Team #16

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.

ON APPEAL FROM THE DISTRICT COURT
FOR THE DISTRICT OF NEW UNION

BRIEF OF COAL, OIL, AND GAS ASSOCIATION
INTERVENOR-DEFENDANT-APPELLANT-CROSS APPELLEE

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STATEMENT OF JURISDICTION

This action was properly brought before the United States District Court for the District of New Union under the Citizen Suit provision of the Clean Air Act ("CAA"), 42 U.S.C. § 7604(a), and the federal question jurisdiction of 28 U.S.C. § 1331. Coal, Oil and Gas Association ("COGA"), Climate Health and Welfare Now ("CHAWN"), and the United States Environmental Protection Agency ("EPA") each filed a timely Notice of Appeal upon the district court's Order No. 66-CV-2019 issued on August 15, 2020. The United States Court of Appeals for the Twelfth Circuit has jurisdiction of appeals from all final decisions of the district courts of the United States pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

I. Should this Court invalidate the EPA's 2009 Endangerment Finding when the air pollutant does not directly endanger public health and validation of the finding would lead to patently absurd results that Congress did not intend?

II. Did the district court err when it relied on a forty-year-old out of circuit case instead of the seminal case on agency statutory interpretation and ignored the statutory language that did not require agency action nor a deadline to act?

III. Is the EPA's delay to list greenhouse gases as criteria pollutants under CAA § 108 reasonable provided that 1) existing government actions precluded the EPA from listing greenhouse gases as criteria pollutants, 2) Congress did not designate a timetable for EPA action, 3) greenhouse gases do not directly impact human health, and 4) regulation of greenhouse gases present a complex, scientific issue?

IV. Did the district court have jurisdiction over a claim to compel agency action when no party objected to venue, the claim met statutory requirements, and restarting this action would cause further delay?

STATEMENT OF THE CASE

In December 2009, CHAWN petitioned the EPA to issue an endangerment finding that greenhouse gases ("GHGs") adversely impact the public health and welfare pursuant to the CAA § 108, 42 U.S.C. § 7408. R. at 5. On April 1, 2019, CHAWN served the EPA a notice letter for

failure to act on the petition. *Id.* The letter alleged the EPA failed to perform its duty to regulate GHGs as a criteria pollutant under CAA § 108, 42 U.S.C. § 7408, and unreasonable delayed listing GHGs as a criteria pollutant under CAA § 304(a), 42 U.S.C. § 7604(a). *Id*. The EPA did not respond to the notice and CHAWN filed this action on October 15, 2019 in the U.S. District Court for the District of New Union under CAA § 304(a)(2), 42 U.S.C. § 7604(a)(2). *Id*.

COGA moved to intervene in this action under Federal Rule of Civil Procedure 24(a) and asserted "that the grant of CHAWN's requested relief would result in regulatory limits that would severely limit, or completely destroy, the market for its products." *Id.* The district court granted the motion on November 30, 2019. *Id*. Both COGA and the EPA then responded to the complaint, and COGA filed a crossclaim against the EPA seeking a declaration that the administrative record did not support the 2009 Endangerment Finding and that the finding is contrary to law. *Id.* No party objected to venue or filed a motion to dismiss for lack of jurisdiction. *Id.* In addition, all parties filed cross motions for summary judgement and fully briefed the issue of unreasonable delay. R. at 4, 12.

After finding CHAWN established Article III standing, the district court granted both COGA's and CHAWN's motions in part. *Id.* With respect to COGA, the district court determined the Endangerment Finding's in regard to public health was contrary to law and thereby vacated to that extent. R. at 14. All parties filed a timely notice of appeal. R. at 2.

On appeal, COGA respectfully requests this Court:

> 1) find the Endangerment Finding invalid because it is contrary to the law, or in the alternative affirm the district court's holding that the Endangerment Finding was contrary to law with regard to public health;
> 2) the EPA had discretion to list GHGs as a criteria pollutant under § 108;
> 3) the EPA did not unreasonably delay listing GHGs as a criteria pollutant under § 108; and,
> 4) the district court had proper jurisdiction to hear CHAWN's § 304 unreasonable delay claim.

STATEMENT OF FACTS

I. NATIONAL AMBIENT AIR QUALITY STANDARDS

Title I of the CAA outlines "a comprehensive scheme of regulation" for pollutants that the EPA determines "endanger the public health or welfare." R. at 6. Under this regulatory scheme any air pollutants deemed "criteria pollutants" become subject to concentration limits known as National Ambient Air Quality Standards ("NAAQS"). *Id*. To trigger the NAAQS program, the EPA must first make a § 108 endangerment finding that (1) the air pollutant's "emissions . . . may reasonably be anticipated to endanger public health and welfare," (2) the presence "in the ambient air results from numerous or diverse mobile or stationary sources," and (3) "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." R. at 7-8; 42 U.S.C. § 7408.

After a § 108 endangerment finding, the EPA has twelve months to propose primary and secondary NAAQS. *See* 42 U.S.C. § 7408(a)(2). The EPA establishes primary NAAQS as the requisite concentration limits of the criteria pollutant in the ambient air that is required to protect the public health, while secondary NAAQS are the requisite concentration limits of the criteria pollutant necessary to protect public welfare. R. at 8; CAA § 109, 42 U.S.C. § 7409. Once the EPA has established NAAQS, every state has three years to create a State Implementation Plan ("SIP") that outlines how the state will comply with the primary NAAQS concentration limits within ten years. R. at 8; CAA § 110, 42 U.S.C. § 7410; CAA § 172(a)(2)(A) 42 U.S.C. § 7502(a)(2)(A). A state's inability to establish a satisfactory plan or to comply with NAAQS by the Congressionally imposed deadlines may lead to direct federal intervention and possible sanctions, including loss of federal highway funding. R. at 8; CAA § 179, 42 U.S.C. § 7509.

II. THE 2009 ENDANGERMENT FINDING

In 1999, environmental groups petitioned the EPA to make a finding that GHG emissions from automobiles endangered human and environmental health under § 202. R. at 6. In September 2003, the EPA denied the petition on grounds that GHGs did not "fit the concept of 'air pollutant' subject to CAA regulation." *Id*. Due to the global nature and complexity of climate change, the EPA argued the CAA did not provide proper redress, and instead should be addressed through specific legislation or international agreements. *Id.*; *See* Control of Emissions From New Highway Vehicles and Engines 68 Fed. Reg. 52,922 (Sept. 8, 2003).

However, in 2007, the Supreme Court rejected the EPA's position that GHGs did not fit the definition of "air pollutant" under the CAA and directed the EPA to decide if GHGs presented an endangerment to public health and welfare under § 202. R. at 6; *See Massachusetts v. E.P.A.,* 549 U.S. 497 (2007).

On, December 15, 2009, the EPA released the Endangerment Finding under § 202. *Id.* In the finding, the EPA acknowledged GHGs endangered public health and welfare, but this endangerment was due to GHGs' contribution to global climate change rather than direct impacts. R. at 6-7; s*ee* Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act 74 Fed. Reg. 66,496 (Dec. 15, 2009). Thus, the EPA found "these climate change impacts were determined to endanger public health" and "climate change was determined to endanger public welfare," not GHGs. R. at 7. Shortly after the § 202 Endangerment Finding, CHAWN filed a petition to demand the EPA list GHGs as a "criteria pollutant" pursuant CAA § 108. R. at 5.

