IN THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

Team Brief*

C.A. No. 20-000123

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

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY
Defendant-Appellant

-and-

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

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

NO. 66-CV-2019

HONORABLE JUDGE ROMULUS N. REMUS

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

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JURISDICTIONAL STATEMENT

Climate Health and Welfare Now filed a complaint in the United States District Court for the District of New Union seeking to compel the Environmental Protection Agency to perform a non-discretionary duty pursuant to 42 U.S.C.A. § 7604. On September 1, 2020, the district court granted Climate Health and Welfare Now's Motion for Summary Judgment in part, and granted Coal, Oil, and Gas Association's Motion for Summary Judgment in part. The district court's order is final, and jurisdiction is proper pursuant to 28 U.S.C. § 1291. (2019).

STATEMENT OF THE ISSUES

I. Whether the Environmental Protection Agency has a non-discretionary duty to designate Green House Gases as a criteria pollutant under 42 U.S.C.A. § 7408 based on its 2009 Endangerment Finding concluding that Green House Gases pose a substantial risk to public health and welfare.

II. Whether the District Court for the District of New Union had jurisdiction over Climate Health and Welfare Now's unreasonable delay claim under 42 U.S.C.A. § 7604 where the Complaint sought to compel the Environmental Protection Agency to list Green House Gases as criteria pollutants.

III. Whether the Environmental Protection Agency's 2009 Endangerment Finding is valid with respect to public welfare.

IV. Whether the Environmental Protection Agency's 2009 Endangerment Finding is valid with respect to public health.

V. Whether the Environmental Protection Agency's failure to list Green House Gases as criteria pollutants within ten years after determining their substantial risk to public health and welfare constitutes unreasonable delay.

STATEMENT OF THE CASE

This is an appeal from a final order of the District Court for the District of New Union granting in part Climate Health and Welfare Now's ("CHAWN") motion for summary judgment and granting in part Coal, Oil, and Gas Association's ("COGA") motion for summary judgment. (R. 3.) CHAWN brought a civil action under the Clean Air Act's ("CAA") citizen suit provision, 42 U.S.C.A. § 7604, seeking an order compelling the Administrator of the United States Environmental Protection Agency ("EPA") to list Green House Gases ("GHGs") as criteria pollutants subject to the National Ambient Air Quality Standards ("NAAQS") program. (R. 3.) COGA intervened in the case to protect its own interests in preventing the listing of GHGs as criteria pollutants. (R. 3.)

After discovery, the parties cross-moved for summary judgment. (R. 3.) The district court held that (1) the EPA's 2009 Endangerment Finding (the "Endangerment Finding") is valid with respect to public welfare; (2) the Endangerment Finding is invalid with respect to public health, and it was vacated to the extent that it declares GHGs a danger to public health; (3) that the EPA has a non-discretionary duty to list GHGs as criteria pollutants; and (4) that the EPA has unreasonably delayed this duty to designate GHGs as criteria pollutants. (R. 13-14.)

CHAWN, COGA, and the EPA have each filed timely Notices of Appeal challenging the District Court for the District of New Union's holdings. (R. 2.) CHAWN files a Notice of Appeal challenging the district court's holding that the public health Endangerment Finding is invalid. (R. 2.) COGA files a Notice of Appeal challenging the district court's holding that the Endangerment Finding is valid with respect to public welfare and that the EPA has a non-discretionary duty to list GHGs as criteria pollutants under 42 U.S.C.A. § 7408. (R. 2.) COGA also appeals the district court's holding that the EPA unreasonably delayed the listing of GHGs as criteria pollutants. (R.

2.) EPA files its Notice of Appeal to challenge the District Court's decision that it has a non-discretionary duty to list GHGs as criteria pollutants, and that it unreasonably delayed doing so. (R. 3.)

STATEMENT OF THE FACTS

In 1999, a number of environmental protection groups filed a petition with the EPA to make a finding that GHGs from automobiles posed a substantial risk to human health. (R. 6.) This petition was filed pursuant to 42 U.S.C. § 7521 of the CAA. (R. 6.) In response to the petition, the EPA expressed its view that GHGs did not fit within the definition of "air pollutants" subject to CAA regulation, and denied the request. (R. 6.) However, the United States Supreme Court, in *Massachusetts v. E.P.A.*, 549 U.S. 497 (2007), held that GHGs constitute air pollutants and are subject to potential regulation under the CAA. (R. 6.) Accordingly, the EPA was required to respond to the petition by making an endangerment finding on the potential risks of GHG emissions. (R. 6.)

The EPA followed the direction of the Court, subsequently issuing its Endangerment Finding. (R. 6.) *See Endangerment and Cause or Contribute Findings for Green House Gases Under Section 202(a) of the Clean Air Act*, 74 Fed. Reg. 66,496, 66,496-546 (Dec. 15, 2009) (hereinafter "Endangerment Finding"). In this Endangerment Finding, the EPA concluded that GHGs are made up of a mix of gases: carbon dioxide, nitrous oxide, and methane. (R. 6.) The EPA went on to conclude that GHGs were emitted from numerous mobile sources and the emissions of GHGs pose a substantial risk to both public health and public welfare. (R. 7.) Endangerment to public health was due to (1) increases in global temperatures, (2) changing storm frequency and increases in extreme weather events, (3) increased ozone pollution, (4) increases in heat-related deaths, and (5) increases in the spread of insect-borne disease. (R. 7.) In addition, the

Endangerment Finding concludes that GHGs threaten public welfare by (1) reducing agricultural productivity, (2) reducing water supply, (3) increasing property damage resulting from extreme weather events, and (4) creating rising sea levels. (R. 7.)

Acting upon its Endangerment Finding, the EPA rolled out a series of regulations aimed at reducing the emission of GHGs. (R. 7.) Nevertheless, the EPA has failed to list GHGs as a criteria pollutant under 42 U.S.C.A. § 7408. (R. 7.) This failure has created a chain reaction of regulatory consequences: it has prevented the EPA from establishing required NAAQS, a vital standard that sets limits on the prevalence of regulated pollutants in the ambient air. (R. 7.) This failure to establish NAAQS then prevented the issuance of air quality regulations needed to protect citizens from the public health and welfare risks upon which the Endangerment Finding was based. (R. 7.)

Highlighting the importance of regulation under Section 7408, a coalition of environmental organizations, including CHAWN, filed a petition with the EPA shortly after its issuance of the Endangerment Finding. (R. 5.) In its petition, filed with the EPA in 2009, CHAWN demanded that the EPA list GHGs as criteria pollutants to protect its members who had to flee coastal areas from increased storm-surge flooding and those young adults whose futures were at risk from the effects of climate change. (R. 5.) Not only had the EPA failed to list these pollutants, requiring regulation, the EPA has failed to respond *at all*: more than ten (10) years have passed since CHAWN and its fellow environmental organizations filed this petition. (R. 5.) As a result of this failure, CHAWN filed the instant action against the EPA to compel the non-discretionary listing of GHGs under Section 7408 of the CAA. (R. 2.)

