Team 23

CA No. 20-000123

UNITED STATES COURT OF APPEALS

FOR THE TWELFTH CIRCUIT

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

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Defendant-Appellant,

-and-

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

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

BRIEF FOR CLIMATE HEALTH AND WELFARE NOW

Plaintiff-Appellee-Cross Appellant

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER

JURISDICTIONAL STATEMENTS

The U.S. Court of Appeals for the Twelfth Circuit has appellate jurisdiction over this case pursuant to 28 U.S.C. § 1291 (2020). Plaintiffs have filed a timely Notice of Appeal following the Order of the District Court dated August 15, 2020 in 66-CV-2019.

ISSUES PRESENTED FOR REVIEW

1. Does the District Court have jurisdiction under §304(a) of the Clean Air Act where the rule sought would be a rule of nationwide applicability subject to review exclusively in the DC Circuit under §307(b) of the Clean Air Act?

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

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

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

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

STATEMENT OF THE CASE

A. Statement of Relevant Facts

This litigation arises from a citizen suit under the Clean Air Act (CAA) filed by an environmental organization, Climate Health and Welfare Now (CHAWN), to compel the administrator of the United States Environmental Protection Agency (EPA) to list greenhouse gases (GHGs) as criteria pollutants subject to the National Ambient Air Quality Standards (NAAQS) program. R. at 4-5. On November 30, 2019, the District Court granted a motion to intervene filed by Coal, Oil, and Gas Association (COGA), a trade association representing the economic interests of fossil fuel companies, on the side of EPA. R. at 4-5. The parties do not dispute the underlying administrative record. R. at 4.

On December 15, 2009, the EPA issued a formal finding of endangerment (the "Endangerment Finding") under § 202 of the Clean Air Act (CAA). R. at 6. In this finding, EPA found GHGs may present a danger to both public health and public welfare as GHGs increase global temperatures, change storm frequencies, and alter precipitation patterns, resulting in climate change. Climate change was determined to endanger public health by causing an increase in ozone pollution, an increase in heat related deaths, and an increase in insect borne disease. R. at 7. Moreover, climate change was determined to endanger public welfare because it will lead to reduced agricultural productivity and reduced water supplies, while increasing property and economic damage due to storms and rising sea levels. R. at 7. EPA's endangerment determination was consistent with published findings of several international and national scientific review bodies and the vast majority of peer reviewed scientific literature. R. at 9. In response to EPA's finding that GHGs endanger public health and welfare, environmental organizations, including plaintiff CHAWN, filed a rulemaking petition on December 2, 2009, demanding EPA list GHGs as criteria air pollutants under CAA § 108, 42 U.S.C. § 7408. R. at 5. EPA has since refused to take any action in response to CHAWN's 2009 petition–whether to grant or deny it. R. at 5. Additionally, EPA has not sought by rulemaking to rescind the endangerment finding, which has previously survived legal challenge, despite regulatory rollbacks since a 2017 administration change. R. at 8, 9. Consequently, the 2009 Endangerment Finding remained completely intact until the District Court's order. R. at 7, 14. Thus, an entire decade has passed since EPA issued its Endangerment Finding, during which EPA has failed to take any action to list GHGs as criteria pollutants under CAA § 108. R. at 5, 7. To justify this delayed response EPA cites regulatory complexities that would result from such a listing. R. at 5. Specifically, regulation of GHGs as criteria pollutants requires "resolution of thorny policy and

scientific issues." R. at. 12. Moreover, EPA argues its delay is justified, as acting now would interfere with the agency's "highest priority" i.e. the reduction of regulatory burdens on business and economic activity. R. at 12-13.

B. Procedural History

On April 1, 2019, CHAWN properly served notice of its intention to sue EPA for failure to regulate GHGs as criteria pollutants under the Clean Air Act, 42 U.S.C. § 7408 and for unreasonable delay in carrying out its non-discretionary duty to designate GHGs as a criteria pollutant as demanded in CHAWN's petition for rulemaking dated December 15, 2009. R. at 5. After waiting 197 days, CHAWN filed the original action in the District Court of New Union on October 15, 2019. R. at 5. CHAWN's lawsuit invoked the CAA's citizen suit provision, 42 U.S.C. § 7604(a)(2), seeking an order to compel the administrator of the EPA to publish a new list of criteria pollutants that includes GHGs. The parties then filed cross motions for summary judgment. R. at 4.

In its Decision and Order issued on August 15, 2020, the District Court: granted CHAWN's motion for summary judgment declaring the Endangerment Finding is valid with respect to public welfare; granted COGA's motion for summary judgment on its cross-claim finding the Endangerment Finding with respect to public health is contrary to law; granted CHAWN's motion for summary judgment declaring that the EPA unreasonably delayed action by failing to respond to CHAWN's 2009 petition; granted CHAWN's motion for summary judgment declaring EPA has a nondiscretionary duty to designate GHGs as a criteria pollutant pursuant to CAA § 108, 42 U.S.C. § 7408. R. at 13-14. Finally, the District Court ordered the EPA to publish notice of a proposed rule designating GHGs as a criteria pollutant within 90 days of its order and publish a final rule designating GHGs as a criteria pollutant within 180 days

following publication of the notice of proposed rulemaking. R. at 13-14. Following the issuance of the District Court Order, CHAWN, COGA, and EPA filed a timely Notice of Appeal. R. at 2.

