C.A. NO. 20-000123 Team Number: 22

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

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

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Defendant-Appellant,

-and-

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

On Appeal from the United States District Court
for the District of New Union

BRIEF OF CLIMATE HEALTH AND WELFARE NOW
Appellee-Cross Appellant

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STATEMENT OF JURISDICTION

The Federal District Courts of the United States have subject matter jurisdiction over claims arising under federal law and the United States Constitution. 28 U.S.C. § 1331. The Federal District Courts of the United States also have subject matter jurisdiction to compel agency action unreasonably delayed. 42 U.S.C. § 7604(a).

The United States Court of Appeals for the Twelfth Circuit has jurisdiction over appeals of any final decision of the United States District Court for the District of New Union. This case involves appeals of a final decision of that court. Therefore, the Twelfth Circuit has jurisdiction over the appeals in this case. 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Did the District Court have jurisdiction over the Clean Air Act ("CAA") § 304(a) unreasonable delay claim where the rule sought would be a rule of nationwide applicability subject to review in the DC Circuit under CAA § 307(b)?
2. Is the 2009 Endangerment Finding valid with respect to public welfare?
3. Is the 2009 Endangerment Finding valid with respect to public health?
4. Did EPA unreasonably delay by taking ten years to take any action on listing greenhouse gases ("GHGs") as criteria pollutants under CAA § 108(a)?
5. Does EPA have a nondiscretionary duty to list GHGs as a criteria pollutant under CAA § 108 based on the 2009 Endangerment Finding?

STATEMENT OF THE CASE

I. Factual Background

The severity of climate change cannot be overstated. In the coming years climate change will threaten the planet through heat waves, flooding, droughts and crop failure, ultimately

resulting in injury and death for many. R. at 7. These severe effects have motivated concerned citizens to form groups and advocate for the future of our planet.

One such group is Climate Health and Welfare Now ("CHAWN"), the Plaintiff in this matter. CHAWN is fighting for the rights of future generations to be free from the terrors of climate change. By contrast, Coal, Oil, and Gas Association ("COGA") seeks to invalidate settled issues of environmental law in order to protect the fossil fuel market. R. at 5. Perhaps even worse, the EPA has aligned itself with COGA on several claims, arguing they are free to choose when, and even if, they will act to protect the public. R. at 2.

The current controversy began in 2009 when the EPA issued the Endangerment Finding ("Endangerment Finding"). R. at 6. The Endangerment Finding concluded GHGs come from numerous sources causing or contributing to climate change, which in turn endangers public health and welfare. R. at 6–7. Upon making this finding the EPA should have listed GHGs as criteria pollutants under the CAA section 108. 42 U.S.C. § 7408. Instead, EPA disregarded their mandatory duty to list GHGs as criteria pollutants. R. at 5.

Listing GHGs as criteria pollutants triggers regulation under section 108. R. at 7. The EPA would have 12 months to propose primary and secondary National Ambient Air Quality Standards ("NAAQS") for GHGs. R. at 8. Primary NAAQS are set at levels to protect public health, whereas secondary NAAQS are set at levels to protect public welfare. *Id.* Primary NAAQS require states create an implementation plan for how they will meet the primary NAAQS level, which the State must meet within 10 years. *Id.* Failing to meet the primary NAAQS deadline results in loss of highway funds and EPA regulation. *Id.* Secondary NAAQS do not carry a strict timeline and do not have penalties for noncompliance. *Id.*

Seeing the EPA's inaction, CHAWN, along with a coalition of environmental organizations, petitioned the EPA in 2009 to fulfill their mandatory duty and list GHGs as criteria pollutants. R. at 5. The EPA has continuously ignored the petition for over a decade, explicitly violating the mandatory terms of the statute.

II. Procedural History

After a decade of inaction CHAWN commenced a section 304 citizen suit seeking the court compel the EPA to list GHGs as criteria pollutants as required under section 108. R. at 5. COGA intervened and asserted a cross-claim against the EPA alleging the 2009 Endangerment Finding is unsupported and contrary to law. R. at 5. The District Court for The District of New Union granted CHAWN's motion for summary judgment in part and granted COGA's motion for summary judgment in part. R. at 2. CHAWN, COGA, and the EPA all timely appealed the District Court's Order. *Id.*

SUMMARY OF THE ARGUMENT

First, the District Court had jurisdiction over CHAWN's section 304 claim. Section 304 requires claims regarding rules of nationwide scope and effect be brought pursuant to section 307, which provides such rules must be brought in the D.C. Circuit. 42 U.S.C. §§ 7604(a), 7607(b). Section 307(b) is a venue provision, based on the statute's text, legislative history, and court's historical treatment of section 307(b) as a venue requirement. Because section 307(b) is a venue provision the defendants waived protection by failing to raise an objection. As such, the District Court had jurisdiction over CHAWN's unreasonable delay claim.

Second, the 2009 Endangerment Finding with respect to public welfare is valid. Section 202(a) of the CAA embodies the precautionary principle and allows the Administrator to promulgate standards protecting against uncertain harm. Supported by decades of research the

Administrator reasonably concluded climate change caused by GHGs endangers public welfare. R. at 7. The substantial scientific record has survived scrutiny under the D.C. Circuit and should be respected as settled environmental law.

Third, the 2009 Endangerment Finding with respect to public health is valid. The CAA's term "public health" is ambiguous. In 2009, the EPA reasonably concluded consequential health harms are included in finding an endangerment to public health. *Id.* The EPA's reversal of position falls under *Skidmore*'s less deferential view and should not be enforced as it lacks consistency and is contrary to the statute's design.

Fourth, EPA's ten-year delay in taking any action on listing GHGs as criteria pollutants under CAA section 108(a) constitutes an unreasonable delay. The EPA's decision to delay is nothing short of egregious; the delay has not been governed by a rule of reason, expediting EPA's delayed action would not interfere with agency activities of a higher or competing priority, and EPA's delayed action has a direct impact on human health and welfare.

Fifth, EPA has a nondiscretionary duty to designate GHGs as a criteria pollutant under CAA section 108. The 2009 Endangerment Finding concludes that GHGs satisfy section 108(a)(1)(A) and (B)'s criteria. Section 108 unambiguously provides once section 108(a)(1)(A) and (B) are met the EPA must list the material as a criteria pollutant; it is clear that section 108(a)(1)(C) is not the third of three factors, holding otherwise would be contrary to the statute.

ARGUMENT

I. THE DISTRICT COURT HAD JURISDICTION OVER CHAWN'S CAA § 304(A) UNREASONABLE DELAY CLAIM BECAUSE § 307(B) IS PRIMARILY A VENUE REQUIREMENT AND DEFENDANTS HAVE WAIVED THEIR RIGHT TO OBJECT.

The District Court had jurisdiction over CHAWN's unreasonable delay claim because section 307(b) is primarily a venue provision and defendants have waived their right to object. Citizen suit

claims of unreasonable delay under section 304(a) seeking rules of nationwide applicability must be brought in the DC Circuit pursuant to section 307(b). 42 U.S.C. §§ 7604(a), 7607(b)(1). CHAWN is seeking a rule of nationwide scope and effect; however, based on the text, legislative history, and courts' consistent treatment of the statute, section 307(b)'s mandate is primarily a venue requirement. The district court had jurisdiction over CHAWN's unreasonable delay claim.

A. CAA § 307(b) is a venue provision because of the statute's text, legislative history, and consistent treatment of § 307(b) as a venue requirement.

Section 307(b) is primarily a venue provision. Three reasons demonstrate this. First, the statute's text clearly demonstrates a conferral of venue, not jurisdiction. Second, section 307(b)'s legislative history demonstrates Congress intended section 307(b) to be a venue statue. Third, the portion of section 307(b) at issue in this case has always been treated as a venue requirement. The section is primarily a venue provision.