In the wake of the Endangerment Finding, the EPA undertook many initiatives to reduce GHG emissions. R. at 7. For example, the EPA: limited tailpipe emissions for new vehicles;

applied Title I emissions restrictions on power plants under New Source Performance Standards ("NSPS") and Best Available Control Technology ("BACT"); adopted the 'Tailoring Rule' to limit the scope of permitting and review requirements on GHG sources; and issued the "Clean Power Plan" which required states to updated implementation plans under CAA § 111(d), 42 U.S.C. § 7411 in order to reduce GHG emissions. R. at 7; *see* Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule 75 Fed. Reg. 31,514 (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 Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units 80 Fed. Reg. 64,662 (Oct. 23, 2015); 42 U.S.C. § 7411(d).

Few of these GHGs regulatory efforts survived judicial scrutiny. The "Tailoring Rule" and NSPS limits were partially struck down by the Supreme Court in 2014. R. at 7; s*ee Util. Air Regulatory Grp. v. E.P.A.*, 573 U.S. 302 (2014). And following the 2016 election, the Trump administration rolled back other efforts. R. at 7. Most notably, the EPA repealed the Clean Power Plan in July 2019 and the new vehicle emission standards in April 2020. *Id.*; *see* Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions From Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations 84 Fed. Reg. 32,520 (July 8, 2019); The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks 85 Fed. Reg. 24,174 (Apr. 30, 2020). The 2009 Endangerment Finding has survived thus far. R. at 7.

STANDARD OF REVIEW

This appeal is from the district court's grant of summary judgment. Summary judgment is appropriate where "there is no genuine issue as to any material fact and . . . the moving party is

entitled to judgment as a matter of law." Fed. R. Civ. Proc. 56(c). Because the issues before this Court are questions of law, this Court must conduct an independent review and not defer to the district court's decisions. *Pierce v. Underwood*, 487 U.S. 552, 557 (1988) (holding that questions of law are reviewed de novo).

In addition, courts review the EPA's interpretation of the CAA under the standard established in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The Supreme Court has elaborated that "[u]nder *Chevron*, we presume that when an agency-administered statute is ambiguous with respect to what it prescribes, Congress has empowered the agency to resolve the ambiguity. [Therefore,] the question for a reviewing court is whether in doing so the agency has acted reasonably and thus has stayed within the bounds of its statutory authority." *Util. Air*, 573 U.S. at 302.

SUMMMARY OF THE ARGUMENT

The Framers premised the founding of the United States on the intentional separation of powers. The Constitution thus limits an executive agency's regulating authority to that what Congress delegated. If the Court requires the EPA regulate GHGs under the NAAQS framework, it will expand the EPA's power beyond what Congress had delegated.

Congress enacted the CAA with the purpose of protecting the ambient air quality and ensuring that all Americans "have clean air to breath, air that will have no adverse effects on their health." 116 Cong. Rec. 32901 (Sept. 21, 1970). To achieve this goal, Congress developed the NAAQS program under Title I of the CAA as a pathway to attainable national ambient air quality standards and to create an enforcement mechanism to encourage state compliance. However, when the EPA initially proposed the Endangerment Finding it made clear that ambient levels of GHGs "do not cause direct adverse health effects," and "all public health risks and

impacts" attributed to increased levels of GHGs "occur via climate change." Proposed Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act 74 Fed. Reg. 18886-01, at 18901 (Apr. 24, 2009).

To appropriately interpret the relevant statutes and avoid unchecked agency power, this Court should find for COGA on all claims. First, this Court should find the 2009 Endangerment Finding on public health and welfare is invalid because the EPA found that GHGs have no direct adverse public health impacts and "give effect to the unambiguously expressed intent of Congress" climate effects as effects on welfare under § 302 (h). *Chevron*, 467 U.S. at 843. More so, this Court should invalidate the Endangerment Finding because it will lead to patently absurd results. Section 108 would force states to attain GHGs "beyond the power of any one State," and this Court compelling the EPA to create unattainable NAAQS is absurd on its face and misconstrues Congress' vision for the CAA. R. at 9.

Second, if this Court finds the Endangerment Finding valid, it should find, nonetheless, that the EPA has discretion to list GHGs as criteria pollutants under § 108. The Supreme Court affirmed the EPA's "use of statutory context" in considering how to apply findings and definitions across the CAA to ensure airborne substances may be "sensibly . . . encompassed within the particular regulatory [provision]." *Util. Air*, 573 U.S. at 319. Section 108 serves a unique regulatory purpose that cannot sensibly encompass GHGs, therefore the EPA has discretion on whether to apply the § 202 Endangerment Finding to § 108. Further, the district court erred when it relied on an outdated Second Circuit case, *Natural Resources Defense Council, Inc. v. Train ("Train")*, 545 F.2d 320 (2d Cir. 1976), to determine the EPA had a nondiscretionary duty to list GHGs as a criteria pollutant. Instead of relying on the seminal case

in agency statutory interpretation, *Chevron;* the district court relied entirely on a forty-year-old decision that the Second Circuit heard before the Supreme Court decided *Chevron*.

Third, if this Court finds the EPA had a duty to act, it should find in the alternative that EPA did not unreasonably delay in its duty to list GHGs under § 108 under the flexible, multi-factor *Telecomm. Research & Action Ctr. v. F.C.C. ("TRAC")*, 750 F.2d 70 (D.C. Cir. 1984) test. The EPA's delay was reasonable given the complexity of the CAA and the events that followed the Endangerment Finding. Notably, the proposed legislation brought by Congress precluded the EPA from issuing NAAQS. In addition, Congress did not impose a statutory deadline for the EPA to list GHGs. In consequence, the rule of reason provides that the EPA did not unreasonably delay listing GHGs as criteria pollutants.

Finally, this Court should find that district court had proper jurisdiction to hear CHAWN's § 304 unreasonable delay claim. Section 307(b) is a venue statute and the parties waived any objection because they failed to raise the issue. Alternately, this Court should find that the EPA met the statutory requirements under § 304(a) and § 307(b) to bring an unreasonable delay action in the district court. Moreover, judicial efficiency further suggests this Court find the district court had proper jurisdiction to hear the claim.

Accordingly, COGA requests the Court invalidate the 2009 Endangerment Finding and. In the alternate, COGA respectfully requests the court find the EPA's duty to list GHGs as criteria pollutants was discretionary, or that there was no unreasonable delay in listing GHGs as a criteria pollutant.

ARGUMENT

I. THE 2009 ENDANGERMENT FINDING IS INVALID IN REGARD TO CAA § 108 OF THE CLEAN AIR ACT BECAUSE GHGS HAVE NO DIRECT ADVERSE IMPACT ON PUBLIC HEALTH AND ALLOWING THIS FINDING WOULD CREATE PATENTLY ABSURD RESULTS.

The EPA's 2009 Endangerment Finding was pursuant to § 202, which provides that the EPA Administrator "shall by regulation prescribe . . . standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which . . . cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7521.

Like § 202, § 108 examines "public health" or "welfare" to determine if an "air pollutant" is a "criteria pollutant" for the purposes of establishing NAAQS. It states that the EPA Administrator shall compile and revise "a list which includes each air pollutant . . . emissions of which . . . cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7408. However, § 108 goes beyond the language of § 202 and requires the air pollutants' presence "in the ambient air [result] from numerous or diverse mobile or stationary sources" and "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." 42 U.S.C. § 7408.

Ambiguities in the CAA have provided broad deference to the EPA's interpretation. Section 302 does define "effects on welfare," referring to "effects on soils, water, crops, vegetation, manmade materials, animals, wildlife, weather, visibility, and climate . . ." 42 U.S.C § 7602. However, the CAA does not define "public health." In the past, the EPA has interpreted it to include "morbidity, such as impairment of lung function, aggravation of respiratory and cardiovascular disease, and other acute and chronic health effects, as well as mortality." 74 Fed.

Reg. at 66510. The Supreme Court has provided little guidance, relying on the ordinary meaning – "the health of the public" – in the past. *See Whitman v. Am. Trucking Associations*, 531 U.S. 457, 466 (2001).