COGA, a trade association representing the interests of fossil fuel companies, moved to intervene in the action. (R. 5.) The lower court granted this motion to intervene and both COGA and the EPA answered the Complaint. (R. 5.) The EPA relied on anemic reasons for delay: it had

to navigate "thorny" policy, it had to follow an Executive Order deeming the EPA's highest priority to reduce regulatory burdens on businesses and economic activity, and it had to determine the science of the correct regulatory levels for GHGs, a task the EPA has had for over ten years. (R. 12.) Indeed, the EPA failed to provide *any* timeline for completion of its duty, concrete or otherwise. (R. 12-13.)

After the lower court properly held that the EPA has a non-discretionary duty to list GHGs as a criteria pollutant based on danger to the public welfare and that it unreasonably delayed doing so, the EPA and COGA filed this appeal. (R. 2.) CHAWN cross appealed, seeking review of the lower court's improper ruling that the EPA could back-pedal against its previous position that GHGs were a danger to public health. (R. 2.) Because the lower court overstepped its authority in overturning the Endangerment Finding on public health, that holding should be reversed. (*See* R. 8.) However, the lower court properly ruled that the EPA had a non-discretionary duty to list GHGs and that they unreasonably delayed doing so; those holdings should be affirmed. (*See* R. 10-14.)

SUMMARY OF THE ARGUMENT

By making its Endangerment Finding, the EPA triggered a non-discretionary duty to list GHGs as criteria pollutants under 42 U.S.C.A. § 7408, *Train*, and *Natural Resource Defense Council, Inc. v. Thomas*. Commanding language in the statute creates this mandatory duty, which policy supports. Courts enforce such duties under Section 7604 of the CAA, and the United States District Court for the District of New Union had jurisdiction to hear CHAWN's Section 7604 unreasonable delay claim under *Costle*.

The lower court erred in overturning the conclusion regarding GHGs' danger to public health because it lacked jurisdiction to evaluate the EPA's Endangerment Finding. Under *Thomas* and *Train,* the making of an endangerment finding is clearly within the discretion of the EPA and

fall within its discretionary duties. Section 7604 only grants jurisdiction to the district courts to hear actions compelling *non-discretionary* duties of the EPA; therefore, the lower court's review of the Endangerment Finding and its decision to overrule its determination that GHGs endanger public health was improper.

In addition to the lack of jurisdiction, the lower court erred in holding that the EPA's Endangerment Finding was invalid with respect to public health because the EPA's prior finding was supported by evidence. The EPA analyzed scientific data, and therefore the finding must only exhibit that it was applied in a rational manner to be upheld under *Costle*. The Endangerment Finding is a complete and in-depth analysis of the dangers to human health posed by the increased emissions of GHGs, which pose a significant risk to human health by increasing the death rate. A higher death rate, as found by the EPA, is caused by direct temperature increase, increased spread of disease and pathogens, decreased air quality, and extreme weather events. Finally, because the Endangerment Finding was subject to notice and comment rulemaking and made within the discretion of the EPA, it is entitled to *Chevron* deference.

The lower court correctly held that GHG emissions pose a substantial risk to human welfare. As noted by the lower court, climate effects are included in the definition of "effects on welfare" within the CAA Section 7602(h). As found by the EPA in its Endangerment Finding, the climate will be harmed by an increase in global temperatures. Higher global temperatures also pose risks to human welfare by substantially changing the ecosystems, and impacting the ability to provide energy, water, and infrastructure to communities.

Finally, having determined the existence of a non-discretionary duty to list GHGs as a criteria pollutant, the EPA unreasonably delayed in not only requiring regulation of these

pollutants, but also responding to CHAWN's initial filing *at all*. Under the TRAC factor analysis, the ten-year delay is unjustifiable and this Court should remedy the EPA's failure.

STANDARD OF REVIEW

The district court granted in part both CHAWN and COGA's respective motions for summary judgment. This Court reviews a district court's grant of summary judgment *de novo*. *Lefevers v. GAF Fiberglass Corp.*, 667 F.3d 721, 723 (6th Cir. 2012).

ARGUMENT

Under the Clean Air Act, the EPA must propose and promulgate two sets of NAAQS: (1) Primary NAAQS, and (2) Secondary NAAQS. Primary NAAQS are those standards which are "requisite to protect ***public health***;" while secondary NAAQS are those standards which are "requisite to protect ***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.A. § 7409(b)(1)-(2) (2019) (emphasis added). The EPA's Endangerment Finding determined that GHGs pose a substantial risk to both public health and public welfare, triggering the mandatory duty to list GHGs as a criteria pollutant under 42 U.S.C.A. § 7408(a)(1)(A)-(C) (2019). As the lower court properly held, and as discussed below, the EPA has unreasonably delayed in carrying out its non-discretionary duty of listing GHGs as criteria pollutants. (R. 13-14.)

I. THE EPA MUST ADD GREEN HOUSE GASES TO THE LIST OF CRITERIA POLLUTANTS SUBJECT TO REGULATION.

Both the language of the statutes themselves and well-cited case law support finding a non-discretionary duty to list Green House Gases ("GHG") as a criteria pollutant. *See* 42 U.S.C.A. § 7408; 42 U.S.C.A. § 7409; *see also Nat. Res. Def. Council, Inc. v. Train*, 545 F.2d 320 (2d Cir. 1976). To find otherwise would promote industry confusion and agency foot-dragging. *See Ctr. for Biological Diversity v. U.S. E.P.A.*, 794 F. Supp. 2d 151 (D.D.C. 2011).

a. The Clean Air Act *requires* the EPA to list and regulate Green House Gases after the 2009 Endangerment Finding.

The Clean Air Act imposes a statutory duty on the EPA to establish both primary and secondary ambient air quality standards for pollutants deemed potentially dangerous to public health and welfare. *See* 42 U.S.C.A. § 7408(a)(1)(A)-(C) (". . . the Administrator . . . shall from time to time . . . 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 . . . but for which he plans to issue air quality criteria under this section."). Further, Congress mandated a specific timeframe to perform this duty: ". . . at five-year intervals . . . , the Administrator . . . shall . . . promulgate such new standards as may be appropriate in accordance with section 7408 of this title . . . ." 42 U.S.C.A. § 7409(d)(1).

i. <u>The EPA Cannot Avoid its Burden by Arguing Discretion.</u>

Settled case law shows that once the first two parts of Section 7408 of the Act are fulfilled, the EPA's Administrator cannot shirk his duty under the last part. In *Train*, the Second Circuit held that once a pollutant is deemed to have an adverse effect on public health and welfare and its presence in the ambient air results from the statutory "numerous or diverse mobile or stationary sources," the EPA cannot argue that the last portion of the act regarding the Administrator's "plans to issue air quality criteria" transforms this mandatory duty into a discretionary one simply because the Administrator does not plan to issue criteria. 545 F.2d at 324. To allow this interpretation of discretion is contrary to the statute as a whole and would negate the underlying public policy of the CAA; deliberately including a specific timetable for reviewing these dangerous pollutants and promulgating standards would be futile if the Administrator could avoid adding pollutants to the

list by simply not choosing to issue these criteria. *Id.* at 327; *see Zook v. McCarthy*, 52 F. Supp. 3d 69, 74 (D.D.C. 2014) (holding that the "statute makes clear" that satisfaction of parts (A) and (B) creates the non-discretionary duty to list and regulate). If the EPA has the discretion to act on this duty, then there is truly no deadline in spite of the five-year maximum set by Congress. *See Ctr. for Biological Diversity*, 794 F. Supp. 2d at 157.