1. The text of § 307(b) illustrates that it is primarily a venue provision.

Section 307(b) is a venue provision because it specifies where a suit will be filed. Provisions specifying where a suit shall be filed are generally treated as venue provisions. *See New York v. EPA*, 133 F.3d 987, 990 (7th Cir. 1998). Section 307(b)(1) specifies a petition for review of a determination of nationwide scope or effect "*may be filed only* in the United States Court of Appeals for the District of Colombia . . . ." 42 U.S.C. § 7607(b)(1) (emphasis added). The phrase "may be filed only" specifies where a suit shall be filed. Because it specifies where a suit shall be filed courts generally interpret 307(b) as a venue provision. *See, e.g.*, *Tex. Mun. Power Agency v. EPA*, 89 F.3d 858, 867 (D.C. Cir. 1996); *Dalton Trucking, Inc. v. U.S. EPA*, 808 F.3d 875, 879 (D.C. Cir. 2015). The text of section 307(b) specifies where a suit will be filed, making it a venue provision.

The text of section 307(b) clearly confers venue even though it has some jurisdictional components. The D. C. Circuit in *Texas Municipal Power Agency* dismissed the argument that section 307(b) is a jurisdiction provision because it has jurisdictional wording. 89 F.3d at 867. The

court explained, "while there is 'some' jurisdictional language," because section 307(b) "refers to *where* a petitioner *must* file" it is more framed as a venue provision. *Id.* The EPA raises the same argument now as was raised in *Texas Municipal Power Agency*, that some jurisdictional language in the provision makes section 307(b) a jurisdiction provision. As it did in 1996, this argument must fail. The language of 307(b) clearly denotes venue by telling petitioners where to file—classic venue language. Given the language used in section 307(b) the provision is primarily a venue provision.

2. The legislative history of § 307(b) further demonstrates that Congress intended for § 307(b) to be treated as a venue provision.

Congress adopted the Administrative Conference amendments to section 307(b) focusing on venue. In 1996, the Administrative Conference of the United States recommended amendments to the CAA. *See* Miscellaneous Amendments, 41 Fed. Reg. 56767, 56768 (Dec. 30, 1976) (to be codified at 1 C.F.R. pts. 305 & 310). The recommendations under section "A. Venue in the Court of Appeals" proposed language similar to current-day section 307(b). *Id.* These recommendations were "intended to clarify some questions relating to venue" under the CAA. *See* H. R. Rep. No. 95–294, at 323 (1977). The recommendation focused on venue, evidenced by the title of the recommendation and the substance of the amendments. The recommendations centering on venue were largely accepted by Congress.

Congress evidenced its desire that section 307(b) be treated as a venue provision by adopting the Administrative Conference's recommendations. The Supreme Court in *Harrison v. PPG Industries, Inc.*, explained section 307(b)'s legislative history focused on the "proper venue" for review of final actions. 446 U.S. 578, 590 (1980). The majority noted changes to section 307(b) after the Administrative Conference report "reflected the Committee's agreement with certain venue proposals . . . ." *Id.* at 591. Congress has also confirmed that "[i]n adopting this subsection, the committee was in large measure approving the portion of the Administrative Conference of the United States recommendation section 305.76-4(a), that deals with venue." *See* H. R. Rep. No. 95-

294, at 324 (1977). Given the substantial discussion of venue in the amendments, and Congress' explicit acceptance of the provisions, section 307(b) was envisioned to be a venue provision. The provision at issue in this case is the venue portion of § 307(b).

The specific portion of section 307(b) at issue in this cause is the venue prong of section 307(b). In 1980, the Supreme Court held section 307(b)(1) confers jurisdiction onto the court of appeals to review "any other final action" of the Administrator. *Harrison*, 446 U.S. at 593. As seen above, section 307(b) is also a venue provision. The D. C. Circuit has explained the interplay of these two prongs, noting that "[s]ection 307(b)(1) is a 'conferral of jurisdiction upon the courts of appeals' . . . [and] section 307(b)(1) is also a venue provision, specifying which types of section 307(b)(1) challenges can be filed in which federal circuit courts." *Dalton Trucking, Inc., v. U.S. EPA*, 808 F.3d 875, 879 (D.C. Cir. 2015); *See also S. Ill. Power Coop. v. EPA*, 863 F.3d 666, 670 (7th Cir. 2017) ("[t]he Act's venue provision separates reviewable agency actions . . . into three distinct categories and allocates venue accordingly."). Therefore, section 307(b)(1) does confer jurisdiction, however the issue in this case is the venue provision specifying where review of rules of nationwide scope may occur.

At issue in this case is the venue portion of section 307(b). The venue portion of section 307(b) is the language analyzed above, that "petitions for review of certain enumerated national applicable actions . . . '*may only be filed in the* United States Court of Appeals for the District of Columbia.'" *Dalton Trucking, Inc.*, 808 F.3d at 879–880 (quoting 42 U.S.C. § 7607(b)). The EPA claims the district court lacked jurisdiction, however the portion of section 307(b) which specifies where review of final actions of nationwide scope and effect must occur is the venue provision. Indeed, by *Harrison's* reasoning, the district court's actions would be reviewed by a federal court of appeals, who would have jurisdiction. *Id.* (explaining that *Harrison* meant section 307(b)'s conferral of jurisdiction "extends both to 'the United States Court of Appeals for the District of Columbia' and

to the regional 'United States Court of Appeals.'"). The argument raised is centered on the venue provision of section 307(b).

Section 307(b)(1) is primarily a venue provision given its text, legislative history, and consistent treatment as a venue provision.

B. Defendants waived § 307(b)'s venue provision by failing to raise a venue objection.

Venue was waived in this case because neither defendant objected to the venue. Venue is a privilege which is lost when the defendant fails to assert improper venue. *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 168 (1939). Once venue has been waived, the venue requirements no longer have to be met. *Tex. Mun. Power Agency v. EPA*, 89 F.3d 858, 867 (D.C. Cir. 1996) ("Therefore, EPA's failure to object waives § 307(b)(1)'s venue requirements."). As stipulated in the record, neither defendant has raised an objection to venue. R. at 12. Accordingly, protection under section 307(b)(1) has been waived.

Section 307(b)(1) is primarily a venue provision and defendant's failure to object has waived section 307(b)(1)'s protections. The District Court properly had jurisdiction over CHAWN's unreasonable delay claim.

II. THE 2009 ENDANGERMENT FINDING IS VALID WITH RESPECT TO PUBLIC WELFARE BECAUSE THE FINDING IS REASONABLE AND POLICY ARGUMENTS ARE NOT CONSIDERED WHEN MAKING AN ENDANGERMENT FINDING.

The EPA's 2009 Endangerment Finding is valid with respect to public welfare. Under *Chevron*, an agency's decision will not be overturned unless it is arbitrary and capricious, or manifestly contrary to the design of the statute. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 844 (1984). The 2009 Endangerment Finding was made under section 202(a). Section 202(a) embraces the precautionary principle, allowing the Administrator to set standards protecting the public from uncertain harm. Additionally, an endangerment finding is a purely

scientific finding devoid of public policy considerations. The 2009 Endangerment Finding with respect to public welfare is valid and should not be overturned.

A. The 2009 Endangerment Finding is valid for public welfare because it is based on the Administrator's careful judgment and is supported by substantial scientific evidence.