STANDARD OF REVIEW

Federal statutory interpretation and questions of law are to be reviewed under the de novo standard. *Schleining v. Thomas*, 642 F.3d 1242, 1246 (9th Cir. 2011). When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law. *Citizens for Resp. and Ethics in Washington v. Fed. Election Commn.*, 892 F.3d 434, 440 (D.C. Cir. 2018).

SUMMARY OF THE ARGUMENT

On Issue One, the District Court did not err when it exerted jurisdiction over the unreasonable delay claim under CAA § 304(a). The District Court has jurisdiction over CHAWN's unreasonable delay claim, despite the fact that the rule will be one of national applicability, because CAA § 307(b) is a venue provision, rather than a jurisdictional rule. No party chose to raise an issue of venue, which is a waivable right.

On Issue Two, CHAWN asks the Court to uphold the District Court's finding that the Endangerment Finding is valid with respect to an endangerment to public welfare. CAA § 302(h) requires climate be considered in the effects on welfare. Therefore, EPA was acting within its delegated authority under the CAA when it found GHGs, due to their impact on climate, will result in endangering public welfare. This determination is grounded in a rational basis, the scientific record, and is therefore entitled to deference.

On Issue Three, CHAWN asks the Court to reverse the District Court's judgment declaring the Endangerment Finding is contrary to law, and is thus invalid, to the extent that it determined GHGs endanger public health. The term public health is ambiguous. So long as

EPA's interpretation of the term is reasonable, and grounded in a rational basis, EPA's Endangerment Finding is entitled to deference. EPA's Endangerment Finding with regard to public health is reasonable as it is based on the scientific record, and therefore is entitled to deference. Additionally, EPA's new position with respect to public health is not entitled to deference, because only proof of "demonstrable harm," rather than "direct harm," is required to support a finding of danger to public health. Moreover, the Endangerment Finding remains intact, and this new position was adopted in the course of this litigation and is unsupported by formal rulemaking procedures.

On Issue Four, the District Court did not err in finding EPA has a nondiscretionary duty to designate GHGs as a criteria pollutant under CAA § 108(a), 42 U.S.C. § 7408(a) based on the 2009 Endangerment Finding. The statutory structure and the use of the term "shall" triggers an obligatory duty once EPA has made the appropriate Endangerment Finding.

On Issue Five, the Court should affirm the District Court's ruling that EPA's ten-year delay in taking any action on listing GHGs as criteria pollutants under CAA § 108(a), 42 U.S.C. § 7408(a) constitutes an unreasonable delay. EPA has delayed any action for a decade and failed to offer any timeline when it may take affirmative action or inaction. EPA justifications for inaction cannot justify their unreasonable delay. EPA has found GHGs pose a serious risk to the public health and public welfare. The severity of these findings takes precedence over any other priorities, especially those not grounded in the CAA's statutory mandate. The agency cannot rely on other economic priorities to avoid action given the threat GHGs pose. EPA has failed to expedite action despite the fact that the public's health is at risk.

ARGUMENT

I. THE DISTRICT COURT HAS JURISDICTION OVER UNREASONABLE DELAY CLAIMS UNDER THE CITIZEN SUIT PROVISION OF THE CLEAN AIR ACT.

CHAWN respectfully requests this Court find the District Court exercised appropriate jurisdiction over its unreasonable delay claim despite it resulting in a rule of nationwide applicability because CAA § 307(b) is a venue provision, rather than a jurisdictional one.

Clean Air Act § 304(a), 42 U.S.C. § 7604(a) authorizes citizen suits to compel agency action unreasonably delayed. However, it also stipulates any action referred to in CAA § 307(b) must be filed in the District Court within the circuit where that action would be reviewable. 42 U.S.C. § 7604(a). Pursuant to CAA § 307(b)(1), judicial review of agency action regarding any "nationally applicable regulations promulgated, or final action taken. . . may be filed only in the United States Court of Appeals for the District of Columbia." 42 U.S.C. § 7607(b)(1). This Court has thus raised *sua sponte* whether the District Court had appropriate subject matter jurisdiction. The District Court had jurisdiction over CHAWN's unreasonable delay claim despite implicating a rule of nationwide applicability because (1) District Courts have statutory authority to review unreasonable delay claims and (2) Section 307(b)(1) is merely a venue provision which can be waived if not asserted.