This court should affirm the district courts determination The Endangerment Finding was contrary to law with respect to public health. Further, this Court should the Endangerment Finding is invalid in all respects because an GHG Endangerment Finding under § 108 would lead to absurd results not intended by Congress.

A. The Legislative History of the CAA and its Amendments Proves that GHGs Do Not Directly Endanger the Public Health in the Way Congress Intended.

The Endangerment Finding in regard to public health is inconsistent with the CAA's original intent. Congress was clear that its purpose in enacting the 1970 CAA was to provide people clean ambient air to breathe. A leading proponent of the CAA announced "[t]his bill states that all Americans in all parts of the Nation should have clean air to breathe, air that will have no adverse effects on their health." 116 Cong. Rec. 32901 (Sept. 21, 1970). Congress reaffirmed its concern about the direct health impacts from breathing polluted air in the 1990 Amendments to the CAA. *See* S. Rep. No. 101-228, at 3389 (1989) ("[t]here is no choice but to breathe the air, whether it is clean or polluted. Air is inhaled regardless of its quality.").

Yet, the EPA found that "ambient concentrations of carbon dioxide and the other greenhouse gases . . . do not cause direct adverse health effects such as respiratory or toxic effects." 74 Fed. Reg. at 18901. Further, the EPA admitted the "public health" finding is based on the secondary health impacts caused by changes in the climate and not from directly breathing in GHGs. R. at. 7. The CAA also clearly lists any alleged changes in climate as effects under "welfare" and not "public health." 42 U.S.C. § 7602. Today, the EPA concedes the determination

that GHGs "endangered public health" was wrong. R. at 10. The district court agreed and held "Congress saw climate impacts of air pollution solely as a matter of public welfare." R. at 10.

CHAWN argues the EPA's initial interpretation should control under the *Chevron* doctrine. Though such reliance may be unwarranted,[1] it is inconsequential. The district court did not base the holding on a theory of agency deference. R. at 10. Instead, the district court's decision was grounded in Congress' unambiguous intent when it specifically included climate impacts within the definition of welfare under § 302(h). 42 U.S.C. § 7602(h). The district court held that "where Congress has expressed a specific intention regarding the resolution of a question of statutory interpretation, the Court must always give effect to that specific intention of Congress." R. at 10. The district court's holding is consistent with the *Chevron* Court, which held where "the intent of Congress is clear . . . the court . . . must give effect to the unambiguously expressed intent. . ." *Chevron*, 467 U.S. at 842-43.

The district court's ruling is provided greater support by the structure and the language in the CAA. The CAA is clear that effects on climate are effects on welfare, not public health. To hold otherwise renders the public welfare prong "insignificant, if not wholly superfluous." *Duncan v. Walker*, 533 U.S. 167, 174 (2001). Allowing public welfare effects to be reinterpreted as a public health effects would be redundant and run contrary to the Supreme Court's reluctance "to treat statutory terms as surplusage in any setting." *Id*. (internal quotations omitted); *see also*

[1] The Supreme Court rejected an agency change in interpretation as relevant to the issue of deference: "An initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis. Moreover, the fact that the agency has adopted different definitions in different contexts adds force to the argument that the definition itself is flexible, particularly since Congress has never indicated any disapproval of a flexible reading of the statute." *Chevron,* 467 U.S. at 863–64.

United States v. Menasche, 348 U.S. 528 (1955) ("It is our duty to give effect, if possible, to every clause and word of a statute") (internal quotations omitted).

Finally, interpreting public health effects to now include any tangential or indirect health impacts caused by any "agent or combination of such agents, including any physical, chemical, biological, radioactive . . . substance or matter which is emitted into or otherwise enters the ambient air" would substantially expand the EPA's regulatory power. 42 U.S.C. § 7602. It is difficult to find a substance that would not eventually cause an indirect adverse health impact on the public, which could open countless substances to stringent regulation. Such a broad definition would result in the "enormous and transformative expansion in the EPA's regulatory authority without clear congressional authorization," exactly what the *Utility Air* Court deemed "outrageous." *Util. Air*, 573 U.S. at 324.

For example, water vapor also significantly contributes to the greenhouse effect,[2] but poses no direct public health threat. Under CHAWN's interpretation, the EPA should also classify water vapor as an air pollutant. This finding would require the EPA to declare water vapor as "emissions of which . . . may reasonably be anticipated to endanger public health" and therefore subject to strict NAAQS regulation. 42 U.S.C. § 7408. Such a radical step would be absurd and beyond the authority Congress delegated to the EPA.

B. <u>The Endangerment Finding Is Invalid Because It Would Lead to Absurd Results Not Intended by Congress Under CAA § 108.</u>

Courts have long interpreted statutes to avoid absurd results. "No rule of construction necessitates our acceptance of an interpretation resulting in patently absurd consequences."

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[2] *See* Steven C. Sherwood et al., *The Global Warming Potential of Near-Surface Emitted Water Vapour*, Environ. Res. Lett.13 104006, (2018) ("Water vapour [sic] is the most powerful greenhouse gas in Earth's atmosphere, accounting for roughly half of the present-day greenhouse effect")

United States v. Brown, 333 U.S. 18, 27 (1948). Unlike *Chevron*, this doctrine does not rely on ambiguity, but instead allows the court to adopt "a restricted rather than a literal or usual meaning of [the statute's] words where the acceptance of that meaning would lead to absurd results . . . or would thwart the obvious purposes of the statute." *C.I.R. v. Brown*, 380 U.S. 563, 571 (1965); *see also Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 470 (1989) (Kennedy, J., concurring) ("[w]here the plain language of the statute would lead to patently absurd consequences, that Congress could not possibly have intended, we need not apply the language in such a fashion" (original citations omitted)). Courts developed this doctrine after they recognized that "laws enacted with good intention, when put to the test, frequently, and to the surprise of the law maker [him or herself], turn out to be mischievous, absurd, or otherwise objectionable." *Crooks v. Harrelson*, 282 U.S. 55, 60 (1930).

1. Validating the Endangerment Finding will lead to unattainable standards.

Finding the Endangerment Finding valid under § 108 will lead to patently absurd results. Section 108 triggers the establishment of national primary and secondary ambient air quality standards under CAA § 109. National primary standards "shall be ambient air quality standards the attainment and maintenance of which . . . are requisite to protect the public health," and secondary standards "protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air." 42 U.S.C. § 7409. Once the EPA establishes primary and secondary NAAQS, States would have three years submit their SIP [3] and then ten years to attain those standards[4] or face possible federal sanctions.[5] R. at 8.

[3] 42 U.S.C. § 7410.
[4] 42 U.S.C. § 7502.
[5] 42 U.S.C. § 7509.

Congress' design of the NAAQS program only sets the States up to fail in regulating GHGs. Even CHAWN and the EPA concede that "since GHG concentrations are relatively constant around the globe – it is beyond the power of any one State . . . to bring global GHG concentrations down to a level that does not threaten climate change." R. at 9. It would be absurd for this Court to compel the EPA to establish primary and secondary NAAQS that all parties acknowledge the States could never meet.

Congress enacted the CAA to ensure that all Americans "have clean air to breath, air that will have no adverse effects on their health." 116 Cong. Rec. 32901 (1970) (Senator Muskie). To do this, Congress made one of primary goals of Title I "to encourage or otherwise promote *reasonable* Federal, State, and local governmental actions, consistent with the provisions of this chapter, for pollution prevention." 42 U.S.C. § 7401 (emphasis added). Validating the Endangerment Finding will require the EPA to promulgate NAAQS, and the States to produce SIPs that could never be harmonized, "thwart[ing] the obvious purposes of the statute." *C.I.R. v. Brown*, 380 U.S. at 571.