The 2009 Endangerment Finding for public welfare is valid as the Administrator properly assessed future risk and provided an adequate explanation for the endangerment finding. Section 202(a)'s precautionary principle allows the Administrator to predict future harm which may occur based on an assessment of risk. *Ethyl Corp. v. EPA*, 541 F.2d 1, 28 (D.C. Cir. 1976). Courts review scientific evidence under an extremely deferential standard; as long as there is an adequate explanation the action will be enforced. *Am. Farm Bureau Fed'n v. EPA*, 559 F.3d 512, 519 (D.C. Cir. 2009). The public welfare endangerment finding is valid because the Administrator reasonably assessed the risk of future harm and provided an adequate explanation for their decision.

1. The EPA's Administrator is empowered by the precautionary principle to promulgate standards based on an assessment of risk and future harm.

Section 202(a) embodies the precautionary principle. Section 202(a) allows the Administrator to set standards for the emission of air pollutants "*which may reasonably be anticipated to endanger public health or welfare*." 42 U.S.C. § 7521(a)(1) (emphasis added). The text of 202(a) has long been understood to embody the precautionary principle. *See Ethyl Corp.*, 541 F.2d at 13; *see also Coal. for Responsible Regul., Inc. v. EPA*, 684 F.3d 102, 121 (D.C. Cir. 2012) (finding the language in 202(a) "requires a precautionary, forward-looking" judgment which is in line with the CAA's overall precautionary orientation), *aff'd in part*, *rev'd in part sub*

nom. Util. Air Regul. Grp. v. EPA, 573 U.S. 302 (2014). By 202(a)'s clear language the statute is a precautionary statute.

The Administrator may protect against uncertain harm. Section 202(a) empowers the Administrator to protect against uncertain harm. *Massachusetts v. EPA*, 549 U.S. 497, 534 (2007) (noting the EPA could not "avoid its statutory obligation" to regulate GHGs because of uncertainty). *See also Coal. for Responsible Regul., Inc.*, 684 F.3d at 122 (observing the EPA "may issue an endangerment finding [under 202(a)] even while the scientific record" has some uncertainty). Were the Administrator to wait until the data was certain the harm would have already occurred, which would be contrary to the statute's aim. *Ethyl Corp*, 541 F.2d at 13. Uncertainty is insufficient to overturn an endangerment finding, especially given that the Administrator is charged to protect against *future* harm.

The severity of climate change necessitates an endangerment to public welfare finding. The Administrator may consider the level of harm threatened and act to prevent great harm which is less certain to occur. *Id.* at 19. Climate change threatens public welfare by increasing flooding, exacerbating forest fires, straining water resources, and creating crop failure. Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66496, 66531–66535 (Dec. 15, 2009) (to be codified at 40 C.F.R. Ch. I) [hereinafter *Endangerment Finding*]. These severe effects are clearly great harms. The Administrator may regulate the cause of great harm even in the face of uncertainty. The uncertainty COGA raises is significantly outweighed by the great harm threatened; the severe effects of climate change warrant an endangerment finding.

Additionally, Section 202(a) allows the Administrator to set standards based on their expertise and analysis of uncertain data. *Ethyl Corp* explained that a precautionary statute allows

the Administrator to "apply [their] expertise to draw conclusions from suspected, but not completely substantiated, relationships between facts . . ." 541 F.2d at 28. Moreover, the statute allows the Administrator to draw conclusions based off trends in data and "theoretical projections from imperfect data." *Id.* Congress conferred this power onto the Administrator, not the courts. The Administrator drew reasonable conclusions based off the evidence and found public welfare was threatened. As such, the Administrator's endangerment finding should be upheld because it is based on their expert analysis of the data.

Section 202(a)'s precautionary principle allows the Administrator to assess uncertain data and make regulations to protect against great future harm.

2. Scientific data is reviewed under an extreme degree of deference and is preserved as long as the EPA has articulated a rational basis for its actions.

The Administrator's endangerment finding was rationally related to the substantial evidence that GHGs pose a threat to public welfare. Court's review scientific data under an extreme degree of deference and enforce agency decisions as long as there is a rational basis. *See Coal. for Responsible Regul., Inc.*, 684 F.3d at 120. *See also Am. Farm Bureau Fed'n v. EPA*, 559 F.3d 512, 519 (D.C. Cir. 2009). A court's review does not entail a re-weighing of scientific evidence. *Coal. for Responsible Regul., Inc. v. EPA*, 684 F.3d 102, 122 (D.C. Cir. 2012), *aff'd in part*, *rev'd in part sub nom. Util. Air Regul. Grp. v. EPA*, 573 U.S. 302 (2014). Instead, the court must enforce a rational decision based on substantial evidence. *Id.* The EPA has articulated a rational basis supported by substantial evidence.

The 2009 Endangerment Finding was based on substantial scientific evidence. In 2009, the EPA published the Endangerment Finding, concluding GHGs cause climate change and that climate change will continue to impact public health and welfare. *Endangerment Finding* at

66497. EPA's conclusion was based on assessments synthesizing thousands of studies, representing the consensus of scientific literature in this area. *Id.* at 66511. The D.C. Circuit affirmed the 2009 finding, noting the EPA was supported by a "substantial record" of evidence demonstrating "emissions of greenhouse gases 'very likely' caused"' global warming which in turn "threatens both public health and public welfare." *Coal. for Responsible Regul., Inc.*, 684 F.3d at 121. Having survived scrutiny from the D.C. Circuit it is clear the EPA has relied on substantial evidence to support the endangerment to public welfare finding.

The finding should be upheld because there is a rational basis to support the finding. Scientific evidence is reviewed under an extremely deferential standard and is upheld as long as there is a rational basis for the agency conclusion. *Id.* at 120; *see also Am. Farm Bureau Fed'n v. EPA*, 559 F.3d 512, 519 (D.C. Cir. 2009). The court should not re-weigh the science, nor should they assess whether they would have made the same decision. *Coal. for Responsible Regul., Inc*., 684 F.3d at 122. Decades of research concluded that climate change endangers public welfare by increasing forest fires, producing crop failure, and straining water-resources. *See Endangerment Finding* at 66531–66534. These findings rationally led the EPA to conclude GHGs endanger public welfare. The EPA's 2009 endangerment finding with respect to public welfare is valid because it is rationally based on substantial scientific evidence.

B. The 2009 Endangerment Finding is a purely scientific finding which rejects considerations of policy.

The 2009 Endangerment Finding with respect to public welfare should be upheld because it is a purely scientific finding which rejects consideration of policy. An endangerment finding under section 202(a) is a purely scientific finding; the Administrator may only consider scientific evidence when making their determination. Policy considerations and "absurd result" arguments have never been allowed to muddy the waters of the scientific finding. As such, the 2009

Endangerment Finding with respect to public welfare should be upheld because it is a purely scientific finding which cannot consider policy arguments.

1. § 202(a)'s text demonstrates the Endangerment Finding is a purely scientific inquiry.

An endangerment finding under section 202(a) is a purely scientific inquiry. The text of section 202(a) allows the Administrator to set standards for the emission of air pollutants "*which may reasonably be anticipated to endanger public health or welfare*." 42 U.S.C. § 7521(a)(1) (emphasis added). In *Massachusetts v. EPA*, the Supreme Court explained an endangerment finding under section 202(a) requires an inquiry into "whether sufficient information exists" to make the purely "scientific judgment" that GHGs pose a risk to public welfare. 549 U.S. 497, 534 (2007). The text of section 202(a) requires the EPA to consider only scientific evidence when making an endangerment finding. In *Coalition for Responsible Regulation, Inc.* the court explained "[t]he Supreme Court made clear in *Massachusetts v. EPA* that it was not addressing the question 'whether policy concerns can inform EPA's actions in the event that it makes such a finding,' but that policy concerns were not part of the calculus for the determination of the endangerment finding in the first instance." 684 F.3d at 118 (quoting *Massachusetts*, 549 U.S. at 534–35). The Administrator must only consider the relevant scientific information before them to make their endangerment finding.