The EPA has itself determined that these two sections of the statute are met. The Endangerment Finding deemed GHGs potentially dangerous to both public health and public welfare, satisfying section (A). *See* Endangerment Finding, 74 Fed. Reg. at 66,496-546. Further, the same finding fulfilled section (B) where the EPA found numerous mobile sources as the origin of these gases. *Id.* Not only were mobile sources identified there, but the EPA later took steps to regulate *stationary* sources. *See Standards of Performance for Green House Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units*, 80 Fed. Reg. 64,510 (Oct. 23, 2015).

Supreme Court precedent highlights the EPA's duties under this Act. In *Massachusetts v. E.P.A.*, the Court described one of the EPA's main purposes: to protect the public's health and welfare. 549 U.S. at 532. Indeed, once the EPA makes an Endangerment Finding, the CAA "*requires* the Agency to regulate the emissions of the pollutant." *Id.* at 533 (emphasis added). Once deemed a contributor to climate change, the EPA *cannot* avoid its duty. *Id.* This case law mandates that the EPA must list GHGs as criteria pollutants once they are found potentially dangerous and present in the air.

ii. *Shall* is the Imperative Command that Congress Placed in These Statutes.

The specific, unequivocal commands in the statutes satisfy the Clear Statement Rule required under the citizen suit provisions of the CAA. *See Citizens for Pa.'s Future v. Wheeler*,

No. 19-cv-02004-VC, 2020 WL 3481425, at *5 (N.D. Cal. June 26, 2020) (citing *Wildearth Guardians v. McCarthy*, 772 F.3d 1179, 1182 (9th Cir. 2014)) (describing the Clear Statement Rule that requires a "clear, unequivocal command" from the statutory text to find a non-discretionary duty).

"Shall" is a clear Congressional order that forecloses dispute against a mandatory, non-discretionary duty. *Nat. Res. Def. Council, Inc. v. Thomas*, 689 F. Supp. 246, 253 (S.D.N.Y. 1988) (determining that "shall" created the non-discretionary duty). The statutory language of "shall publish a list" precludes the EPA Administrator from bypassing these requirements at his will. *See Train*, 545 F. 2d at 325. And the D.C. Circuit court explicitly found such language of "shall specify the level of air quality" that is "requisite to protect the public welfare" from adverse effects meant that a failure to do so was contrary to statute and was therefore unlawful. *Am. Farm Bureau Fed. v. E.P.A.*, 559 F.3d 512, 530 (D.C. Cir. 2009).

iii. The EPA's Duty to Regulate Primary Versus Secondary Standards is the Same.

While primary and secondary standards protect against different effects from pollutants, the EPA's duty to regulate both are equally important. Primary standards regulate public health, which includes health effects for the population at large as well as sensitive populations like children, older adults, and people with lung disease; secondary standards protect the public welfare, including effects on soil, plants, wildlife, property damage, aesthetic concerns, and other non-health-related impacts like hazards to economic values and personal comfort. *Murray Energy Corp. v. E.P.A.*, 936 F.3d 597, 604-05 (D.C. Cir. 2019).

While the term "secondary standards" may belie its importance, these standards can be *more* restrictive than primary levels. In *American Farm Bureau Federation*, the D.C. Circuit court held that the EPA improperly set the secondary standard of particulate matter in the ambient air to

be equal to the primary standard, even though the primary standard was set to the same level. 559 F.3d at 512. This equality resulted in the secondary standard becoming *much* too low. *Id.* The court required the EPA to reevaluate the secondary standards because the matching primary standard was insufficient to protect the public welfare. *Id.*

iv. Chevron Deference does not Apply to the EPA's Position Favoring Discretion.

The agency deference found in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.* only applies to an Agency's interpretation of a statute when the statute is silent as to Congress' intention on an issue. 467 U.S. 837, 844 (1984). The courts are the final authority on statutory construction issues; they must reject agency interpretations that are contrary to clear congressional intent. *Id.* at 843 n.9. When language is plain, the court's inquiry should end. *Wildearth Guardians v. Jackson*, 870 F. Supp. 2d 847, 851 (N.D. Cal. 2012). Additionally, words must be read in context in view of their place in the overall statute to find unambiguous results. *Id.* at 853.

Here, there is no silence or ambiguity as to the EPA's duty to list GHGs as criteria pollutants. The statutes require the EPA's action through the word "shall"; a duty sparked when the EPA published its Endangerment Finding. 42 U.S.C.A. § 7408; 42 U.S.C.A. § 7409. No discretionary words like "may" or "if" apply to this requirement. *See Ctr. for Biological Diversity*, 794 F. Supp. 2d at 157 (holding a duty as discretionary with words like "may" and "if" describing possible actions). The argument for the EPA's discretionary interpretation of the statutory duty to list once it determined GHGs were potentially dangerous fails to meet the basic requirement of the *Chevron* deference – the statutes are neither silent nor ambiguous on this matter.

v. Allowing a Discretionary Duty here will Cause Industry Confusion and Promote Administrative Foot-Dragging.

Agency delays cause the uncertainty and expense among regulated entities that the EPA is directed to avoid. Congress sought to eliminate, not encourage, the opportunity for agencies to drag their feet. *Train*, 545 F.2d at 328. These delays make it difficult for businesses to plan for the future, like for new projects or capital improvements, and may cause additional expense if cost-effective, short-term alternatives require replacement once the agency acts. Michael D. Sant'Ambrogio, *Agency Delays: How a Principal-Agent Approach Can Inform Judicial and Executive Branch Review of Agency Foot-Dragging*, 79 Geo. Wash. L. Rev. 1381, 1400-1401 (2011). The EPA's delay will also increase costs to obtain legal advice about the meaning and importance of the law until the EPA finally decides to act. *Id.*

The EPA argues against itself when relying upon the Executive Order. *See Reducing Regulation & Controlling Regulatory Costs*, Exec. Order 13771, 82 Fed. Reg. 9,339 (Feb. 3, 2017). This Order requires the EPA to reduce regulatory burdens on business and economic activity; by delaying, the EPA only further burdens these businesses. *Id.* Companies continue to operate and grow while the EPA lounges, requiring these companies to guess when and how the EPA will finally regulate GHGs. Buildings may need to be refurbished or replaced, shipping methods may need to be reevaluated, and lawyers will be constantly consulted to determine not only if improvements will be wasted when these regulations are finally released, but also to determine the mere meaning of possible regulations. By further delay, the EPA is not only violating its non-discretionary, statutory duty, it is in direct contravention of the Executive Order.

b. A "Date Certain" within a statute is sufficient, but not necessary to create a duty.

Under the Rule of Reason, clear statutory construction is required. *See Train*, 545 F.2d at 320 (holding that statutes must be interpreted under the Rule of Reason); *Telecomms. Research & Action Ctr. v. F.C.C.*, 750 F.2d 70, 80 (D.C. Cir. 1984) (using the "Rule of Reason" to assess agency delay); *Sierra Club v. Thomas*, 828 F.2d 783, 791 (D.C. Cir. 1987) (holding that provisions with stated deadlines are non-discretionary and those without the same deadlines are discretionary).

i. The Clean Air Act Includes a Date Certain Regarding the EPA's Duty to List Green House Gases as a Criteria Pollutant.