2. The district court erred in dismissing COGA's absurd results because it ignored relevant Supreme Court authority about the context of statutes.

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Although the district court dismissed these absurd results arguments, it used an inapposite persuasive authority that relied on the Supreme Court's holding in *Massachusetts v. E.P.A* R. at 9. In *Massachusetts*, the Court rejected the EPA's argument that it lacked statutory authority to regulate GHGs based on the EPA's interpretation of *Food & Drug Admin. v. Brown & Williamson Tobacco Corp. ("FDA")*, 529 U.S. 120, 133 (2000) (using "common sense" and historical context to determine Congress did not intend to "delegate a policy decision of such economic and political magnitude" to allow the FDA to regulate tobacco). *Massachusetts*, 549 U.S. at 530-531. The EPA, aware of the economic and political ramifications of regulating

GHGs, argued that Congress had not intended to delegate a policy decision of such magnitude to the EPA. The Court in *Massachusetts* disagreed because it did not believe Title II of the CAA had the same "extreme measure" concerns that it found central to the *FDA* case. *Id.* at 531.

However, the Court in *Massachusetts* only applied the "extreme measures" analysis in the context of § 202. Though § 202 and § 108 use similar language, they serve two very different regulatory functions and purposes. Where § 202 under Title II only triggers emission regulations on new motor vehicles and engines, an endangerment finding under § 108 triggers a broader regulatory scheme and potentially severe sanctions. Therefore, any decision on absurd results must look at the two sections in context. As the Court held in *Environmental Defense v. Duke Energy Corp.,* 549 U.S. 561, 576 (2007), "[c]ontext counts."

On the same day the Court decided *Massachusetts,* it upheld the EPA's ability to define the term "modification" differently in separate sections of CAA and that such action was well within the agency's discretion. *Id.* The Court emphasized that "[a] given term in the same statute may take on distinct characters from association with distinct statutory objects calling for different implementation strategies." *Id.* at 574.

Seven years later, the Court reaffirmed the "context counts" position in *Utility Air* when it reversed *Coalition for Responsible Regulation* in part. *Util. Air*, 573 U.S. 302. In *Utility Air,* the Supreme Court declined to require strict GHG regulation throughout the CAA. *Id.* The Court limited the effect of the *Massachusetts* holding. Finding "*Massachusetts* rejected EPA's categorical contention that greenhouse gases could not be 'air pollutants' for any purposes of the Act," it did not require an "equally categorical position that greenhouse gases must be air pollutants for all purposes regardless of the statutory context." *Id.* at 319 (internal quotations omitted) Concerned about absurd results, the Court emphasized "the [CAA's] provisions use 'air

pollutant' to denote not every conceivable airborne substance, but *only* those that may sensibly be encompassed within the particular regulatory program." *Id*. The district court accordingly should have found the 2009 finding invalid on absurd results grounds.

II. THE EPA HAD THE DISCRETION TO LIST GHGs AS A CRITERIA POLLUTANT UNDER CAA § 108.

The district court held that it "will follow *Train's* holding that the EPA has a non-discretionary duty to list GHGs as a criteria pollutant under CAA § 108(a)(1)." R. at 13. However, because the district court relied exclusively on an out of circuit, forty-year-old opinion, it erred in its conclusion. Specifically, the district court ignored three important considerations for whether the EPA had discretion to list the GHGs as a criteria pollutant. First, Congress intended § 108 for the express purpose of protecting breathable ambient air and the EPA's § 202 Endangerment Finding does not fit that mold. Second, the district court inappropriately relied on *Train* because it is distinguishable from the issue here and is no longer good law. Third, Congress did not impose a statutory "date-certain deadline" under § 304(a)(2). In accord, after this Court conducts its own independent review, it should find that the EPA had discretion to list GHGs as a criteria pollutant under § 108.

A. The EPA Has Discretion in Applying the Endangerment Finding to CAA § 108 Because Congress Expressly Intended the NAAQS Program to Protect Breathable Ambient Air.

As discussed at length earlier, ensuring breathable ambient air was a primary purpose behind Congress enacting the CAA. Since 1971, the EPA has consistently defined "ambient air" as the "portion of the atmosphere, external to buildings, to which the general public has access." 40 C.F.R. § 50.1. The Supreme Court determined this to mean the "outdoor air used by the general public." *Train v. Natural Resources Defense Council, Inc.*, 421 U.S. 60, 65 (1975). This focus on "ambient air" is perhaps most apparent in the National *Ambient Air* Quality Standards

established under CAA § 109.[6] Historically, NAAQS focused on establishing "concentrations of . . . substances in the air *near the surface* . . . *not higher in the atmosphere*." 68 Fed. Reg. at 52926-52927 (Sept. 8, 2003) (emphasis added). This portion of the atmosphere is not where GHGs are concentrated. GHGs like CO_2 are "well mixed throughout the atmosphere, up to approximately the lower stratosphere." *Id*. At 52927.

Moreover, the endangerment finding under § 108 requires the EPA to list pollutants as "criteria pollutants" if they "endanger public health or welfare." 42 U.S.C. § 7408. Though the public health and welfare language is identical to § 202, § 108(a)(1)(B) requires a pollutant be present "in the ambient air." Section 108(a)(2) reinforces this view and requires the EPA Administrator's air quality criteria to "accurately reflect . . . effects on public health or welfare which may be expected from *the presence* of such pollutant in *the ambient air*. . ." 42 U.S.C. § 7408 (emphasis added). This language clearly indicates § 108 and the NAAQS' regulatory scheme focuses specifically on the public health and welfare impacts created by the presence of air pollutants in breathable ambient air.

Section 202 does not have this same qualifying language, and therefore this Court should not assume the Endangerment Finding under § 202 applies to § 108. "The omission of the same term or phrase from a similar section is significant to show different legislative intent for the two sections." 2A Sutherland Statutory Construction § 46:6 (7th ed.). The Supreme Court has endorsed this position in the wake of the Court's *Massachusetts* decision. *See Util. Air*, 573 U.S. at 319. In *Utility Air* the Supreme Court rejected the EPA's contention that the term "any air

[6] *See* CAA § 109: Primary NAAQS "shall be *ambient air* quality standards" required "to protect the public health." 42 U.S.C. § 7409(b)(1) (emphasis added); Secondary NAAQS set standards "to protect the public welfare from any known or anticipated adverse effects associated with *the presence of such air pollutant in the ambient air*. 42 U.S.C. § 7409 (b)(2) (emphasis added).

pollutant" had to be interpreted consistently throughout the CAA. 573 U.S. at 319. Justice Antonin Scalia was clear "*Massachusetts* does not strip EPA of authority to exclude greenhouse gases from the class of regulable air pollutants under other parts of the Act where their inclusion would be inconsistent with the statutory scheme." *Id.* Here, if this Court allows the Endangerment Finding under § 202 to trigger an endangerment finding under § 108, it would in turn require the creation of national atmospheric air quality standards rather than national ambient air quality standards, which would be inconsistent with the statutory scheme and purpose of the NAAQS program.

The EPA and CHAWN may argue the Supreme Court addressed this issue in *Massachusetts,* but this fails to account for the EPA's clear ambient air definition. In *Massachusetts*, the Court held that GHGs fit the definition of "air pollutant" under § 302(g),[7] and made a passing reference to the term "ambient air" in a footnote. *Massachusetts*, 549 U.S. at 529 n. 26. The Court found the CAA used "the phrase 'the ambient air' without distinguishing between atmospheric layers." *Id.* However, the EPA has remained clear on the definition of ambient air since 1971. The "portion of the atmosphere, external to buildings, to which the general public has access" is unambiguous language that identifies ambient air as low-level air accessible to the general public. 40 C.F.R. § 50.1. Congress has passed two sweeping Amendments to the CAA since the EPA narrowly defined "ambient air" and has made no effort to clarify the statute's meaning of "ambient air." Therefore, following *Utility Air*'s contextual approach, the EPA has discretion to determine if the Endangerment Finding triggers § 108.

