution. 42 U.S.C. § 7602(h). The Supreme Court ruled that when reviewing an agency determination made "within [the agency's] area of special expertise, at the frontiers of science," courts are to give a high degree of deference to the agency. *Balt. Gas and Elec. Co.*, 462 U.S. at 103.

The D.C. Circuit Court of Appeals reviewed and upheld EPA's 2009 Endangerment Finding with respect to public welfare in *Coalition for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102, 119 (D.C. Cir. 2012), *rev'd in part on other grounds sub nom*. *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302 (2014). In that case, a group of industry and state petitioners challenged EPA's finding that GHG emissions may reasonably be anticipated to endanger public welfare, claiming that EPA violated the CAA in failing to consider the "absurd" policy implications of its

Endangerment Finding. *Id.* at 116–17. Petitioners also argued that the scientific record was inadequate to support EPA's finding. *Id.* at 119. The court quashed both claims, holding that regulations pursuant to the CAA must be based upon scientific judgment rather than policy concerns, regardless of any "absurdity." *Id.* at 117. It also held that EPA was justified in basing its determination on the "substantial record evidence that anthropogenic emissions of greenhouse gases 'very likely' caused warming of the climate." *Id*. at 122.

Similarly, in *Lead Industries Association*, the D.C. Circuit ruled that EPA's lead regulations were reasonable and substantiated by the record, explaining that the CAA's "precautionary and preventive orientation and the nature of the Administrator's statutory responsibilities" allow EPA to "act in the face of uncertainty." *Lead Indus. Ass'n, Inc. v. EPA,* 647 F.2d 1130, 1155 (D.C. Cir. 1980). There, an industry group challenged the maximum safe blood lead level for children and subsequent establishment of NAAQS for lead, arguing that EPA's findings were not justified by the scientific evidence in the record. *Id.* at 1157. As EPA conducted a "searching and careful" inquiry into the scientific studies, expert opinions, and medical evidence upon which the findings were based, the court found that EPA's decisions were "reasonable and supported by the record." *Id.* at 1146, 1167. The court also held that the Administrator had complied with the procedural requirements of the CAA in allowing interested parties "a number of opportunities to participate in exploration and resolution of the issues" in setting NAAQS for lead. *Id.* at 1184. Thus, the court affirmed EPA's rules as the "culmination of a process of rigorous scientific and public review," in compliance with the CAA. *Id.*

Likewise, in *Ethyl Corporation v. EPA,* the D.C. Circuit agreed with the EPA Administrator's interpretation of "endanger" to mean that an air pollutant "presents a significant risk of harm." 541 F.2d 1, 13 (D.C. Cir. 1976). The court held that the language of CAA section

202(a) indicates that the statute is precautionary in nature and allows for a "somewhat attenuated chain of causation." *Id.* at 16. Recognizing that environmental issues are "particularly prone to uncertainty" and emphasizing that "awaiting certainty will often allow for only reactive, not preventive, regulation," the court ruled that EPA need not show "actual harm" before issuing an endangerment finding and regulating air pollution under the CAA. *Id.* at 18, 24–25.

Here, the Endangerment Finding is valid with respect to public welfare because the plain language of the CAA indicates that Congress intended for effects on climate to be considered a danger to public welfare. *See* 42 U.S.C. §7602(h). In any challenge involving an agency's statutory interpretation, the court must look first to the text of the statute. *CSX Transp., Inc. v. Ala. Dep't of Revenue*, 562 U.S. 277, 283 (2011). In the CAA, Congress expressly included effects on climate in the definition of public welfare, as well as effects on soils, water, and weather. 42 U.S.C. §7602(h). GHGs contribute to climate change and have demonstrable impacts on these other aspects of the environment. Thus, they endanger public welfare and meet the criteria for secondary NAAQS regulation.