2. Policy and absurdity arguments must not be considered when making an endangerment finding.

An endangerment finding does not consider policy or absurdity arguments. Both the Supreme Court and the D.C. Circuit have confirmed 202(a) requires an endangerment finding be made based on scientific evidence; therefore, policy and absurdity arguments do not impact the Endangerment Finding.

An endangerment finding under 202(a) rejects consideration of policy. In 2007, the Supreme Court held the EPA must regulate GHGs under section 202(a), as they fit the definition of air pollutants under the statute. *Massachusetts*, 549 U.S. at 532, 535. The EPA had produced a "laundry lists" of reasons to not regulate, arguing regulating GHGs could interfere with the President's ability to negotiate with developing nations and regulation would be an inefficient way to address climate change. *Id.* at 533. The Supreme Court rejected these arguments because they strayed from section 202(a)'s clear language that the Administrator must base a decision to regulate off of scientific evidence. *Id.* at 535. Consideration of policy is not permitted under 202(a).

Absurd result arguments may not be considered when making an endangerment finding. The D.C. Circuit has strongly opposed the "absurd result" arguments COGA raises in this matter. In 2012, the D.C. Circuit held the EPA could not consider whether "stationary-source regulation triggered by an endangerment finding" would produce an "absurd" result. *Coal. for Responsible Regul., Inc.*, 684 F.3d at 118. The court explained that while the result triggered may be absurd and "may indicate that the CAA" is a "less-than-perfectly tailored" scheme, the act does not allow those considerations to become part of the endangerment inquiry. *Id.* at 119. COGA's argument is foreclosed by section 202(a)'s text. The statute does not allow consideration of absurd results when making an endangerment finding.

The 2009 endangerment finding with respect to public welfare should be enforced. Section 202(a) empowers the Administrator to protect against great, uncertain harm. Only scientific evidence is considered under this finding, and an agency action is upheld when there is a rational basis for it. The 2009 Endangerment Finding with respect to public welfare was rationally related to the substantial scientific evidence and should be upheld.

III. THE 2009 ENDANGERMENT FINDING WITH RESPECT TO PUBLIC HEALTH IS CONTROLLING BECAUSE IT IS ENTITLED TO *CHEVRON* DEFERENCE AND EPA'S NEWFOUND POSITION IS NOT ENTITLED TO DEFERENCE.

The EPA's 2009 Endangerment finding is valid with respect to public health and their newfound position is not entitled to deference. Agency actions are reviewed under *Chevron*'s two-step process. First, the court considers whether the statue is ambiguous. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 842 (1984). Second, if the statue is ambiguous, an agency's reasonable interpretation is controlling. *Id.* at 843. The CAA is ambiguous because public health is undefined. In 2009, the EPA reasonably concluded an endangerment finding for public health can be made up of consequential health harms from climate change. The EPA's newfound position falls under *Skidmore* and is entitled to significantly less deference. As such, the 2009 Finding with respect to public health should control.

A. The 2009 Endangerment Finding is entitled to *Chevron* deference because § 202(a) is ambiguous and including consequential health harms in a public health finding is reasonable.

The 2009 Endangerment Finding with respect to public health is reasonable and entitled to deference. Congress created ambiguity when enacting the CAA by not defining public health. Under *Chevron*, an agency's reasonable interpretation of an ambiguous statute is controlling. *Id.* In 2009, the EPA concluded a public health endangerment finding may be based on consequential health harms from climate change. The 2009 finding was a reasonable interpretation of the statue and is entitled to *Chevron* deference.

1. The term "public health" under the CAA is ambiguous.

The CAA is ambiguous with respect to public health. The first step under *Chevron* is for the court to determine if Congress has "directly spoken" to the issue, either through the statute's text or construction. *Pine Creek Valley Watershed Ass'n. v. EPA*, 97 F. Supp. 3d 590, 599 (E.D.

Pa. 2015). The statute does not define public health. Congress has not directly spoken to the meaning of public health through the statue's text.

Similarly, the construction of the statute does not provide a clear meaning of public health. The CAA allows the EPA to prescribe "standards applicable to air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7521(a)(1). This section does not explain what evidence may be used for a public health finding, and the rest of the statute is silent as to public health's exact meaning. Based on the statute's construction it is unclear what evidence may be relied upon for a public health endangerment finding. The construction of the statute does not help define public health.

The definition of "welfare" under the CAA does not resolve the ambiguity as to the meaning of "public health" because the term "climate" is also ambiguous. Welfare is defined as including effects on "soils, water, crops, vegetation, manmade materials, animals, wildlife, weather, visibility, and climate . . ." 42 U.S.C. § 7602(h). Defendants argue consequential health harms from climate change cannot be included in public health because climate is included in welfare's definition. This argument fails because the term climate is ambiguous. It is unclear what climate effects are meant to be included or whether the effects must be indirect or direct. Indeed, this ambiguity is what led the EPA to include climate effects in public health. *Endangerment Finding* at 66527 (noting the inclusion of climate in welfare's definition "does not resolve" the question). Being that climate is ambiguous, the term's use in welfare's definition does not resolve the ambiguity of "public health."

Congress has not spoken directly to how public health should be defined. The CAA does not define public health and the construction of the statue does not provide a clear meaning of the term. "Public health" under the CAA is clearly ambiguous.

2. The 2009 EPA finding that public health may include consequential health impacts from climate change is reasonable.

The EPA's 2009 Endangerment Finding is reasonable and should not be overturned. Under *Chevron*'s second step, an agency's reasonable interpretation of a statute is controlling. *See Chevron*, 467 U.S. at 843. A reasonable interpretation must be consistent "with the design and structure of the statute as a whole." *See Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 321 (2014). An agency decision will be overturned only if the decision is "arbitrary or capricious in substance, or manifestly contrary to the statute." *United States v Mead Corp.*, 533 U.S. 218, 227 (2001). In 2009 the EPA reasonably concluded that consequential harms may be included in an endangerment to public health finding.

The consequential health harms the EPA observed reasonably led them to conclude GHGs pose a risk to public health. In 2009 the EPA explained GHGs contribute to climate change which causes adverse health impacts. These "consequential harms" include severe heat waves, regional ozone pollution, and an increase in the spread of food and water-borne pathogens, all of which can lead to illness, injury, and death. *See Endangerment Finding* at 66526. Upon observing these severe and sometimes fatal effects, the EPA reasonably concluded public health was endangered by GHGs.

Consequential health harms should be included in the endangerment finding based off the design of the statute. The CAA was designed to address a "major social issue"—air pollution. *Chevron*, 467 U.S. at 849. The EPA's duty is even more critical now because of climate change. *See Massachusetts v. EPA*, 549 U.S. 497, 521–523 (2007) (detailing the severe consequences of climate change). A statute designed to address a major social issue should be interpreted to include consequential health harms. Requiring the EPA consider only direct health harms would be contrary to the broad aims of the statue. In fact, the EPA rejected that narrow reading of the

statute in 2009, explaining "it would be anomalous to argue that a person who is injured or dies from heat exhaustion . . . has not suffered a health impact." *See* Proposed Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 18886, 18902 (April 24, 2009) (to be codified 40 C.F.R. Ch. I) [hereinafter *Proposed Endangerment Finding*]. Including consequential health harms is consistent with the design of the statute.

Section 202(a) is ambiguous as to the definition of "public health." The E.P.A.'s 2009 interpretation of public health is reasonable and is entitled to deference.