[7] Section 302(g) of the CAA defines "air pollutant" as "air pollution agent or combination of such agents . . . which is emitted into or otherwise enters the ambient air."42 U.S.C. § 7602(g).

B. The District Court Erred by Relying On *Train*.

CHAWN also relies on a 1976 Second Circuit case, *NRDC v. Train,* to argue the Endangerment Finding under § 202 establishes a § 108 endangerment finding. R. at 11. However, *Train* differs from this case because it examined whether to list lead – a pollutant Congress discussed when creating the 1970 Amendments – as a criteria pollutant. In addition, *Train* is not binding authority and the Court should instead follow the *Chevron* doctrine. In consequence, the EPA has discretion to designate GHGs as a criteria pollutant under § 108.

1. Train examined whether the EPA had a nondiscretionary duty to list a pollutant Congress had specifically identified in the legislative history as a criteria pollutant under CAA § 108.

Train involved the listing of lead as a criteria pollutant. The NRDC argued the EPA Administrator was required to list lead as a criteria pollutant after determining: (1) lead had "an adverse effect on public health and welfare" and (2) "the presence of lead in the ambient air results from numerous or diverse mobile or stationary sources." *Train*, 545 F.2d at 324. The Court rejected the EPA's argument that § 108 (a)(1)(C) provided the Administrator discretion in listing lead as a criteria pollutant and partly based its holding on Congress' clear expectation that lead would be listed following the enactment of the 1970 Amendments to the CAA. *Id*. at 325.

Unlike the issue of lead of *Train*, the presence of GHGs in ambient air does not pose a direct public health threat. In addition, there is no evidence in the legislative history that Congress intended the NAAQS regime to regulate GHGs, while Congress clearly intended to regulate lead in that way. *See NRDC v. Train*, 545 F. 2d at 326 (citing legislative history that notes, "[w]ithin the 13-month deadline, the Congress expects criteria to be issued for nitrogen oxides, fluorides, *lead* . . .") (emphasis added).

The CAA's structure instead leads to the opposite conclusion – that Congress never intended for GHGs to be regulated under certain sections of CAA. The Supreme Court agreed in

Utility Air, where it held that including GHGs in the definition of "any air pollutant" under the CAA's Prevention of Significant Deterioration and Title V permitting regimes would "radically transform those programs and render them unworkable as written." *Util. Air*, 573 U.S. at 320. Similarly, as discussed above, a determination that the Endangerment Finding triggers § 108 would render the NAAQS program unworkable.

2. The Chevron *Doctrine Undermines the District Court's reliance on* Train.

As explained above, CHAWN's argument that the EPA has a nondiscretionary duty to designate GHGs as a criteria pollutant under § 108 hinges on its belief that *Train* is still good law. There, the Second Circuit rejected the EPA's claim of discretion under § 108 (a)(1)(C) because of: (1) the judicial interpretations of the CAA; (2) § 108's plain language and the CAA's structure; and (3) the CAA's legislative history. By relying on *Train*, the district court failed to consider more recent Supreme Court precedent, and the two expansive CAA amendments added after the *Train* decision. Thus, this Court should not follow *Train*.

In *Train,* the court partially based their conclusion on recent judicial decisions the court found persuasive in determining the CAA imposed a nondiscretionary duty on the EPA. *See* 545 F.2d at 327-28. However, eight years after the Second Circuit decided *Train*, the Supreme Court decided the seminal case on legal interpretation and agency deference – *Chevron, U.S.A., Inc. v. NRDC, Inc*. In *Chevron*, the Court held that if a statute is ambiguous, courts must accept any reasonable interpretation by the agency. *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984). There, the Court examined whether the EPA's construction of the statutory term "stationary source" was reasonable after the court of appeals found the "relevant part of the amended Clean Air Act 'does not explicitly define what Congress envisioned." *Id.* at 840-41 (quoting *Natural Resources Defense Council, Inc. v. Gorsuch*, 685 F.2d 718, 723).

In its analysis, the Court noted, "we have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer" and if the choice is reasonable, "[the Court] should not disturb it unless it appears from the statute or legislative history that the accommodation is not one Congress would sanction.'" *Id.* at 844-45 (quoting *United States v. Shimer*, 367 U.S. 374, 382-83 (1961)). Because the statute was ambiguous and the "legislative history was silent," the Court determined "the EPA should have broad discretion in implementing the policies of the 1977 Amendments," and held "we must recognize that the EPA has advanced a reasonable explanation for its conclusion that the regulations serve the environmental objectives as well." *Id.* at 862-63.

Chevron remains the seminal case in this area of law and is binding upon this Court. CHAWN may contend that *Train* is still good law because it mirrored the *Chevron* analysis, but this is incorrect. Since the Second Circuit's decision in *Train,* Congress has substantially amended the CAA twice (in 1977 and 1990), each time with significant legislative history to provide greater context to the role and purpose of the CAA. Therefore, this Court cannot rely on the Second Circuit's interpretation of a section of law that has been significantly changed. A proper *Chevron* analysis is required to determine if the EPA's interpretation provides discretion in listing GHGs as a criteria pollutant under § 108.

C. Even if this Court Follows Train, it Should Not Find the EPA Had a Nondiscretionary Duty to List GHGs as a Criteria Pollutant Because CAA § 108 Does Not Impose a Statutory Deadline.

The district court correctly held that it "is convinced that a date-certain deadline is indeed an essential element of a pure non-discretionary duty under CAA § 304(a)(2)."[8] R. at 11. This

[8] The pertinent portion of CAA § 304 reads "any person may commence a civil action on his own behalf . . . against the Administrator where there is alleged a failure of the Administrator to

"date certain deadline requires that for a petitioner to bring citizen suit under § 304(a)(2) it must demonstrate that "a duty of timeliness . . . 'categorically mandate[d]' that all specified action be taken by a date-certain deadline." *Sierra Club v. Thomas*, 828 F.2d 783, 791 (D.C. Cir. 1987) (quoting *Natural Resources Defense Council, Inc. v. Train*, 510 F.2d 692, 710 (D.C. Cir. 1974)). The court can either find the statute explicitly provides the deadline or it can infer it from the statute. *Id.* This date certain deadline doctrine protects "the delicate balance struck by Congress to permit citizen enforcement only of clear-cut agency violations and defaults." *Defenders of Wildlife v. Browner*, 888 F.Supp. 1005, 1009 (D. Ariz. 1995). Consequently, because § 108 does not impose a deadline and this Court cannot infer a deadline from the statute, CHAWN cannot bring a citizen suit under § 304(a)(2).

The date certain doctrine originated in *Sierra Club v. Thomas*, where the court – pursuant to § 304 – reviewed whether the EPA unreasonably delayed promulgating regulations for strip mines. *Id.* at 785. In 1984, five years after the EPA announced a rulemaking proposal for the fugitive emission source list that did not include strip mine emissions the EPA decided to add them. *Id.* at 785. The EPA then conducted public hearings on the proposal and in February 1986, the EPA released its Regulatory Impact Analysis on the socioeconomic impact of listing strip mines and "as it had promised in its original proposal, reopening the comment period." *Id.* at 786. Plaintiffs then filed suit and alleged that the EPA had unreasonable delayed in promulgating strip mine emissions regulations. *Id.* at 786-87.