Congress required the EPA to administer this duty at least every five years. *See* 42 U.S.C.A. § 7409(d)(1). To enforce the importance of timely performing this duty, Congress promoted even more swift action. *Id.* ("The Administrator may review and revise criteria or promulgate new standards *earlier or more frequently* than required under this paragraph") (emphasis added).

As previously discussed, GHG's fall under section 7408 of the CAA. *See* 42 U.S.C.A. § 7408(a)(1)(A)-(C). Because the EPA deemed GHGs as potentially dangerous to the public health and welfare, and because the EPA determined the sources of these GHGs, these pollutants must be listed under section 7408. *Id.* Once listed, the EPA must "promulgate such new standards" every five years *or sooner*. 42 U.S.C.A. § 7409(d)(1). This statutory language creates a date-certain within which the EPA must act on this non-discretionary duty.

ii. Even Without a Date Certain, the EPA Must Act Without Unreasonable Delay.

Notwithstanding the Date Certain Rule in *Sierra Club v. Thomas*, courts in multiple circuits and districts have found a non-discretionary duty absent a date certain contained in the statute. *See Raymond Proffitt Found. v. E.P.A.*, 930 F. Supp. 1088 (E.D. Pa. 1996) (finding an "inferable

deadline" without a date certain still gives rise to a non-discretionary duty enforceable by a citizen suit); *Nat. Res. Def. Council, Inc. v. Thomas*, 689 F. Supp. At 253 (holding a duty was mandatory by the statute's use of the word "shall," and not discussing the presence of a date-certain within the statute); *Am. Farm Bureau Fed.*, 559 F.3d at 530 (holding no date certain necessary to find a non-discretionary duty).

Further, circuits are split in their use of this rule. Cases within the Third Circuit and the Seventh Circuit have found no date certain necessary for a duty, while courts within the First, Second, Ninth, and D.C. Circuits have required a date certain. *See* Katherine A. Rouse, *Holding the EPA Accountable: Judicial Construction of Environmental Citizen Suit Provisions*, 93 N.Y.U. L. Rev. 1271, 1307-10 (2018) (describing multiple cases in various circuits and districts that found a non-discretionary duty where the applicable statute did *not* include a date-certain deadline; that found a non-discretionary duty *with* a date certain deadline; and describing two cases that found a duty discretionary *even with* a date-certain deadline). Further, the Fifth District has yet to address this issue, with only courts in Louisiana following the date-certain rule. *Id.*

Congress' use of commanding language is what provides the non-discretionary duty. Even with no date, the use of the word "shall" suggests that Congress intended to mandate certain outcomes; if there exists a first, discretionary step, then the use of the word "shall" to require the next step becomes "largely nugatory." *Ctr. for Biological Diversity*, 794 F. Supp. 2d at 160.

Here, not only does the statute provide the date-certain to create a mandatory duty, it also has the language required to form a non-discretionary duty. "Shall" peppers the statutes and directly applies to the issues in this case. Congress requires the EPA to reevaluate and issue standards on these pollutants at least every five years. Providing a date-certain and finding an

implied duty against unreasonable delay not only satisfies the date-certain rule, it also circumvents any argument against the mandatory duty based on the commanding words "shall."

II. THE LOWER COURT HAD JURISDICTION TO HEAR CLIMATE HEALTH AND WELFARE NOW'S UNREASONABLE DELAY CLAIM.

Under the CAA, district courts have jurisdiction to hear cases "against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under [the CAA] which is not discretionary with the Administrator." 42 U.S.C.A. § 7604(a)(2) (2019). Section 7604 allows any person to commence such an action, referring to these actions as "Citizen Suits." *Id.* Section 7604 confers this jurisdiction upon the district courts of the United States to hear Citizen Suits as follows:

> The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an emission standard or limitation, or such an order or to order the Administrator to perform such an act or a duty, as the case may be, and to apply any appropriate civil penalties (except for actions under paragraph (2)). The 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 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.A. § 7604(a). However, where a party seeks review of a final action taken by the EPA, jurisdiction is vested solely in the United States Court of Appeals for the District of Columbia. Section 7607 confers exclusive jurisdiction upon the District of Columbia as follows:

> A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard or requirement under section 7412 of this title, any standard of performance or requirement under section 7411 of this title, any standard under section 7521 of this title, [] any determination under section 7521(b)(5) of this title, any control or prohibition under section 7545 of this title, any standard under section 7571 of this title, and rule issued under section 7413, 7419, or under section 7420 of this title, 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(b)(1) (2019).

Nevertheless, courts have interpreted the language of Section 7607 as limited to actions in which the challenged activities of the EPA are discretionary in nature. *See Nat. Res. Def. Council, Inc. v. Thomas*, 689 F. Supp. at 255. On the other hand, failure of the EPA to perform a non-discretionary duty is subject to jurisdiction within the district courts, as provided by Section 7604. *See Mountain States Legal Found. v. Costle*, 630 F.2d 754, 766 (10th Cir. 1980) (stating that "in terms of 'citizen suits', they are, in our view, clearly authorized by direct proceedings in the district courts under 42 U.S.C.A. 7604 when the EPA Administrator is charged with failure to perform a non-discretionary duty"). Here, the EPA has failed to perform a non-discretionary duty; therefore, the lower court had jurisdiction to hear the claim for unreasonable delay.

a. The Lower Court had Jurisdiction to Enforce a Non-Discretionary Duty of the EPA.

The duty to list a substance as a criteria pollutant under 42 U.S.C.A. § 7408 is non-discretionary and becomes a mandatory action of the EPA if the Administrator has "already identified the substance as a hazardous air pollutant by exercise of his discretionary powers." *Thomas*, 689 F. Supp. at 254. After this endangerment finding is made, "there is no discretion provided by statute not to list the pollutant." *Train*, 411 F. Supp. at 868 (S.D.N.Y. 1976). The *Train* court interpreted 42 U.S.C.A. § 7408, which states in pertinent part "the Administrator shall . . . publish, and shall from time to time revise, a list which includes each air pollutant . . . emissions of 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.A. § 7408(a)(1)(b). This creates a non-

discretionary duty to list pollutants which the EPA has already deemed to endanger public health or welfare.[1]

Once a non-discretionary duty is triggered, district courts have jurisdiction to compel performance of that duty. *See California v. E.P.A.*, 385 F. Supp. 3d 903, 916 (N.D. Cal. 2019) (finding that "the proper remedy given the jurisdiction-vesting statute is limited to compelling the EPA to perform mandatory duties it has already failed to perform"); *see also Sierra Club v. Browner*, 130 F. Supp. 2d 78, 93 (D.D.C. 2001) (stating that "the Court's power to grant relief in cases such as this one (brought under section 7604) arises only in situations in which the administrator should have taken action in the past"); *Costle*, 630 F.2d at 766 (holding district courts have authority to decide citizen suits).

Moreover, listing of hazardous pollutants has been found to be specifically within the jurisdiction of district courts in Citizen Suits. In *Natural Resources Defense Council, Inc. v. Thomas*, the court stated "there could be no doubt as to this court's power to compel the non-discretionary listing of the subject pollutants if there were no controversy over whether the EPA had already found them to be hazardous air pollutants." 689 F. Supp. at 254; *see also Train*, 545 F.2d at 328 (holding that once the Administrator finds that a pollutant poses a risk of endangerment to public health or welfare, listing of that pollutant becomes mandatory).