B. The EPA's 2009 interpretation of public health should control because the EPA's newfound position is not entitled to *Chevron* deference and is arbitrary and capricious.

The EPA's newfound position is not entitled to *Chevron* deference and is arbitrary and capricious. Not all agency actions are given *Chevron* deference. Agency actions which lack consistency and formality fall under *Skidmore*, a less deferential position than *Chevron*. *Mead*, 533 U.S. at 228. Under *Skidmore*'s less deferential review, the EPA's newfound position fails. Moreover, even if the EPA's newfound position is viewed under *Chevron*, it fails because it is arbitrary and capricious and does not fit the design of the statute.

1. Agency decisions which lack consistency and formality are given significantly less deference under *Skidmore.*

The EPA's newfound position does not fall under *Chevron* deference because it lacks consistency and formality. Prior to *Chevron*, Justice Jackson in *Skidmore v. Swift & Co.*, explained the deference given to an agency's judgment will depend on consistency and formality. 323 U.S 134, 144 (1944). Agency decisions which lack consistency and formality may not be afforded *Chevron* deference. *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993).

The EPA's new position lacks both consistency and formality and should not be afforded *Chevron* deference.

The EPA's new position should not be afforded *Chevron* deference because it lacks consistency. "[A]n agency interpretation . . . which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view." *Good Samaritan Hosp.*, 508 U.S. at 417 (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446, n.30 (1987)). Prior to this litigation, the EPA included consequential health harms in the public health finding. *See Endangerment Finding* at 66510. Additionally, the EPA has considered morbidity and mortality for other public health endangerment findings. *See* National Ambient Air Quality Standard for Ozone, 73 Fed. Reg. 16436 (March 28, 2008) (to be codified at 40 C.F.R. pts. 50 & 58). The EPA's new position was first espoused during this litigation and is clearly inconsistent with previous determinations. This lack of consistency entitles their position to considerably less deference.

Additionally, the EPA's newfound position is entitled to less deference because it lacks formality and is not supported by ample evidence. The degree of deference an agency decision is entitled to is based on the thoroughness and validity of that agency's action. *Fed. Election Comm'n v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981). Additionally, when an agency reverses its position without a sufficient reason, that decision may be entitled to less deference. *See Nat'l Fed'n of Fed. Emps., Local 1309 v. Dep't of Interior*, 526 U.S. 86, 109 (1999) (O'Connor, J., dissenting) (arguing a lesser standard of deference should be given to FLRA's change in position which was motivated only by a shift in judicial reasoning). The new standard was not subject to notice and comment nor was it supported by substantial evidence. Additionally, this newfound position was raised suddenly during litigation, a stark contrast from

the reasoned judgment of the 2009 position. A position so clearly lacking in evidence and formality is not deserving of *Chevron* deference.

The EPA's newfound position is not entitled to *Chevron* deference as it is inconsistent, informal, and lacks evidentiary support.

2. The EPA's newfound position fails under *Chevron* because it is arbitrary, capricious, and does not fit the design of the statute.

The EPA's newfound position should be overturned because it is arbitrary and capricious and does not fit the design of the statute. Agency decisions are overturned when they are arbitrary and capricious or do not fit the design of the statute. *United States v Mead Corp.*, 533 U.S. 218, 227 (2001). An arbitrary or capricious action is one which relies on factors Congress did not intend. *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983). Additionally, an agency's final action must provide a "rational connection between the facts found and the choice made." *Id.* The EPA's new position is arbitrary and capricious and does not fit the design of the statute.

The EPA's new position is arbitrary and capricious because it considers factors Congress did not intend to be considered. As discussed above, the endangerment finding is a purely scientific finding devoid of policy considerations. *Massachusetts v. EPA*, 549 U.S. 497, 535 (2007). The EPA changed positions to avoid triggering primary NAAQS. Upon finding public health endangered under section 202(a), the EPA should have then listed GHG as criteria pollutants under section 108(a). 42 U.S.C. § 7408(a)(1). The EPA would then be required to set primary NAAQS, which the states must meet within 10 years. *Id.* States would likely not be able to meet the primary NAAQ level and would be subject to penalties. This "absurd result" however, should not be included in considering an endangerment finding. The text of the statute

does not permit consideration of "absurd result" arguments. The EPA's newfound position is arbitrary and capricious because it considers factors Congress did not intend to be considered.

Moreover, the EPA's position is arbitrary and capricious because it lacks a rational connection to the facts. In 2009, the EPA concluded climate change causes illness and death. *See Endangerment Finding* at 66510. The EPA rationally found illness and death are public health threats. As the EPA itself noted, it would be anomalous to say a person who died from climate change has not suffered a public health harm. *Proposed Endangerment Finding* at 18902. Now, armed with identical facts, the EPA argues public health should only include direct harms. This new position lacks a rational connection to the evidence and is unsupported by new evidence. The EPA's change is not rationally connected to the facts.

Finally, the EPA's new position does not fit the design of the statute. An agency's decision must be consistent with the specific context in which the phrase is used and within the broader context of the statute as a whole. *Util. Air Regul. Grp.*, 573 U.S. 302, 321 (2014). Section 202(a) allows the EPA to set emission standards for air pollutants "which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7521(a)(1). An endangerment to public health finding would permit primary NAAQS, which allows the EPA to set strict standards to protect public health. 42 U.S.C. § 7408(a)(1). Congress sought to protect public health via primary NAAQS. The EPA's new view would strip protections from the public health even though the danger is still present. Circumventing regulation under primary NAAQS is in direct violation of the statute's overall design and clear congressional intent. The EPA's new position does not fit the design of the statute.

The 2009 EPA interpretation for public health should control as the new standard is arbitrary and capricious and does not fit the design of the statue.

IV. EPA HAS UNREASONABLY DELAYED ITS NONDISCRETIONARY DUTY TO LIST GHGS AS A CRITERIA POLLUTANT UNDER § 108.

EPA has unreasonably delayed action on the mandatory listing of GHGs as criteria pollutants under CAA section 108(a). EPA was petitioned in 2009 to list GHGs as criteria pollutants, but this petition has been ignored for the last ten years. In 1990, Congress authorized District Courts to "compel agency action which is unreasonably delayed." 42 U.S.C. § 7604(a). "When a statute requires agency action at indefinite intervals," the EPA's failure to act is reviewed for unreasonable delay pursuant to section 304(a). *WildEarth Guardians v. Jackson*, 885 F. Supp. 2d 1112, 1115 (D.N.M. 2012). The central question in evaluating a claim of unreasonable delay is whether the agency's delay is so egregious as to warrant mandamus. *Telecomm. Research & Action Ctr. v. FCC* (*TRAC*), 750 F.2d 70, 79 (D.C. Cir. 1984). *TRAC* outlined six factors relevant to the analysis. *TRAC*, 750 F.2d at 80.

The six factors are:

> (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 statute, 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 delayed action on agency activities of a higher or competing priority, . . . ; (5) the court should also take into account the nature and extent of the 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.'"

Id. (quoting *PCHRG v. FDA*, 740 F.2d 21, 34 (D.C. Cir. 1984) (citations omitted)).

The second and sixth factors merit little discussion because Congress has not provided a specific date for action, rather the EPA is instructed to revise the list of criteria pollutants from, "time to time."42 U.S.C. § 7408(a)(1). The sixth factor is also irrelevant because even if the agency was acting in good faith the remaining *TRAC* factors clearly demonstrate EPA has acted

egregiously. The EPA's decision to delay is nothing short of egregious; it has not been governed by a rule of reason, expediting EPA's delayed action would not interfere with agency activities of a higher or competing priority, and EPA's delayed has a direct impact on human health and welfare.