The court found that the EPA had a discretionary duty to act under § 304 because § 302(j) offered neither a "date certain deadline" in the explicit text of the statute nor a "readily

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perform an act or duty under this chapter which is not discretionary with the Administrator." 42 U.S.C. § 7604(a)(2).

ascertainable . . . reference to a fixed date or event." *Id.* at 791, n.58. Moreover, the court found that a deadline inferred from § 302(j) "is likely to impose a merely 'general duty' of timeliness, one of which does not result in *per se* violations, but instead requires assessment of both the need for 'quality' in the agency's actions and the 'burden' that compliance with the deadline would impose upon the agency." *Id.* at 791.

Although CHAWN may argue that Congress has abrogated *Sierra Club v. Thomas*, Congress did not abrogate the date certain deadline doctrine, and courts continue to apply it. In 1990, Congress amended § 304 to add language that concerned whether a party should file a citizen suit in a district court or court of appeals. *See* Clean Air Amendments, Pub. L. No. 101-549, § 707(f), 104 Stat. 2399 (1990). However, Congress did not choose to add any language concerning a deadline under § 304, nor did it choose to update the § 108 to include a deadline. *See* Clean Air Amendments, Pub. L. No. 101-549, § 707(f), 104 Stat. 2399 (1990); Clean Air Amendments Pub. L. No. 101-549, Title I, §§ 108(a) to (c), (o), 111, Nov. 15. 1990, 104 Stat. 2465, 2466, 2469, 2470.

Courts continue to apply the "date certain deadline" to find that that an agency has a nondiscretionary duty only if the statute explicitly imposes a deadline or if a court can infer a deadline. *E.g. WildEarth Guardians v. Jackson*, 885 F. Supp. 2d 1112, 1155 (D.N.M. 2012) (considering whether the EPA had a duty to issue or revoke a Title V permit based on the "'specific non-discretionary clear-cut requirements of the Clean Air Act'" (quoting *Mountain States Legal Foundation v. Costle*, 630 F.2d 754, 766 (10th Cir. 1980))). Thus, this Court should follow the *Sierra Club v. Thomas* standard and find that § 304 imposes no nondiscretionary duty for the EPA to act because § 108 imposes no deadline language. This achieves the delicate balance envisioned by Congress to only allow citizen suits for clear-cut violations.

In consequence, this Court should find that the EPA had a discretionary duty to list The Court's determination of the EPA's discretionary authority is critical because it shows that the unreasonable delay issue is moot. *See Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 64 n.1 (2004) ("Agency 'delay cannot be unreasonable with respect to action that is not required'"); *Friends of the Earth v. U.S. E.P.A.*, 934 F.Supp.2d 40, 47 (D.D.C. 2013) (finding that "where there is no nondiscretionary act or duty to compel, a claim of agency unreasonable delayed under the citizen suit provision of the Clean Air Act is barred").

III. IN THE ALTERNATIVE, THIS COURT SHOULD FIND THAT THE EPA DID NOT UNREASONABLY DELAY IN ITS DUTY TO LIST GHGs AS A CRITERIA POLLUTANT UNDER CAA § 108.

Section 304 of the CAA provides that "district courts of the United States shall have jurisdiction to compel . . . agency action unreasonably delayed." 42 U.S.C. § 7604(a). A court's inquiry into whether the unreasonably delay under § 304 is guided by the test articulated in *Telecomm. Research & Action Ctr. v. F.C.C. ("TRAC")*, 750 F.2d 70 (D.C. Cir. 1984). *See, e.g.*, *In re Natural Resources Defense Council, Inc.*, 956 F.3d 1134 (9th Cir. 2020) (holding the EPA unreasonably delayed responding to administrative petition under the *TRAC* test). In *TRAC*, the D.C. Circuit determined courts should examine unreasonable delay using six-factors:

> 1) the 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 statue, that statutory scheme may supply content 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 delay action on agency activities of a higher or competing priority . . .
> 5) the court should also take into account the nature and extent of the interests prejudiced by the delay . . . and
> 6) the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is 'unreasonably delayed.'

Id.

The *TRAC* court recognized that "there is no per se rule as to how long is too long to wait for agency action" and that "although the standard is hardly ironclad, and sometimes suffers from vagueness, it nevertheless provides useful guidance in assessing claims of agency delay." *TRAC*, 750 F.2d at 80. Therefore, after this Court independently applies the *TRAC* test to the EPA's decisions it should find that the EPA did not unreasonably delay in listing GHGs as criteria pollutants under § 108.

Using *TRAC's* fact-specific and flexible standard, this Court should find the EPA did not unreasonably delay listing GHGs under § 108 for three reasons. First, Congress prevented the EPA from taking immediate action because it not only omitted a statutory deadline, but also brought forward legislation that tackled GHGs and in turn, prevented the EPA from issuing NAAQS. Second, this Court should find that the EPA's lack of action did not prejudice the interests of the CAA because the EPA found that GHGs do not have a direct impact on human health or welfare. Finally, the rule of reason suggests this Court find that the EPA did not unreasonable delay in issuing NAAQS because of the complexities of the CAA.

A. The EPA Did Not Act With Impropriety Because Congress Delayed the EPA from Acting Immediately By Not Setting a Timetable Under CAA § 108 and by Creating New Legislation that Would Have Contradicted a NAAQS.

As explained earlier, Congress has not officially indicated a timetable with which the Endangerment Finding under § 202 triggers a finding under § 108, if at all. Because the CAA does not provide "'a precise statutory timetable or other factors counseling expeditious action, an agency's control over the timetable of a rulemaking proceeding is entitled to considerable deference.'" *Sierra Club v. Thomas*, 828 F.2d at 798 (quoting *Sierra Club v. Gorsuch*, 715 F.2d 653, 658 (D.C. Cir. 1983)). Because of Congress' omission, the second *TRAC* factor leans heavily against unreasonable delay.

In addition, the fourth *TRAC* factor weighs against a finding of unreasonable delay because Congress created legislation that targeted GHGs and suppressed the EPA's ability to immediately act. Courts find this factor weighs against unreasonable delay when an agency is confronted with agency activities of a higher or competing priority that that "adversely [affect]" the agency's ability to act. *See Federal Election Com'n v. Rose*, 806 F.2d 1081, 1091, n. 17 (D.C. Cir. 1986) (finding no unreasonable delay after the FEC did not investigate a complaint filed in 1983 when in 1984 a judicial order ruled on the merits of the investigation and a presidential election occurred).

Further, when a court has "no basis for reordering agency priorities," it defers to the agency for how it chooses to prioritize actions. *In re Barr Labs., Inc.*, 930 F.2d 72, 76 (D.C. Cir. 1991); *see also Massachusetts*, 549 U.S. at 527 (finding that "an agency as broad discretion to choose how best to marshal its limited resources and personnel to carry out its delegated responsibilities"). In particular, a court will extend agencies deference for unreasonable delay claims that involve how an agency will act with "complex scientific and technical issues." *Oil, Chemical and Atomic Workers Intern. Union v. Zegeer*, 768 F.2d 1480, 1488 (D.C. Cir. 1985). Courts provide this deference because "the agency is in a unique – and authoritative – position to view its projects as a whole, estimate the prospects for each, and allocate its resources in the optimal way. Such budget flexibility as Congress has allowed the agency is not for us to hijack." *In re Barr Labs., Inc.*, 930 F.2d at 76.

Here, the EPA not only encountered competing priorities, but had to act with highly technical scientific issues found in the CAA. After the endangerment finding, Congress proposed two bills that aimed to reduce GHGs emissions. The Waxman-Markey Bill passed the House in 2009 and explicitly declared "no greenhouse gas may be added to the list under section 108(a) on

the basis of its effect on global climate change." H.R. 2454, 111th Cong. § 831 (2009). Due to uncertainty around climate legislation, the EPA moved to regulate GHGs in other ways.