In this case, the EPA has already made the finding that GHG's pose a substantial risk to public health and welfare. *See generally* Endangerment Finding, 74 Fed. Reg. at 66,496. Because this endangerment finding has already been made, the EPA has a non-discretionary duty to list GHG's as a subject pollutant. Nevertheless, EPA has failed to list GHG's under 42 U.S.C.A. § 7408. CHAWN brought its suit in the District Court for the District of New Union to compel the

[1] This non-discretionary duty is discussed at length in Section I of the Argument.

EPA to list GHG's under Section 7408. Notably, Section 7408 is not among the sections specifically included in Section 7607 as determinations which may only be reviewed in the District Court of Appeals for the District of Columbia. *See* 42 U.S.C. § 7607(b)(1). The omission of Section 7408 is evidence of Congress' intent to allow non-discretionary listing of pollutants to be brought before the United States district courts. As such, CHAWN sought an order compelling the EPA to perform a non-discretionary duty. Therefore, the lower court had jurisdiction to hear that Citizen Suit pursuant to 42 U.S.C.A. § 7604.

b. The Lower Court did not have Jurisdiction to Review the 2009 Endangerment Finding.

While the lower court had jurisdiction to hear CHAWN's unreasonable delay claim, brought to compel the EPA to perform a non-discretionary duty, it did not have jurisdiction to overturn the EPA's Endangerment Finding with respect to public health. The EPA made its endangerment finding pursuant to 42 U.S.C. § 7521 (2019). Notably, Section 7521 is specifically listed in Section 7607 as reviewable only in the United States Court of Appeals for the District of Columbia. *See* 42 U.S.C. § 7607(b)(1). Accordingly, review of the Endangerment Finding, made by the EPA within its duties under Section 7521, is only reviewable in the D.C. Court of Appeal.

Moreover, the plain language of 42 U.S.C.A. § 7408 gives the EPA discretion in determining which pollutants endanger public health or welfare. Section 7408 states that the EPA must list pollutants 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.A. § 7408(a)(1)(a) (2020) (emphasis added). This language shows Congress' intent to give the EPA sound discretion in determining which pollutants pose a threat to public health. In addition, "discretion to make the threshold determination of whether a pollutant has 'an adverse effect on health'" is wide. *Train*, 411 F. Supp. at 868. Questions of the danger posed by a pollutant "go to the very heart of the

Administrator's discretionary powers." *Nat. Res. Def. Council, Inc. v. Thomas*, 689 F. Supp. at 255. Accordingly, the EPA's Endangerment Finding constitutes a final action taken by the EPA that is discretionary in nature.

Congress has delegated exclusive jurisdiction to the United States Court of Appeals for the District of Columbia to review discretionary actions of the Administrator. *Id.* As the *Thomas* Court held, "interference with the Administrator's discretionary powers is particularly inappropriate in this case where . . . I am called upon to judge the sufficiency of Agency decisions based on analyses of complex scientific data." *Id.* For a court to determine the validity of the Administrator's decisions based on scientific data is to "exceed[] § 304's limited grant of jurisdiction over the 'clear-cut' non-discretionary duties of the Administrator." *Id.*

By judging the sufficiency of the Administrator's Endangerment Finding, the lower court exceeded its limited grant of jurisdiction. The lower court reviewed, and reversed, the EPA's Endangerment Finding with respect to public health. (R. 9.) Under the Clean Air Act, and based on the clear intention of Congress, the making of an Endangerment Finding under Section 7521 is discretionary and subject to review in only the United States Court of Appeal for the District of Columbia. By usurping the EPA's discretion, and undertaking its own analysis of the complex data making up the Endangerment Finding, the lower court overstepped its jurisdictional boundaries.

The lower court's review of the Endangerment Finding was not within its jurisdiction. The EPA has the sole discretion to make a finding of endangerment and analyze the scientific data to make such a finding. Accordingly, the lower court exceeded its authority in reversing the Administrator's finding of endangerment as to public health: it was authorized to compel EPA to perform a *non-discretionary* duty, nothing more and nothing less. CHAWN sought this limited remedy in seeking an order compelling the EPA to list GHGs as a criteria pollutant. After making

the finding that GHGs pose a risk of substantial harm to public health and welfare, listing these gases as a pollutant is a non-discretionary duty. CHAWN's unreasonable delay claim, brought to compel a non-discretionary duty, was within the lower court's jurisdiction.

III. THE EPA'S 2009 ENDANGERMENT FINDING IS VALID WITH RESPECT TO BOTH PUBLIC HEALTH AND PUBLIC WELFARE.

Under the CAA, the Administrator of the EPA is required to regulate "the emission of any air pollutant . . . 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). The "endanger" standard has been interpreted to be "precautionary in nature and does not require proof of actual harm before regulation is appropriate." *Ethyl Corp. v. E.P.A.*, 541 F.2d 1, 17 (D.C. Cir. 1976); *see also Reserve Mining Co. v. E.P.A.*, 514 F.2d 492 (8th Cir. 1975) (stating that "in the context of this environmental legislation, we believe that Congress used the term "endangering" in a precautionary or preventative sense, and, therefore, evidence of potential harm as well as actual harm comes within the purview of that term"). In determining whether a certain air pollutant has the potential to endanger public health or welfare, courts are required to weigh the "risk and harm, or probability and severity." *Ethyl*, 541 F.2d at 18. In other words, public health and welfare may be endangered "both by a lesser risk of a greater harm and by a greater risk of a lesser harm." *Id.* Courts must also "give an extreme degree of deference to the agency when it is evaluating scientific data within its technical expertise." *Am. Farm Bureau Fed.*, 559 F.3d at 519.

In making an endangerment finding, the EPA is not required to provide "rigorous step-by-step proof of cause and effect" where the finding is "precautionary in nature, the evidence difficult to come by, uncertain, or conflicting because it is on the frontiers of scientific knowledge, the regulations are designed to protect the public health, and the decision of an expert administrator." *Id.* at 27-28. Instead, the decision of the EPA will be upheld where the Administrator applies his

expert analysis to the facts, trends, probative data, and subsequently forms an informed conclusion, even though it is not completely substantiated. *Id.* at 28; *see also Am. Petroleum Inst. v. Costle*, 665 F.2d 1176, 1187 (D.C. Cir. 1981) (holding that an endangerment finding with respect to public health should be upheld where a court finds that the EPA applied the scientific record "in a rational manner").

Here, the Endangerment Finding is precautionary in nature and designed to protect public health. The Administrator applied his expert analysis in a rational manner to the data indicating that GHGs pose a significant risk to both public health and welfare. Moreover, the Endangerment Finding has previously been upheld in another case by the Circuit Court of Appeals for the District of Columbia with respect to public health and welfare. *See Coal. for Responsible Regulation, Inc. v. E.P.A.*, 684 F.3d 102, 121 (D.C. Cir. 2012).

a. The EPA's Endangerment Finding with respect to public health is valid and must be upheld.