A. EPA's ten-year delay in acting on the criteria pollutant determination was not governed by a rule of reason.

EPA's ten-year delay in responding to the petition to list GHGs as a criteria pollutant was not governed by a rule of reason. The first and "most important" *TRAC* factor is the "time agencies take to make decisions must be governed by a 'rule of reason.'" *In re Core Commc'ns, Inc.*, 531 F.3d 849, 855 (D.C. Cir. 2008) (citing *TRAC*, F.2d at 80). A rule of reason requires more than speculative dates of action and requires a "concrete timetable," particularly when there has been years long delay. *In re A Cmty. Voice v. U.S. EPA*, 878 F.3d 779, 787 (9th Cir. 2017). The EPA has failed to provide a concrete timetable for action and incorrectly argues that resolution of policy and scientific issues is a rule of reason.

The time the EPA has taken to make a decision on the petition has not been governed by a rule of reason, let alone a concrete timetable. In the ten-year period since the petition was filed, EPA has done nothing. Reasonable time for agency action is typically counted in weeks or months, not years. *In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 419 (D.C. Cir. 2004). Even if the EPA had some form of timetable, no lower court has considered a delay of over eight to ten years to be reasonable. *See, e.g.*, *In re Core Commc'ns, Inc.*, 531 F.3d 849 (D.C. Cir. 2008) (eight-year delay unreasonable); *In re Pesticide Action Network N. Am. v. EPA*, 798 F.3d 809 (9th Cir. 2015) (eight-year delay unreasonable); *In re A Cmty. Voice v. U.S. EPA*, 878 F.3d 779 (9th Cir. 2017) (eight-year delay unreasonable). The EPA has no concrete timetable for

action, there are not even speculative dates for actions. The EPA has not relied on a rule of reason to govern their decision.

EPA argues listing of GHGs as criteria pollutants requires resolution of policy and scientific issues; this is not a rule of reason, this is an excuse to avoid nondiscretionary action. The CAA demands regulatory action to prevent future harm, commanding agency action based on reliable but uncertain data. *Ethyl Corp. v. EPA*, 541 F.2d 1, 25 (D.C. Cir. 1978). Awaiting certainty allows for only reactive, and not preventive regulation, exactly the opposite goal of the CAA. *Id.* While the EPA may wish to conduct additional studies, that alone fails to provide a rule of reason and is no reason acting against their own findings. *Chlorine Chemistry Council v. EPA*, 206 F.3d 1286, 1290 (D.C. Cir. 2000). EPA's 2009 Endangerment Finding conclusively establishes that GHGs meet the requirements of section 108 and must be regulated. Section 108's command cannot be ignored, especially because the EPA has not provided a rule of reason. EPA failed to follow a rule of reason during its ten-year delay of listing GHGs as a criteria pollutant.

Therefore, because EPA has not developed a concrete timetable for responding to the petition to list GHG as a criteria pollutant and is following no other rule of reason, the ten-year delay on action is nothing short of egregious.

B. Expediting EPA's delayed dction would not interfere with activities of a higher or competing priority.

The EPA must list GHGs as a criteria pollutant because it does not have any competing or higher priority duties than fulfilling a mandatory duty to list. Agencies are bound to follow the terms of the agencies' organic statutes. *Massachusetts v. EPA*, 549 U.S. 497, 535 (holding the EPA "must ground its reasons for action or inaction in the statute."). The fourth *TRAC* factor states, "the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority." *TRAC*, 750 F.2d 70, 80 (D.C. Cir. 1984). EPA is not able to claim

that an Executive Order prioritizing reduced regulation or EPA's other activities affecting human health is of same or higher priority than a nondiscretionary statutory duty.

EPA's contention that it cannot prioritize a nondiscretionary statutory duty over an Executive Order prioritizing reduced regulation is egregious. If an Executive Order conflicts with an existing statute, the Executive Order must fall. *Chamber of Com. of U.S. v. Reich*, 74 F.3d 1322, 1332–34 (D.C. Cir. 1996). Agencies are bound to follow the terms of the agencies' organic statutes. *Massachusetts*, 549 U.S. at 535. The Executive Branch can create policies to fill gaps left by the organic statue; however, when the organic statue is clear the agency must act. The EPA has delayed action on a nondiscretionary duty mandated by the agency's organic statute. The EPA's highest priority is to follow and act on this nondiscretionary statutory duty, an Executive Order requiring a reduction in regulation cannot be used to circumvent the agency's organic statute and clear congressional intent.

The EPA also cannot deny listing GHGs by claiming that listing will detract from all of its other activities affecting human health. Failing to prioritize known health dangers is not an acceptable justification for delay. *In re Nat. Res. Def. Council, Inc.*, 956 F.3d 1134, 1141 (9th Cir. 2020). EPA does not get a free pass on several of the TRAC factors simply because all of its activities touch on human health. *Id.* at 1142. The EPA alleges all of its activities impacting human health are important and therefore the listing of GHGs should not be prioritized over its other duties. Listing GHGs, however, is of a higher priority because the health dangers are known. The EPA's 2009 Endangerment Finding identifies specific and known threats to human health and welfare caused by GHGs. R. at 6–7. Additionally, EPA's 2009 Endangerment Finding satisfies the criteria for CAA section 108 and thus EPA has a mandatory, nondiscretionary duty to list GHGs as a criteria pollutant. That all of EPA's activities touch on public health is

immaterial; the EPA has identified a known danger to the public and is required by section 108 to list GHGs as criteria pollutants.

Expediting EPA's delayed action would not interfere with activities of a higher or competing priority. The EPA is required to follow the terms of the statute; an Executive Order or other EPA activities do not have higher or competing prioritization than a nondiscretionary statutory duty to list, claiming otherwise is simply egregious.

C. EPA's ten-year delay is unreasonable because human health and welfare are at stake.

The effects on human health and welfare far outweigh any consideration of economic factors and further delay prejudices human health. The third *TRAC* factor states, "delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake." *TRAC*, 750 F.2d 70, 80 (D.C. Cir. 1984). The fifth *TRAC* factor provides "the court should also take into account the nature and extent of the interests prejudiced by delay." *Id.* The 2009 Endangerment Finding clearly states GHGs have a tremendous impact on human health and welfare; any delay greatly prejudices health interests.

The EPA must end its ten-year unreasonable delay because human health and welfare are at stake. The Ninth Circuit in, *In re Pesticide Action Network North America v. EPA*, found the EPA's report that a pesticide posed significant threat to the water supply significantly outweighed any economic considerations and any delay prejudiced human health interests. 798 F.3d 809, 814 (9th Cir. 2015). Similarly, in this case, EPA has promulgated multiple rules and endangerment findings regulating GHGs, finding they pose a significant threat to human health and welfare. R. at 6–7. Any further delay will prejudice the nation's health and welfare. Therefore, human health and welfare require EPA to end its ten-year delay in action.

The EPA's ten-year delay has been nothing short of egregious. For over ten-years the agency has withheld action, prejudicing the health and wellbeing of the nation's people and disregarding its mission to protect human health and the environment. The *TRAC* factors clearly weight in favor of finding that the EPA's delay is egregious.