In 2015, the EPA enacted the Clean Power Plan pursuant CAA § 111. R. at 7. An endangerment finding under § 108 would have preempted and undermined that plan.[9] The Trump Administration only repealed the Clean Power Plan sixteen months ago in July 2019. *See* 84 Fed. Reg. 32,520 (July 8, 2019). Finally, as explained above, any regulation of GHGs under the Title I NAAQS regulatory regime involves complex scientific and technical issues, so this Court should defer to the EPA's balancing of these competing priority and imposes different regulatory schemes.

Because of these competing actions, the EPA did not act with impropriety. Though not required under the *TRAC* factors, a finding of impropriety weighs in favor of an unreasonable delay finding if it is determined an "agency has manifested bad faith, as by singling someone out for bad treatment or asserting utter indifference to a congressional deadline." *In re Barr Labs., Inc.*, 930 F.2d 72, 76 (D.C. Cir. 1991). Here, because of the complexity of the issue, the messaging coming from Congress, and the EPA pursuit of GHG regulation under § 111, the EPA was not unreasonable in not listing GHGs as criteria pollutants under CAA § 108.

B. <u>The EPA's Lack of Action Did Not Prejudice the Interests of the CAA Because GHGs Do Not Impact Directly Human Health or Welfare.</u>

Courts may evaluate the third and fifth factors together "owing to their similarity" of prejudice of interests as the same for concern for the impact of human health and welfare. *Muwekma Tribe v. Babbitt*, 133 F.Supp. 2d 30, 39 (D.D.C. 2000). In addition, courts find the

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[9] *See* CAA § 111(d)(1): "The Administrator shall prescribe regulations . . . which (A) establishes standards of performance for any existing source for any air pollutant (i) for which air quality criteria . . . which is *not included on a list published under section* [§ 108(a)]" 42 U.S.C. § 7411(d)(1).

third *TRAC* factor weighs towards unreasonable delay where a direct link exists between the regulatory action in question and the harm caused to human health and welfare. *See Public Citizen Health Research Group v. Commissioner, Food & Drug Admin.*, 740 F.2d 21, 34 (D.C. Cir. 1984) (finding that "the pace of agency decision making is unreasonably dilatory [as all] scientific evidence in the record points to a link between" the subject of the sought-after order and Reye's Syndrome).

For example, the Ninth Circuit found the EPA had unreasonably delayed its duty to update standards concerning lead poisoning in part because of the threat to human health and welfare. *In re Cmty. Voice v. E.P.A.*, 878 F.3d 779, 788 (9th Cir. 2017). The court explained that the action stemmed from a Congressional mandate to establish national dust-lead hazard standards as part of Congress' effort to eliminate the risk of lead poisoning from pre-1978 structures in children. *Id.* at 782. Although Congress instructed the EPA to issue its rules by 1998, it did not do so until 2001, and it had yet to update them after it found in 2007 that those standards were insufficient to protect children's health. *Id* at 782-83. When the Ninth Circuit weighed the *TRAC* factors, it found "there is a clear threat to human welfare; indeed EPA itself has acknowledged that '[l]ead poisoning is the number one environmental health threat in the U.S. for children ages 6 and younger.'" *Id.* at 787. Consequently, it found the EPA had unreasonably delayed its duty to issue and granted the petition for writ of mandamus. *Id.* at 788.

Unlike in *In re Cmty. Voice*, here it is clear that there are no direct health or welfare impacts from GHGs. The EPA has admitted GHGs "do not cause *direct* adverse health effects" 74 Fed. Reg. at 18,901(emphasis added). And all parties acknowledge "it is beyond the power of any one State, or even the United States . . . to bring global GHG concentrations down to a level that does not threaten climate change." R. at 9. The district court acknowledged that the

Endangerment Finding in regard to public health "does not rely on any health impact resulting from breathing air with ambient concentrations" of GHGs. R. at 10. Therefore, unlike with lead regulations, even if action the EPA took immediate taken on GHGs emissions it would have no direct benefit on the public health and would be insufficient to mitigate any welfare impacts resulting from climate change.

Even if this Court finds GHGs have a direct adverse effect on human health or welfare, it should find "the urgency of the action [is] mitigated" because the EPA "regulates almost entirely in the realm of human health." *In re Pesticide Action Network N. Am. v. E.P.A.*, 798 F.3d 809, 814 (2015); *see also Sierra Club v. Thomas*, 828 F.2d at 798 (holding that court weighing the health and welfare in favor of unreasonable delay "alone can hardly be considered dispositive when . . . virtually the entire docket of the agency involves issues of this type"). Given this mitigation, the Court should find these *TRAC* factors weigh against unreasonable delay.

C. The EPA's Decisions Did Not Result in an Unreasonable Delay Because of the Complexities of NAAQS Under CAA §§ 108-109.

The "rule of reason" *TRAC* factor requires the reviewing court engage "in some discretionary analysis" to determine if there was an unreasonable delay. *South Carolina v. United States*, 907 F.3d 742, 760 (4th Cir. 2018). The factor provides that "there must be a 'rule of reason' to govern the time limit to administrative proceedings," *Potomac Electric Power Company v. Interstate Commerce Commission*, 702 F.2d 1026, 1034 (D.C. Cir. 1983), and "like the [other factors], is not itself determinative, *In re Cmty. Voice*, 878 F.3d at 786. "A reasonable time for action depends on 'the complexity of the task at hand, the significance (and permanence) of the outcome, and the resources available to the agency.'" *In re Public Employees for Environmental Responsibility*, 957 F.3d 267 (D.C. Cir. 2020) (quoting *Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094, 1102 (D.C. Cir. 2003)). Although the district

court was not persuaded by the EPA's argument that its delay was satisfied under the "rule of reason," this Court should find the delay was reasonable because "the reasonableness determination is a fact-specific inquiry and the length of delay alone is not dispositive." *Motaghedi v. Pompeo*, 436 F.Supp.3d 1345, 1359 (E.D. Cal. 2020).

Given the government actions during this time, the lack of timetable, the inadequacy of the CAA to list GHGs as pollutants, the dearth of GHGs' impact human health or welfare, and absence of impropriety by the EPA, demonstrates the EPA did not unreasonably delay listing GHGs under § 108. Despite the district court's view of unreasonable delay, an independent review of this issue demands the opposite conclusion. This Court should not solely fixate on the length of time between the Endangerment Finding and this action, but instead look at the complexities of the CAA and the totality of the events that the Endangerment Finding sparked. A finding of unreasonable delay and compulsion by this Court will push the EPA to promulgate standards that the States will not attain and result in the EPA stumbling upon an unprecedented amount of agency power. In accord, this Court should find the EPA did not unreasonably delay listing GHGs under § 108.

IV. THE DISTRICT COURT HAD JURISDICTION OVER THIS ACTION BECAUSE THE EPA WAIVED ANY VENUE REQUIREMENTS, THIS ACTION MET THE CAA § 304(a) STATUTORY REQUIREMENTS, AND JUDICIAL EFFICIENCY FAVORS USING THE DISTRICT COURT'S FINDINGS.

In reviewing these issues, the district court correctly found that jurisdiction and venue was proper pursuant to CAA § 304(a) and 28 U.S.C. § 1331. R. At 5. Section 304(a) governs citizen suits under the CAA and states that "the district courts of the United States shall have jurisdiction to compel… agency action unreasonably delayed." 42 U.S.C. § 7604(a). However, the CAA rule has an exception. If an unreasonable delay claim falls under § 307(b), it "may only be filed in a United States District Court within the circuit in which such action would be

reviewable under section [307(b)] of this title." *Id*. Section § 307(b) in turn notes that "A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard…or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia." 42 U.S.C. § 7607.