Second, the Endangerment Finding is valid because it is based on substantial scientific evidence and supported by extensive public participation. As in *Coalition for Responsible Regulation*, where the court upheld the 2009 Endangerment Finding because it found substantial evidence in the record that GHGs very likely contribute to climate change, the record here is the same, and substantial evidence continues to support the Endangerment Finding with respect to public welfare. *See* 684 F.3d at 121. Moreover, the CAA is a precautionary statute, and it licenses EPA to act in the absence of complete scientific certainty. *Ethyl Corp.*, 541 F.2d at 16. As in *Ethyl Corporation*, where the court found that EPA need not prove "actual harm," but merely a "significant risk of harm," here the Endangerment Finding with respect to public welfare is valid

because it demonstrates that GHGs, by causing climate change, pose a significant risk to public welfare. *See id.* at 13. Further, in *Lead Industries Association*, where the court found that EPA's determination was supported by robust public review, here, the 2009 Endangerment Finding with respect to public welfare is supported by several rounds of public comment and expert consultation. *See* 647 F.2d at 1167. This Court should uphold the Endangerment Finding with respect to public welfare in recognition of the causal link between GHGs and climate change, and the extensive public participation that supported the determination.

The Endangerment Finding is valid with respect to public welfare because Congress explicitly included effects on climate in the definition of harm to public welfare. It also authorized the EPA Administrator to act based on science, even in the absence of complete certainty. Therefore, in light of the tradition of deference to agency action in its zone of scientific expertise—and the important role of D.C. Circuit precedent in this realm—this court must uphold the 2009 Endangerment Finding with respect to public welfare.

V. THE ENDANGERMENT FINDING IS INVALID REGARDING PUBLIC HEALTH.

In 2009, EPA found that GHGs were reasonably anticipated to endanger public health. R. at 6. It based these findings on substantial evidence that GHGs cause global warming, which in turn may have significant public health impacts. *Id.* at 7. However, these impacts are *indirect* results of GHGs, and therefore do not constitute an endangerment to public health as envisioned by Congress in the CAA.

As noted by the District Court, the validity of the Endangerment Finding with respect to public health is a question of statutory interpretation regarding section 202(a) of the CAA. R. at 10. The provision directs the EPA Administrator to prescribe and revise regulations for air

pollutants that endanger public health or welfare. 42 U.S.C. §7521(a)(1). EPA now seeks to revise its finding and regulatory scheme, as CAA section 202(a) empowers it to do, in order to stay within the boundaries of its authority delegated by Congress. *Id*.

Here, the Endangerment Finding is invalid with respect to public health because GHGs do not have any direct effect on public health, and Congress did not intend for the CAA to encompass indirect public health impacts from air pollutants. EPA's prior determination is not entitled to Chevron deference because Congress's intent in the CAA was unambiguous. Moreover, this Court should uphold the District Court's determination that the Endangerment Finding is invalid with respect to public health because regulating GHGs through primary NAAQS falls under the major questions doctrine. Congress would not have given EPA discretion over a question of major political and economic significance without explicitly delegating such authority in the CAA.

A. GHG Emissions Do Not Endanger Public Health as Defined in the CAA.

The Supreme Court interpreted "public health" in the CAA to mean, plainly, "[t]he health of the community," and it clearly stated that the purpose of the CAA is to allow EPA to regulate for "direct health impacts." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 465 (2001).

As the CAA does not encompass indirect health effects and GHGs only cause secondary harm to public health, GHG emissions cannot be reasonably anticipated to endanger public health under the CAA. EPA acknowledges that there is substantial proof that GHG emissions contribute to increased global temperatures and intensified weather and storm patterns. R. at 10. Furthermore, we agree with CHAWN that these consequences may have a significant impact on public health. R. at 5. However, these potential public health effects are not contemplated by the text of the CAA, as they are *secondary* consequences. In contrast with all of the other hazardous air pollutants initially listed in the CAA, including lead compounds, asbestos, and other dangerous chemicals,

GHGs are not inherently toxic to human health. *See* 42 U.S.C. § 7412(b)(1). Thus, given that the CAA was intended to prevent and mitigate harm to public health stemming directly from air pollutants, EPA cannot reasonably find that GHGs endanger public health. *See Whitman*, 531 U.S. at 465. At some point, Congress may determine that regulating secondary public health effects of GHGs is a necessary means to combat climate change, in which case it may empower EPA to take action regarding subsidiary effects of air pollution. However, it has not yet done so. Therefore, the 2009 Endangerment Finding is invalid with respect to public health.