V. EPA HAS A NONDISCRETIONARY DUTY TO LIST GHGS AS A CRITERIA POLLUTANT UNDER § 108 OF THE CAA.

The EPA has a nondiscretionary duty to list GHGs as a criteria pollutant because section 108 is unambiguous; holding otherwise would be contrary to the statute. Under section 108(a), the EPA must set a NAAQS for GHGs if it finds that GHGs cause or contribute to air pollution that reasonably is anticipated to endanger public health or welfare and comes from numerous or diverse mobile or stationary sources. 42 U.S.C. § 7408(a)(1)(A)–(B). The 2009 Endangerment Finding established that GHGs meet the criteria of section 202 of the CAA, which are identical to the criteria for section 108. R. at 8. The Second Circuit in *Natural Resources Defense Council, Inc. v. Train* determined that the EPA's section 211 Endangerment Finding triggered section 108 because section 211 and 108 also have identical criteria. 545 F.2d 320, 327–28 (2d Cir. 1976). *Train* determined that if section 108(a)(1)(A) and (B) are met the EPA has a nondiscretionary duty to list the pollutant as a criteria pollutant. *Id.* Additionally, *Train* held section 108(a)(1)(C) is not the third of three factors but instead is a procedural shortcut. *Id. Train*'s decision has been reaffirmed by every court that has since considered this question. *See, e.g.*, *Zook v. McCarthy*, 52 F. Supp. 3d 69 (D.D.C. 2014), *aff'd sub nom*. *Zook v. EPA*, 611 F. App'x 725 (D.C. Cir. 2015); *Center for Biological Diversity v. EPA*, 749 F.3d 1079, 1083 (D.C. Cir. 2014). This Court should find EPA has a nondiscretionary duty to list GHGs as a criteria pollutant because section 108 is unambiguous and holding otherwise would be contrary to the statute.

A. § 108 unambiguously creates a nondiscretionary duty to list GHGs as a criteria pollutant.

Section 108 of the CAA unambiguously states if section 108(a)(1)(A) and (B) are met the EPA must list GHG as a criteria pollutant. The mandatory nature of section 108 was explained by the Second Circuit in *Train*, where the court conclusively held that no discretion exists, "[o]nce the conditions of [Sections] 108(a)(1)(A) and (B) have been met . . ." 545 F.2d at 328. Courts must "give effect to the intent of Congress," by following the "plain and unambiguous meaning" of the statute. *United States v. Am. Trucking Ass'ns*, 310 U.S. 534, 542 (1940). When evaluating whether a statute is ambiguous courts examine the text of the statute through the statute's plain language, the structure of the statute as a whole, and the legislative history of the statute. After evaluating these elements, it is clear section 108 is unambiguous.

1. The plain language of § 108 is unambiguous.

The plain language of section 108 is unambiguous: If the requirements laid out in sections 108(a)(1)(A) and 108(a)(1)(B) are met then the EPA Administrator must list the pollutant as a criteria pollutant regardless if the Administrator plans to issue such regulation under section 108(a)(1)(C). When the plain language is clear, "that is the end of the matter." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 841 (1984). The plain language of the CAA states the EPA Administrator, "*shall* . . . publish . . . a list . . . ." 42 U.S.C. § 7408(a)(1) (emphasis added). The word "shall" is "mandatory" and "normally creates an obligation impervious to judicial discretion." *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998). Congress' use of the word "shall" demonstrates that section 108(a)(1) mandates the publication of a list that meets the criteria of the statute. Congress choosing a mandatory, nondiscretionary term such as "shall" demonstrates Congress' intent for section 108 to be mandatory.

The surrounding subsections of section 108 further confirm Congress used "shall" in section 108(a)(1) as a command. When a statute distinguishes between "may" and "shall," it is clear that "shall" imposes a mandatory duty. *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1977 (2016). Section 108(b) establishes the need for advisory committees with the issuance of each criteria pollutant that meets section 108(a); however, in contrast to section 108(a)(1), 108(b)(2) states that ". . . the Administrator may establish . . . ." 42 U.S.C. § 7408(b)(2). Similarly, section 108(g) states that "[t]he Administrator may assess . . . ." 42 U.S.C. § 7408(g). Congress explicitly distinguished between the use of "may" and "shall" within the same statute making it clear that "shall" imposes a mandatory duty. Therefore, the plain language of the CAA clearly states that the EPA Administrator has a mandatory duty to publish a list that meets the criteria of section 108.

Section 108(a)(1)(C) cannot be read as being a third factor because it would reduce section 108's mandatory language to mere surplusage. The canon against surplusage is at its peak when an interpretation would render superfluous another part of the same statute. *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 386 (2013). Interpreting section 108(a)(1) as mandating listing only for substances "for which [the Administrator] plans to issue air quality criteria . . .", would render the mandatory language in 108(a)(1) superfluous. Rather than mandating listing for pollutants that meet the section 108(a)(1) criteria, the determination to list a pollutant and issue air quality criteria would be at the Administrator's discretion. This would allow the Administrator to circumvent the rigid deadlines in the remaining sections of the statute and never list a new criteria pollutant which satisfies section 108's criteria. To prevent the remainder of section 108 and the whole NAAQS program from becoming entirely superfluous the mandatory

language of section 108(a)(1) must be enforced and 108(a)(1)(C) cannot be read to be the third of three factors.

The plain language of section 108 is unambiguous. Congress' use of "shall" is a clear command that when the criteria of section 108 is met the EPA must list the material as a criteria pollutant. Holding that section 108(a)(1)(C) is the third of three factors would circumvent the entire NAAQS program and reduce the mandatory language of section 108 to mere surplusage. Section 108's plain language creates an unambiguous duty to list GHGs as a criteria pollutant.

2. The structure of the CAA further demonstrates § 108 is unambiguous.

The structure of the CAA evidences section 108 is unambiguous. Any "ambiguity of the statute is resolved when this section is placed in the context of the Act as a whole and in its legislative history." *Nat. Res. Defense Council, Inc. v. Train*, 545 F.2d 320, 327 (2d Cir. 1976). Responding to perceived inaction on the part of states under the Air Quality Act of 1967, Congress amended the Act in 1970 by creating a strict, mandatory timetable for the NAAQS process under sections 108–110. This timetable shows Congress' intent for listing under section108 to be mandatory—if not, this timetable and new structure of the CAA would be "an exercise in futility." *Id.* at 327. The structure of the CAA makes it clear that section 108 imposes a nondiscretionary duty to list materials that meet its requirements; holding otherwise would allow for circumvention of the statute.

The detailed timetables and other NAAQ requirements demonstrate that Section 108 provides a nondiscretionary duty to list. To better serve the CAA's purpose Congress amended the CAA by imposing new, comprehensive mandates on the EPA and the states which were to be met on strict deadlines. Under the amendments the EPA was required to issue NAAQs for pollutants which the EPA had already issued air quality criteria, which, "shall" be issued "within

30 days" after the enactment of the amendments. 42 U.S.C. § 7409(a)(1)(A). For other pollutants, the EPA "shall issue air quality criteria . . . within 12 months" of listing the pollutant under section 108(a)(1), and "shall publish" national standards "simultaneously with the issuance of such criteria." *Id.* §§ 7408(a)(2), 7409(a)(2). States are required to submit state implementation plans ("SIP") to the EPA within nine months after promulgation of a national standard; four months after that, EPA is required to review and approve the state plan. *Id.* § 7410(a)(2). The Act also includes citizen suit provisions to enforce the EPA's mandatory duties. *Id.* § 7604(a). States are required to meet the national standards "as expeditiously as practicable but . . . in no case later than three years from the date of approval" of the SIP. *Id.* § 7410(a)(2)(A). The Supreme Court has described this three-year deadline as "central to the Amendments' regulatory scheme," which was designed to be "a drastic remedy to what was perceived as a serious and otherwise uncheckable problem of air pollution." *Union Elec. Co. v. EPA*, 427 U.S. 246, 256–258 (1976). This detailed structure shows clear congressional intent to mandate agency action to protect the public health and welfare.