Although 307(b)(1) may appear to preclude the district court's jurisdiction, the district court's finding that it had jurisdiction was appropriate for three reasons. First, the requirements of 307(b)(1) in this case impacted venue rather than jurisdiction and were waived when no party objected. Second, even without waiver, 307(b)(1) applies to final actions whereas the issue here is a preliminary endangerment finding. Finally, judicial efficiency and avoidance of delay further supports a finding that the district court had jurisdiction.

A. <u>The EPA Waived § 307(b)(1)'s Venue Requirements.</u>

Courts have held that § 307(b)(1) acts as a venue provision that parties may waive. *See, e.g.*, *Dalton Trucking, Inc. v. E.P.A.*, 808 F.3d 875, 879-880 (D.C. Cir. 2015). For example, in *Texas Mun. Power Agency v. E.P.A.*, 89 F.3d 858, 867 (D.C. Cir. 1996), the D.C. Circuit rejected the EPA's contention that "the language [of § 307(b)(1)] is mandatory rather than providing a 'choice' of circuits," and instead found "EPA's failure to object waives § 307(b)(1)'s venue requirements." The D.C. Circuit reasoned that "Section 307(b)(1) can be read as prescribing the choice among circuits and not the power of a particular federal circuit court to hear a claim" based on "the provision's reference to where a petitioner may 'file,' and… its unequivocal characterization in the legislative history as a venue provision." *Id.* (citing H.R. REP. NO. 294, 95th Cong., 1st Sess. 323-24 (1977)), *see also State of New York v. E.P.A.*, 133 F.3d 987, 990

(7th Cir. 1998) ("Provisions specifying where a suit shall be filed. . . are generally considered to be specifying venue rather than jurisdiction.").

As in *Texas Mun. Power Agency*, the EPA here did not object to venue nor did it file a motion to dismiss for lack of venue. *See* R. at 5, 12. Instead, the EPA moved for summary judgment. R. at 5. Because the EPA and other parties "fully briefed the issue of unreasonable delay in their motions for summary judgment," they all consented that venue was proper in the District Court of New Union. R. at 12. Thus, by failing to object, not moving for dismissal, and implicitly consenting to the venue, the EPA waived § 307(b)(1)'s venue requirements.

Here, CHAWN did not provide notice to the EPA of its intent to sue for unreasonable delay. Rather, it brought "this action, styled as a citizen suit under [§ 304] to compel the administrator" to list GHGs as criteria pollutants. R. at 3. Despite this, CHAWN still served notice more than 180 days before filing, as required by § 304, and the EPA still had sufficient notice to fully brief and prepare its argument for the unreasonable delay issue. See 42 U.S.C. § 7604(a); R. at 5, 12.

Nonetheless, courts have emphasized achieving a balance between stringent statutory requirements and citizens' access to environmental redress. *See City of Highland Park v. Train*, 519 F.2d 681, 690 (7th Cir. 1975) ("The legislative history of section 304 shows Congress's determination that citizen participation in the enforcement of standards and regulations under the Clean Air Act of 1970 be established."). In imposing notice requirements, "Congress intended to provide for citizens' suits in a manner that would be least likely to clog already burdened federal courts and most likely to trigger governmental action which would alleviate any need for judicial relief." *Id.* at 690-91. To achieve the fundamental purposes of the requirements – allowing

CHAWN to help enforce the Clean Air Act while permitting the EPA sufficient notice and time to act on CHAWN's allegations – this Court should find the notice sufficient.

B. The District Court Satisfied the Requirements of § CAA 304 Because it Did Not Review a Final Action.

Even if the court does not find the EPA waived venue under § 307(b)(1), the statute's requirements do not apply to CHAWN's action. As discussed, the general rule of § 304(a) states that "the district courts of the United States shall have jurisdiction to compel… agency action unreasonably delayed." 42 U.S.C. § 7604(a). The § 307(b) exception to that general rule notes that "A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard…or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia." 42 U.S.C. § 7607.

However, this exception only applies to the review of final actions and the EPA's promulgation of nationwide regulations, neither of which are at issue here. The *Bennett* test for whether an agency's actions are "final," is a two-part test requiring that "first, the action must 'mark the consummation of the agency's decisionmaking [sic] process . . . And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow.'" *Sierra Club v. E.P.A.*, 955 F.3d 56, 61 (D.C. Cir. 2020) (quoting *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997)). "Each prong of Bennett 'must be satisfied independently for agency action to be final'" *Id.* (quoting *Soundboard Ass'n, v. FTC*, 888 F.3d 1261, 1267 (D.C. Cir 2018)).

In *Sierra Club v. EPA,* the D.C. Circuit recently applied this test to the EPA's published document that provided "Guidance on Significant Impact Levels for Ozone and Fine Particles in the Prevention of Significant Deterioration Permitting Program." *Id.* at 58, 64-65. The court

reasoned that, because the guidance "does not expose any regulated entity to the possibility of an enforcement action or to enhanced fines or penalties" and only "provides guidance that permitting authorities may use on a 'case-by-case' basis," the second prong was not met, and the guidance did not qualify as a final action for the purposes of § 307(b)(1). *Id.* at 65.

Here, the EPA's activities were akin to the ozone guidance of *Sierra Club*. The endangerment findings alone do not lead to enforcement actions, fines, or penalties. They merely represent part of an inquiry that may be used later by authorities. Endangerment findings also likely do not satisfy the first prong of the *Bennett* test, as they typically represent the beginning of the EPA's inquiry into an area rather than the consummation of its process.

The holding in *Utility Air*, further demonstrates that these endangerment findings are not final actions. *Util. Air*, 573 U.S. at 302. In distinguishing stages of EPA action, the Court differentiated between 1) an initial endangerment finding that motor vehicle emissions may pose a threat, 2) the EPA's "final decision" that motor vehicle standards triggered stationary-source permitting requirements, and 3) a later program to implement and tailor the PSD and Title V programs to greenhouse gases. *Id.* at 311-12. In the instant case, the district court solely reviewed the EPA's § 202 initial endangerment finding and unreasonable delay in claim to promulgate regulations, not any final decisions, rule implementations, or program tailoring.

Because the activities at issue were merely preliminary findings rather than a final action or nationwide regulation, they do not fall into the § 307(b) exception. Instead, they are subject to the general § 304(a) rule, which holds that "the district courts of the United States shall have jurisdiction" over unreasonable delay claims. 42 U.S.C. § 7604(a). Jurisdiction was thus proper.

C. Judicial Efficiency Further Supports Finding the District Court Had Jurisdiction.

Considerations of judicial efficiency also favor a finding that the district court had jurisdiction. The Federal Rules of Civil Procedure begin with the exhortation that the rules

governing the judicial process "should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. Proc. 1. Here, the district court underwent a thorough factfinding process and delivered its findings on the EPA's actions. No parties objected to the venue at the district court level. R. at 5 ("Although there is a question whether venue is proper in this district under 42 U.S.C. § 7604(a), no defendant has raised an objection to venue."). Beyond the thoroughness of the process, the district court took approximately fifteen months from CHAWN's filing to a decision on summary judgment.

Discarding the district court's findings and constructing the facts anew would be both repetitious and time-consuming. It would be especially counterproductive given that one issue is whether the EPA unreasonably delayed actions. To restart the process would further delay resolution of this issue and frustrate the parties' goals and the basic intentions of civil procedure. Accordingly, the court should find that the district court's jurisdiction was proper.

CONCLUSION

For the foregoing reasons, COGA requests the Court invalidate the 2009 Endangerment Finding. Barring that relief, COGA respectfully requests the court find that the EPA had no nondiscretionary duty to list GHGs as criteria pollutant under § 108, or in the alternative the EPA has not unreasonably delayed listing GHGs as a criteria pollutant.