B. The Endangerment Finding is Not Entitled to Chevron Deference Because Congress Intended to Omit Secondary Health Effects from the CAA's Conception of Public Health Under Section 202(a).

When a court evaluates an agency decision, it must apply the two-step *Chevron* test to determine if it should defer to the agency's action. *Chevron, USA, Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). First, a court must look to the statute to determine if Congress's intent was ambiguous. *Id.* If it finds that Congressional intent was clear, it "must give effect to the unambiguously expressed intent of Congress." *Id.* Second, if a court finds that Congressional intent is ambiguous, it should apply a deferential standard of review, only invalidating agency action if it is "arbitrary and capricious." *Id.* at 844.

Here, it is clear that Congress did not intend for the CAA to cover secondary effects on health. In explicitly including effects to climate in the definition of public welfare and omitting them in any discussion of public health, Congress indicated that the CAA should apply *only* to air pollution affecting climate in the context of public welfare. *See* 42 U.S.C. §7602(h). This aligns with the specific purpose of the CAA, which Congress confined to the "protect[ion] and enhance[ment] the quality of the Nation's air resources." 42 U.S.C. § 7401(b)(1). Therefore, one

cannot read Congressional silence here as ambiguous; the CAA indicates clear intent to omit the consideration of secondary health effects on public health.

Moreover, the 2009 Endangerment Finding with respect to public health improperly aggrandized EPA authority by broadening the scope of the CAA. The power to regulate air pollutants for their secondary health effects was neither considered nor delegated by Congress. And Congress would not have granted EPA license to enormously expand the statute without explicitly addressing this in the statute. *See Christensen v. Harris County*, 529 U.S. 576, 589, n.* (2000) (Scalia, J., concurring in part and concurring in judgment) ("The implausibility of Congress's leaving a highly significant issue unaddressed . . . and thus 'delegating' its resolution to the administering agency . . . is assuredly one of the factors to be considered in determining whether there is ambiguity."). Therefore, Chevron deference should not be applied here. *See U.S. v. Mead Corp.*, 533 U.S. 218, 231–232 (2001) (finding that Chevron deference did not apply because there was not clear intent from Congress to delegate power to the U.S. Customs Service to issue tariff classification rulings). The statute is unambiguous and this Court need not reach the second step of the *Chevron* test.

C. The Prior Endangerment Finding is Not Entitled to Chevron Deference Because It Falls Under the "Major Questions" Doctrine.

Even if this court finds the CAA to be facially ambiguous, the court should not apply Chevron deference because the Endangerment Finding invokes major policy questions. Chevron deference is based on the "theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. at 123. But when agency determinations turn on "a major policy question of great economic and political importance," courts must hesitate to assume that Congress implicitly

delegated power. *Paul v. United States*, 140 S.Ct. 342, 342 (2019). In these circumstances, the "major questions" doctrine states that Congress must "expressly and specifically decide the major policy question itself and delegate to the agency the authority to regulate and enforce," or "expressly and specifically delegate to the agency the authority both to decide the major policy question and to regulate and enforce." *Id.* Thus, Chevron deference does not apply in circumstances that implicate major policy questions. *See, e.g.*, *Util. Air Regulatory Grp.*, 573 U.S. 302, 324 (2014); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. at 159; *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 231 (1994).

In *Utility Air Regulatory Group*, after the EPA began regulating vehicular and stationary sources of GHGs, the Supreme Court recognized that these regulations would transform the American economy, and therefore held that they constituted an impermissible overreach of EPA's power. 573 U.S. at 311–12, 324. The Supreme Court emphasized that the regulations "would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization," and that Congress must "speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'" *Id.* at 324. Further, it found that EPA's proposed regulations pertaining to nationwide GHG sources "f[ell] comfortably within the class of authorizations that [it had] been reluctant to read into ambiguous statutory text," particularly as they would "place plainly excessive demands on limited governmental resources." *Id.* at 323–24.