Interpreting section 108(a)(1)(C) as the third of three factors provides the Administrator discretion on when to apply section 108, completely circumventing the detailed and intricate requirements of the NAAQS program. This interpretation runs counter to the CAA's structure by allowing the EPA to circumvent the entire NAAQs program. Congress created an elaborate scheme to protect public health and welfare, holding section 108 to be discretionary would allow for circumvention of the program, therefore, section 108 must impose a nondiscretionary duty.

3. § 108's legislative history makes clear EPA has a nondiscretionary duty to list GHGs as a criteria air pollutant.

The legislative history of the 1970 amendments to the CAA support the unambiguous reading of section 108. The 1970 amendments to the CAA shifted the federal government's

efforts on pollutants from those of merely local concern to those of national significance. Congress drafted the mandatory language of section 108 in response to the perceived inaction on the part of the states under the Air Quality Act of 1967. *Nat. Res. Defense Council, Inc. v. Train*, 545 F.2d 320, 325 (2d Cir. 1976). The legislative history of the 1970 amendments make clear that section 108 unambiguously imposes a nondiscretionary duty to list if its criteria are met.

The history of the 1970 amendments make clear that the third section 108 criteria is an independent and alternative basis for listing. A Senate Report on the bill that became the 1970 amendments to the CAA states, "[t]he agents on the initial list [of pollutants] must include all . . . agents which have . . . an adverse effect on health and welfare and are emitted from widely distributed mobile and stationary sources, and all those for which air quality criteria are planned." S. Rep. No. 91-4358, at 454 (2d Sess. 1970). In this report, the section 108(a)(1)(A) and (B) criteria are unambiguously established as sufficient conditions for listing a pollutant. The section 108(a)(1)(C) criteria—listing for which the EPA plans—is clearly an independent and alternative basis for listing.

Section 108(a)(1)(C) was made as a procedural shortcut, allowing for a second avenue to listing. In 1971, when section 108(a)(1) was passed, the EPA Administrator initially interpreted section 108(a)(1) as requiring inclusion on the initial list to be pollutants for which air quality criteria had already been planned or for pollutants that have an adverse effect on health and welfare and are emitted from numerous sources. Air Pollution Prevention and Control, 36 Fed. Reg. 1515 (1971). Section 108(a)(1)(C) establishes that pollutants for which EPA has already established air quality criteria do not have to satisfy prongs (A) and (B). Section 108(a)(1)(C) allows for the EPA to list pollutants as a criteria pollutant if they simply "plan" to do so. 42

U.S.C. § 7408(a)(1)(C). Section 108(a)(1)(C) is therefore a procedural shortcut available under limited circumstances, rather than a broad grant of regulatory discretion.

Section 108's legislative history illustrates that once section 108(a)(1)(A) and (B) are met the EPA has a nondiscretionary duty to list the pollutant. Section 108(a)(1)(C) is not the third of three factors; it is an independent and alternative basis for listing meant as a procedural shortcut.

B. Interpreting § 108 to be discretionary is contrary to the statute.

Beyond the unambiguous nature of section 108, interpreting section 108 to provide a discretionary duty would be contrary to the CAA. As articulated in section 101, the objective of the CAA is to "protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare . . . ." 42 U.S.C. § 7401. To affect this purpose Congress granted the EPA broad and powerful authority to regulate air pollution to protect public health and welfare. The Supreme Court has broadly interpreted the scope of the pollutants covered by the CAA, aside from a few narrow exceptions. Section 108 exists to regulate pollutants national in character; interpreting section 108 to provide a discretionary duty is contrary to the statue.

Congress did not limit which air pollutants are covered under the CAA because the act was intended to potentially reach all air pollutants that endanger the public health and welfare. *Massachusetts v. EPA*, determined the CAA's "sweeping definition" of air pollutant unambiguously includes GHGs. 549 U.S. 497, 528 (2007). The same case determined the EPA's policy arguments for declining to regulate GHGs in mobile sources had nothing to do with whether GHGs contribute to climate change and did not amount to reasoned justifications for declining to form a scientific judgment. *Id.* at 533–34. In this case, the EPA has determined that GHGs endanger the public health and welfare, policy arguments about the economics of listing GHGs as a criteria pollutant is not a reasoned justification for declining to list.

Regulating national air pollutants, such as GHGs, under NAAQs was anticipated by Congress. *Utility Air Regulatory Group* ("*UARG"*) created a narrow exception to the broad definition of "air pollutant" created in *Massachusetts v. EPA*. 573 U.S. 302 (2014). *UARG* narrowly excluded GHGs from the term "air pollutant" when defining a "major stationary source" for the PSD and Title V programs because regulating GHGs under the PSD and Title V program would be unanticipated by Congress. *Id.* at 320. However, *UARG* impliedly left open the question of whether the EPA could regulate GHGs through the NAAQS program. *Id.* at 320. *UARG* offered the term "any air pollutant" might mean any "NAAQS pollutant []." *Id.* at 320 n.6 (citing *Coal. for Responsible Regul., Inc. v. EPA*, No. 09-1322, 2012 WL 6621785, at *13, *14–18 (D.C. Cir. Dec. 20, 2012) (Kavanaugh, J., dissenting from denials of rehearing en banc)). Beyond the fact GHGs must be listed as a NAAQS pollutant, regulating national air pollutants, such as GHGs, under the NAAQS program was anticipated by Congress, based on the language of section 108 and the regulation of existing NAAQS. This case does not fall under the narrow exception in *UARG* as Congress anticipated regulation under NAAQS.

Based on the language of section 108, a GHG NAAQS would not expand the EPA's role in an unanticipated manner. The NAAQS program is designed to address wide ranging pollutants, like GHGs, emitted from "numerous or diverse mobile or stationary sources." 42 U.S.C. § 7408(a)(1). This language states plainly Congress' anticipation that the NAAQS regulations would impact a multitude of activities. Additionally, in the NAAQS program, the EPA is directed to account for "the latest scientific knowledge" relevant to the "kind and extent of all identifiable effects of public health or welfare which may be expected from the presence of such pollutant in the ambient air. . ." *Id.* § 7408(a)(2). That the regulations would have far reaching affects does not diminish the EPA's power; by the language of the statute the EPA has

been entrusted to establish NAAQS to regulate numerous and diverse sources. Congress recognized there may be new economic effects where science reveals a new air pollution threat.

EPA's regulation of the existing NAAQS already has broad far-reaching economic impacts. *Whitman v. Am. Trucking, Ass'ns., Inc.*, rejected the claim that the EPA would exceed its power by setting NAAQS without taking cost considerations into account. 531 U.S. 457, 471 (2001). The Supreme Court unanimously found EPA may not consider costs in setting NAAQS, and the EPA's power to make NAAQS determinations raises no serious constitutional issues. *Id.* at 474. Similarly, this Court should not permit EPA to use economic impact considerations as criteria for listing GHG as a criteria pollutant and establishing NAAQS for GHG.

The CAA is a broad and powerful authority designed to regulate air pollution to protect public health and welfare. To affect this purpose, Congress created section 108. which mandates that if pollutants meet its criteria it must be listed as a criteria pollutant and NAAQS must be established. GHGs are included in the broad, sweeping definition of air pollutant within the CAA and the NAAQS program was specifically designed to handle pollutants that are national in character. Therefore, the EPA has a nondiscretionary duty to list GHGs as a criteria pollutant under section 108, holding otherwise would be contrary to the statute.

CONCLUSION

For the foregoing reasons we ask this Court affirm the District Court's judgment finding the Endangmerment Finding valid with respect to public welfare, EPA has unreasonably delayed action responding to CHAWN's petition, and EPA has a nondiscretionary duty to list GHGs as a criteria pollutant. We ask this Court to reverse the District Court's judgment finding the Endangerment Finding invalid with respect to public health.