In distinguishing between public health and public welfare, the EPA stated "[i]f the effect on the people is to their health, we have considered it an issue of public health, [and i]f the effect on people is to their interest in matters other than health, we have considered it public welfare." Endangerment Finding, 74 Fed. Reg. at 66,527. Moreover, the *Coalition* court held that the finding of endangerment to public health was supported by "substantial record evidence" and was present in the form of "extreme weather events, changes in air quality, increases in food- and water-borne pathogens, and increases in temperatures[.]" *Coalition*, 684 F.3d at 121. These adverse effects of GHG emissions present a clear and substantial danger to human health; therefore, they should be considered to endanger public health.

Nevertheless, the lower court incorrectly reversed the EPA's finding that GHG emissions pose a substantial risk to public health because "Congress specifically included impacts on

'climate' in its definition of 'welfare.'" (R.6) (citing 42 U.S.C. § 7602(h) (2019)). Public health and public welfare are not mutually exclusive, and adverse effects on climate can significantly impact both. For example, the EPA expressly found that "climate change can increase the risk of morbidity and mortality and that these public health impacts can and should be considered when determining endangerment to public health under CAA section 202(a)." Endangerment Finding, 74 Fed. Reg. at 66,524. The EPA found that GHG emissions, and the climate change resulting from those emissions, "have the potential to affect essentially ***every aspect of human health***, society, and the natural environment. *Id.* at 66,523. (emphasis added). The following effects fall within the definition of public health.

i. Direct Temperature Effects

The direct temperature effects of GHG emissions have led to more frequent heat waves. *Id.* at 66,524. Heat is the leading cause of weather-related deaths in the United States. *Id.* Heat waves are associated with increases in mortality and have always been associated with increased morbidity. *Id.* While it can be argued that increased temperature will also decrease the risk of death from cold-weather, the excess deaths caused by increased heat will substantially outweigh the offset caused by the cold-weather death reduction. According to the EPA, heat waves trigger an increase in death rates of 5.7%, while cold-weather waves increase death rates by only 1.6%. *Id.* at 66,525. Accordingly, increased death rates caused by more frequent heat waves pose a significant risk to public health.

ii. Increased Spread of Disease and Pathogens

In addition, climate-sensitive diseases will contribute to this increase in mortality. According to the EPA, food- and water-borne pathogens show a relationship with the temperature. *Id.* Depending on the nature and severity of the food and water-borne pathogens, an increased

spread could lead to higher transmission rates and severely impact the human health. Increased temperatures are also likely to increase the habitat range of disease carriers, such as the Lyme disease-carrying tick. *Id.* Increases in GHG emissions will also lead to increased production of allergens in the air. *Id.* Higher allergen production, caused by an increase in GHG emissions, could potentially affect the "prevalence and severity of allergy symptoms." *Id.*

iii. Air Quality

GHG emissions are directly related to increases in ozone pollution. *Id.* These increases pose significant risk to "respiratory illness and premature death." *Id.* Ozone also has "significant adverse effects on crop yields, pasture and forest growth, and species composition." *Id.* Respiratory illness, premature death, and decreases in crop yields are all adverse effects of GHG emissions that cause direct harm to the public health and the health of individuals. Accordingly, they fall within the definition of public health.

iv. Extreme Weather Events

GHG emissions cause more frequent extreme weather patterns. *Id.* The Administrator found that a higher frequency of extreme weather events has the "potential for increased deaths, injuries, infectious disease, and stress-related disorders . . . ." *Id.* The EPA pointed to heavy precipitation events, specifically increased flooding, and determined that these events can have adverse public health effects including "deaths, injuries, infectious diseases, intoxications, and mental health problems." *Id.* More intense tropical cyclone activity also has a detrimental effect on public health. *Id.* Drowning, heightened sea levels, more intense storms – all of these are likely results of increased cyclone activity caused by GHG emissions.

Direct temperature effects, increased spread of disease and pathogens, harm posed to the air quality, and extreme weather events all pose a significant threat to public health. Excess deaths

attributable to these weather effects are distinguishable from the harm to the public welfare posed by climate change generally. In fact, these excess deaths and diseases go directly to the heart of public health concern. While the same adverse effects of GHG emission also pose a significant threat to the public welfare generally, they also pose a significant threat to individual persons and public health. As EPA has previously stated, '[i]f the effect on people is to their health, we have considered it an issue of public health." *Id.* at 66,527. GHG emissions impact people's health and should be treated as such. For this reason, the United States District Court for the District of Union's decision that GHG emissions do not pose a significant threat to public health should be overturned.

b. The EPA's Endangerment Finding with respect to public welfare is valid and must be upheld.

The EPA has defined public welfare as "effects on people is to their interest in matters other than health, we have considered it public welfare." Endangerment Finding, 74 Fed. Reg. at 66,527. While the CAA does not specifically define public welfare, it defines "effects on welfare" as follows:

> Includ[ing] but not limited to, effects on soil, water, crops, vegetation, manmade materials, animals, wildlife, weather, visibility, and climate, damage to and deterioration or property and hazards of transportation, as well as effects on economic values and on personal comfort and well-being, whether caused by transformation, conversion, or combination with other air pollutants.

42 U.S.C. § 7602(h). This definition specifically refers to effects on "climate" and "weather." *Id.* The EPA made findings, which are based on substantial data and that apply such data in a reasonable manner, showing that GHG emissions have a significant and adverse impact on weather patterns and climate. Endangerment Finding, 74 Fed. Reg. at 66,523. The *Coalition* court upheld this public welfare endangerment finding, stating that "substantial record evidence" indicates that "climate change endangers human welfare by creating risk to food production and agriculture,

forestry, energy, infrastructure, ecosystems, and wildlife." *Coalition*, 684 F.3d at 121. This holding is supported by the Endangerment Finding.

GHGs negatively affect the public welfare. For example, the EPA has found that global and regional temperature increases "have the potential to affect essentially ***every aspect of human health***, society, and the natural environment." Endangerment Finding, 74 Fed. Reg. at 66,523 (emphasis added). The EPA also found that "[c]hanges in extreme weather events threaten energy, transportation, and water resource infrastructure. *Id.* at 66,535. Increased demand for energy to cope with an increase in global temperatures has the potential to strain the energy grid and lead to a shortage of power. *Id.* This, in combination with the damage that could be inflicted on power plants by extreme weather events, creates an immense vulnerability for the power grid. *See Id.*

In addition, economies that rely on climate-sensitive resources will be negatively impacted by an increase in temperature. Changes in climate have caused species to migrate to new locations in an effort to remain in a survivable habitat. *Id.* Migration of species to higher elevations has the potential to "rearrange U.S. ecosystems." *Id.* More serious negative consequences to ecosystems present themselves in the form of "habitat fragmentation, invasive species, and broken ecological connections [] likely to alter ecosystem structure, function, and services leading to predominantly negative consequences for biodiversity and the provision of ecosystem goods and services" *Id.* Increased frequency of wild fires, the spread of destructive pests and disease, reduced crop yield, more frequent floods, droughts, and extreme weather events all pose a significant threat to public welfare. *Id.*

Data shows that GHG emissions have led, and will continue to lead, to increased global temperature. *Id.* This global temperature increase will lead to a higher frequency of extreme weather events and wildfires, the rapid spread of food-borne illness, increased respiratory illness,

strain on species within the environment, and most importantly, an increase in human mortality. The EPA's Endangerment Finding is precautionary in nature, but nevertheless is based on all available scientific data. The EPA has analyzed this data in a reasonable manner and has used its judgment, a right granted to them by Congress in 42 U.S.C. § 7521(a)(1), to conclude that GHG emissions endanger both public health and welfare. The definition of welfare expressly provides for the protection of climate and natural resources, and the Endangerment Finding shows that climate and natural resources are at risk. 74 Fed. Reg. at 66,523. The Endangerment Finding specifically finds that human health, encompassing all matters affecting the health of the human population, is endangered by the risk of increased illness, pathogen spread, heat waves, and an overall higher mortality rate. *Id.* Accordingly, GHG emissions endanger both public health and public welfare; this Court must uphold the Endangerment Finding and overrule the lower court's decision to invalidate its findings related to public health.

c. The EPA's Endangerment Finding is Entitled to Chevron Deference.