Similarly, in *FDA v. Brown & Williamson Tobacco Corporation*, the Supreme Court held that the FDA's sweeping tobacco regulations, which would impact "a significant portion of the American economy," exceeded the FDA's power authorized by Congress. 529 U.S. at 159. In that case, the FDA promulgated regulations pursuant to the Food, Drug, and Cosmetic Act to curb

tobacco use in minors. *Id.* at 127. While acknowledging that the statute was facially ambiguous, the Supreme Court rejected the theory that Congress "intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion." *Id.* at 160. Therefore, it ruled against the FDA's interpretation, holding that it adopted "an extremely strained understanding of 'safety'" as the central concept of the regulatory scheme. *Id.* Though the Supreme Court found that the record contained ample scientific proof of the dangers of tobacco and recognized the severity of the problem FDA sought to address, it nonetheless held that the regulations were invalid as an excessive exercise of agency authority. *Id.* at 161. It cautioned that in the FDA's "anxiety to effectuate the congressional purpose of protecting the public, [it] must take care not to extend the scope of the statute beyond the point where Congress indicated it would stop." *Id.*

Here, upholding the 2009 Endangerment Finding with respect to public health would significantly alter the American economy and vastly increase EPA's authority. CHAWN states as much in its petition. P. at 33 ("The cooperative federalism structure already embodied in this modern law is ideally suited to achieving the required greenhouse gas reductions from all sectors of the economy."). Regulating GHGs through primary NAAQS would be, as the Supreme Court determined in *Utility Air Group*, a major question of political and economic significance. *See* 573 U.S. at 324. This level of regulation would also place "excessive demands" on EPA's limited resources. *Id.* And like in *Brown*, where the FDA adopted a "strained understanding" of a central statutory concept, here, the Endangerment Finding impermissibly stretched the CAA definition of public health to include indirect health impacts. *See* 529 U.S. at 160. If Congress intended for the CAA to wholly reshape the role of EPA and its effect on the American economy by stringently regulating GHGs for their secondary effects on public health, it would have made that explicit in

the statute. *See King v. Burwell*, 576 U.S. 473, 497 (2015) (holding that "Congress does not alter the fundamental details of a regulatory scheme in vague terms.") (internal quotations omitted).

EPA agrees that climate change is an enormously important global problem. R. at 5. And EPA is actively pursuing solutions that are *within* its authority granted by Congress, including by classifying GHG emissions as a danger to public welfare under CAA section 202(a). However, as in *Brown*, where the FDA exceeded its Congressional authority in its eagerness to protect the public from the health dangers of tobacco, EPA now recognizes that its Endangerment Finding with respect to public health was an overreach of agency power. *See* 529 U.S. at 161. The stated purpose of the CAA is to promote "*reasonable* Federal, State, and local governmental actions" to prevent pollution. 42 U.S.C. § 7401(c) (emphasis added). It is unreasonable to use the CAA to regulate for indirect health effects and vastly expand EPA power. As such, EPA seeks to revise its finding that GHGs endanger public health, in order to stay within the bounds of its authority under the CAA and leave this major policy question for Congress to decide explicitly.

CONCLUSION

For the foregoing reasons, EPA respectfully requests that this Court reverse the District Court's findings that EPA has a non-discretionary duty to list GHGs as a criteria pollutant, that the District Court had jurisdiction over CHAWN's unreasonable delay claim, and that EPA unreasonably delayed designating GHGs as a criteria pollutant. EPA respectfully requests that this Court uphold the District Court's findings that the Endangerment Finding is valid with respect to public welfare but invalid with respect to public health.

Respectfully submitted this 21st day of November, 2020,

Attorneys for the United States Environmental Protection Agency