Chevron deference is the highest level of deference that will be given to a decision of an administrative agency. *See United States v. Mead Corp.*, 533 U.S. 218, 218 (2001). *Chevron* deference is appropriate where congress has given "an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation." *Id.* at 227; *see also Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984). Any regulation made by an administrative agency pursuant to the express delegation of Congress "is binding in the courts unless procedurally defective, arbitrary and capricious in substance, or manifestly contrary to the statute." *Id.* Accordingly, in such a case, a court is prohibited from "substitute[ing] its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Id.*

To be entitled to *Chevron* deference, an agency decision must satisfy three steps. *See generally Mead*, 533 U.S. at 227-36. The first step is to determine whether congress has made an express delegation of authority to the agency. *Id.* at 227-28. The second step requires determining whether Congress has directly spoken to the precise question at issue. *Chevron*, 467 U.S. at 843-44. The third and final step is to determine whether the actions of the agency constitute a permissible construction of the statute. *Id.* In this case, the EPA's Endangerment Finding satisfies all three.

i. Congress Expressly Delegated the Authority to Make Endangerment Findings to the EPA.

An express delegation of authority is granted to an administrative agency where Congress "explicitly left a gap for an agency to fill." *Chevron*, 467 U.S. at 843. Moreover, another strong indicator of an express congressional delegation is a congressional authorization to "engage in the process of rulemaking," through a formal notice-and-comment process. *Mead*, 533 U.S. at 229-230; *see also Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 741 (1996) (applying *Chevron* deference to a ruling of the APA where notice-and-comment rulemaking was undertaken).

Here, the CAA provides an express delegation of power to the EPA to make findings of endangerment. The CAA grants the Administrator of the EPA the power make endangerment findings, stating as follows:

> 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). Section 7521 is an express delegation of authority to the EPA to prescribe regulations for pollutants it finds that endanger public health. In its Endangerment Finding, the

EPA was filling the gap Congress left void in determining that GHGs cause or contribute to air pollution.

Further, the Endangerment Finding was a product of notice-and-comment rule making. *See* Endangerment Finding, 74 Fed. Reg. at 66,526-31. Specifically, the EPA received comments on its finding that GHG emissions pose a substantial risk to public health. *Id.* Section IV(B)(1)(f) of the Endangerment Finding goes over, in great detail, the comments that were made by the public in response to the EPA's finding that GHGs endanger public health specifically. *Id.*

The EPA made a finding of a public health endangerment within its express congressional delegation in 42 U.S.C. § 7521(a)(1) and was subject to notice-and-comment rulemaking. Accordingly, it satisfies the first step of the *Chevron* test.

ii. Congress has not Spoken to the Harm Posed by Green House Gases; therefore, the EPA's Endangerment Finding may be Looked to as Deferential.

The second step of the *Chevron* deference test is to determine whether congress has already addressed the issue. If the intent of Congress is clear, the court "must give effect to the unambiguously expressed intent of congress." *Chevron*, 467 U.S. at 843. However, where Congress has not "directly addressed the precise question at issue, the court does not simply impose its own construction of the statute." *Id.* Rather, "if a statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.*

With respect to the CAA, Congress has not addressed the issue of whether GHGs pose a substantial risk to public health or welfare. This determination is left solely to the Administrator of the EPA, and within its discretion alone. *See* 42 U.S.C. § 7521(a)(1). Here, the Administrator was acting in its congressional delegation, absent any expressed intent of congress, in making the

Endangerment Finding. Because Congress has never discussed whether GHGs pose a substantial risk to public health, the EPA's decision must be given deference, and the second step of the *Chevron* test is satisfied.

iii. The EPA's Endangerment Finding is a Permissible Construction of the Clean Air Act.

Finally, the court must determine whether the agency's decision is based on a permissible construction of the statute. *Chevron*, 467 U.S. at 844. Unless the agency decision is "arbitrary, capricious, or manifestly contrary to the statute," its decision is permissible and will be given controlling weight. *Id.* In addition, courts may not simply reject an agency's determination because it "seems unwise." *Mead*, 533 U.S. at 229 (stating "a reviewing court has no business rejecting the agency's exercise of its generally conferred authority to resolve a particular statutory ambiguity simply because the agency's chosen resolution seems unwise, but is obliged to accept the agency's position if Congress has not previously spoken to the point at issue and the agency's interpretation is reasonable).

In the present case, the EPA's Endangerment Finding is reasonable and permissible. The Endangerment Finding analyzes scientific data showing that GHG emissions pose a substantial risk to public health. 74 Fed. Reg. at 66,523. Its finding expressly concludes that GHG emissions will lead to increased mortality. *Id.* Increased mortality will result from higher temperatures and more frequent heat waves, increases in disease and pathogen spread, decreased quality of air, and a higher frequency of extreme weather events. *Id.* at 66,524-26. The EPA even went as far as to conclude that increased GHG emissions pose a substantial threat to "every aspect of human health." *Id.* at 66,523. This finding is neither arbitrary nor capricious: therefore, the lower court erred in substituting its own Endangerment Finding as it pertains to public health.

The EPA's Endangerment Finding was made under an express delegation of congressional authority under 42 U.S.C. § 7521. Congress has granted the EPA the authority to make endangerment findings and has not addressed the issue of GHG emissions and their effects on public health. Finally, the EPA's conclusion was based on substantial data and is a permissible construction of the CAA. Accordingly, the Endangerment Finding is entitled to *Chevron* deference, and the lower court's overruling of its finding on public health should be reversed.

IV. THE EPA UNREASONABLY DELAYED IN FAILING TO LIST GHGS AS CRITERIA POLLUTANTS FOR OVER TEN YEARS.

Under the CAA, courts may order an agency to act when it has unreasonably delayed taking action. 42 U.S.C.A. 7604(a); *see Browner*, 130 F. Supp. 2d at 78 (holding that Section 7604 of this Act gives the court the power to grant relief by ordering the Administrator to undertake the non-discretionary duty at issue). Because the EPA has a duty to act based on the Endangerment Finding, any failure to act is reviewable for reasonableness. *See Ctr. for Biological Diversity*, 794 F. Supp. 2d at 151 (first reviewing any applicable duty before reviewing any delay). Merely beginning an appropriate proceeding is insufficient to show compliance with a mandatory duty. *See In re A Comty. Voice*, 878 F.3d 779, 787 (9th Cir. 2017) (quoting *Pub. Citizen Health Research Grp. v. Coom'r., Food & Drug Admin.*, 724 F. Supp. 1013, 1020 (D.D.C. 1989) (holding that an agency must enter a final decision subject to judicial review and do so within a reasonable time)).

a. Weighing the TRAC Factors shows an unreasonable delay.

Courts use the TRAC analysis made up of six factors, found in *Telecommunications Research and Action Center*, to determine if an agency's delay is so egregious as to warrant mandamus. 750 F.2d at 80. These factors include (1) the time agencies take to make decisions must be governed by the rule of reason; (2) if Congress provides a timetable or other indication of speed it expects the agency to proceed in, the statutory scheme may supply content for this rule of

reason; (3) delays that might be reasonable under the sphere of economic regulation are less tolerable when human health and welfare are at stake; (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority; (5) the court should also take into account the nature and extent of interests prejudiced by delay; and (6) the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is "unreasonably delayed." 750 F.2d at 80. Of these factors, the first is the most important, although not dispositive. *In re A Comty. Voice*, 878 F.3d at 786.

Multiple circuits have used the TRAC factor test to determine whether an agency has unreasonably delayed. In *In re Pesticide Action Network North America v. U.S. E.P.A.*, the Ninth Circuit determined that an eight-year delay was too long to respond to a petition for rulemaking under the first factor. 798 F.3d 809 (9th Cir. 2015). There, the court determined that the delay, coupled with a lack of a future timeline, was merely a "roadmap for future delay" and was unreasonable. *Id.* at 814. That same court held that a seven-year delay was unreasonable to promulgate rules for lead pollutants, especially when combined with merely speculative dates of four and six years in the future when the EPA *might* take final action on an item it acknowledged was a clear threat to human health and welfare. *In re A Comty. Voice*, 878 F.3d at 787. Further, the D.C. Circuit held that a seven-year delay was unreasonable; the petitioner there was prejudiced by the delay under the fifth TRAC factor because it was unable to use the higher rate caps it desired for those seven years. *In re Core Comms., Inc.*, 531 F.3d 849 (D.C. Cir. 2008). Reasonable delay is shown as a much lower number: in *Mexichem Specialty Resins, Inc. v. E.P.A.*, the D.C. Circuit held that a four-year timeline provided by the EPA was not an unreasonable delay. 787 F.3d 544, 555 (D.C. Cir. 2015). That circuit further held that a three-year delay to deliberate complicated questions was acceptable. *Sierra Club v. Thomas*, 828 F.2d at 799.

Weighing the TRAC factors here show the EPA unreasonably delayed in listing GHGs as criteria pollutants. The first and most important factor is where the balance is heaviest against the EPA. The Rule of Reason, exemplified in the above cases, show delays of seven and eight years unreasonable, and only allowing delays within four years of the creation of a duty. After an extensive search, *no* cases showed courts allowing delays of ten years as seen here. Further, the EPA has yet to offer *any* end in sight; it is still arguing for more time to navigate "thorny policy" and overcome scientific issues surrounding possible standards. (R. 12.) It fails to provide a timeline when it might overcome these vague roadblocks. *Id.* The EPA argues that the above-discussed Executive Order precludes issuing new regulations on business and economic activity like those that would limit GHGs – without a court enforcing the EPA's non-discretionary duty to list GHGs, this Executive Order and its prohibition may extend inaction into perpetuity. (R. 12.)

Further, the second and third factors also weigh in favor of CHAWN. Congress has provided a timetable in the statute: the EPA must promulgate standards as needed *every five years* or sooner, spotlighting how far outside the EPA has acted from the Congressionally mandated timetables. 42 U.S.C.A. § 7409(d)(1). The delays directly affect human health and welfare by the EPA's own original admission, implicating the third factor. *See* Endangerment Finding, 74 Fed. Reg. at 66,523. Hotter temperatures from ozone pollution, increased heat-related deaths, and increased prevalence of insect-born diseases directly affect human health as a result of unregulated GHGs. *Id.*; (R. 7.) Public welfare is impacted by reduced agricultural production, reduced water supplies, increased property and economic damages due to an increase in storms and rising sea level, again caused by unrestrained GHGs. Endangerment Finding, 74 Fed. Reg. at 66,523; (R. 7.).

Finally, the fourth and fifth factors skew the balance further away from reasonableness. The only agency activity of a higher or competing authority mentioned in the record is the

Executive Order previously discussed. (R. 12.) Not only does the EPA's interpretation of the Order contravene the intended effects of that Order as stated above, it also ties together the previously discussed third factor that weighs economic issues against human health and welfare. By delaying, the EPA is holding economic interests from the Executive Branch above the health and welfare interests Congress mandated would be the EPA's duty to protect. The nature and extent of interests prejudiced by delay include those parties in the original suit: members who had to flee their seaside homes from increased storm surge and the property damage that results, and young people who are negatively affected by the ever-increasing effects of GHGs, including the increased heat and related deaths and future filled with escalating insect-related deaths. (R. 5, 7.) On balance, these factors overwhelmingly show that the EPA has unreasonably delayed taking action on its mandatory duty.

b. The EPA cannot meet the heavy burden to show an inability to comply with a deadline.

"Thorny policy," scientific hurdles, and Executive Orders may be a burden, but not impossible ones. Agencies have a heavy burden to demonstrate that the ordered requirements are impossible to meet, or that it is unable to comply with a particular remedial timeline. *Sierra Club v. Wheeler*, 330 F. Supp. 3d 407, 422 (D.D.C. 2018). That burden is especially heavy where the agency has failed to demonstrate any diligence whatever in discharging its statutory duty to promulgate regulations and has in fact ignored that duty for several years. *Id.* Courts must scrutinize carefully any claims of impossibility and separate justifications grounded in the purposes of the Act from the foot-dragging efforts of a delinquent agency, while remaining mindful of commitments and avoid imposing deadlines beyond the agency's capacity. *Id.*

Here, the only burdens cited that directly impact the EPA's ability to perform are those scientific issues. (R. 12.) However, with over ten years after labeling GHGs potentially dangerous,

the EPA cannot point to any action it has taken to address creating the primary or secondary standards to regulate GHGs as required. *Id.* The EPA also failed to provide any future timeline to overcome the current unreasonable delay.

The remaining policy and Executive Order burdens listed cannot overpower Congress' directive that the EPA protect the public health and welfare. The EPA has already determined that GHGs are potentially dangerous to both; economic and policy concerns cannot overshadow the health and welfare of the people.

CONCLUSION

For the foregoing reasons, the Plaintiff-Appellee-Cross-Appellant, Climate Health and Welfare Now, respectfully requests that this Court (1) hold that the EPA had a non-discretionary duty to list GHGs as criteria pollutants under 42 U.S.C.A. § 7408; (2) that the failure to perform that non-discretionary duty gave the lower court jurisdiction to hear the unreasonable delay citizen suit under 42 U.S.C.A. § 7604; (3) that the Endangerment Finding is valid with respect to public health, thereby reversing the lower court's improper vacation of the public health endangerment finding; (4) that the Endangerment Finding is valid with respect to public welfare; and (5) that the EPA unreasonably delayed in listing GHGs as a criteria pollutant.

Respectfully submitted,

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