United States District Courts cannot exercise jurisdiction "absent a statutory basis." *Envtl. Integrity Project v. U.S. Envtl. Protec. Agency*, 160 F. Supp. 3d 50, 53 (D.D.C. 2015). Plaintiff must establish jurisdiction by a preponderance of evidence. *Envtl. Integrity Project v. U.S. Envtl. Protec. Agency*, 160 F. Supp. 3d 50, 53 (D.D.C. 2015). Prior to Congressional amendment, the D.C. Circuit held it had exclusive jurisdiction over claims to compel agency action unreasonably delayed. *Mexichem Specialty Resins, Inc. v. E.P.A.*, 787 F.3d 544, 553 n.6 (D.C. Cir. 2015). However, in 1990, CAA amendments abrogated this holding, and shifted

power to compel EPA action to the District Courts. *Id*. Moreover, the D.C. Circuit–as well as other Circuit Courts–has since held § 307(b)(1) is a waivable venue provision. *Texas Mun. Power Agency v. E.P.A.*, 89 F.3d 858, 867 (D.C. Cir. 1996); *see also Clean Water Action Council of N.E. Wisconsin, Inc. v. U.S. E.P.A.*, 765 F.3d 749, 751 (7th Cir. 2014) (venue provisions of §7607(b) are not jurisdictional); *compare Texas v. U.S. E.P.A.*, 10-60961, 2011 WL 710598, at *3 (5th Cir. Feb. 24, 2011) (leaving undecided whether section 7607(b)(1) is a venue provision because the court in either scenario had authority to transfer the case). In fact, the Seventh Circuit circulated its decision "among the circuits on the question whether the timing and venue rules in § 307(b) are jurisdictional. . . none requested a hearing en banc." *Clean Water Action Council of N.E. Wisconsin, Inc. v. U.S. E.P.A.*, 765 F.3d at 751.

Since deciding *Texas Mun. Power Agency v. E.P.A.*, the D.C. Circuit later reiterated CAA § 307(b)(1) confers "exclusive jurisdiction over 'nationally applicable regulations promulgated, or final action taken, by the Administrator.'" *Massachusetts v. E.P.A.*, 415 F.3d 50, 53 (D.C. Cir. 2005), *rev'd on other grounds*, 549 U.S. 497 (2007). But this determination is merely persuasive on the Twelfth Circuit, rather than binding upon this court. Although, "it would be usurpative for. . . a federal district court to assert jurisdiction over a case that should have been brought in a court of appeals," it is not so where a federal court of appeals asserts jurisdiction absent objection "over a case that it would have been authorized to adjudicate if only the effects of the order sought to be reviewed had been felt in one part of the country rather than another." *State of New York v. E.P.A.*, 133 F.3d 987, 990 (7th Cir. 1998). If asserted, the venue provision is a binding rule and should be treated as mandatory. *S. Illinois Power Coop. v. Envtl. Protec. Agency*, 863 F.3d 666, 670 n.2 (7th Cir. 2017) (non-binding where EPA failed to assert improper venue or even take a position on whether § 307(b) is jurisdictional).

However, the Supreme Court has "urged that a rule should not be referred to as jurisdictional unless it governs a court's adjudicatory capacity, that is, its subject-matter or personal jurisdiction," because the jurisdictional label can carry drastic judicial consequences. *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 435 (2011). "Other rules, *even if important and mandatory*. . . should not be given the jurisdictional brand." *Id*. (emphasis added).

The District Court correctly asserted jurisdiction because § 307(b) is a venue provision, rather than a jurisdictional one. Although this court should be mindful of the important role Congress assigned to the D.C. Circuit, it is not required as a matter of *stare decisis* to remove this case per their decision in *Massachusetts v. EPA,* as noted by the District Court. R. at 9. It is true that this court has the discretion to remove the present action to the D.C. Circuit, as noted in *Texas v. U.S. E.P.A.* by the Fifth Circuit. However, this requirement is only *mandatory* if asserted. Yet EPA did not assert–nor has any party asserted–improper venue. R. at 12. In fact, no party has raised whether § 307(b) is jurisdictional or merely a venue provision, and if so whether it applies. R. at 12. So, as in *S. Illinois Power Coop*, this court is not *required* to enforce § 307(b)'s venue provision. This court should avoid the drastic consequences that would follow should all parties be forced to re-litigate a matter that the present court has adjudicatory authority to oversee. Consequently, this court should affirm the jurisdiction of the District Court.

II. THE 2009 ENDANGERMENT FINDING IS VALID WITH RESPECT TO ENDANGERMENT OF BOTH PUBLIC WELFARE AND PUBLIC HEALTH.

CHAWN respectfully requests this Court to uphold the District Court's determination that the Endangerment Finding's conclusion is valid with respect to public welfare but reverse the District Court's determination that the Endangerment Finding is invalid with respect to public health. It is undisputed that EPA has been delegated authority to administer the Clean Air

Act. 42 U.S.C. § 7601(a)(1). The validity of the Endangerment Finding turns on whether the EPA permissibly interpreted its duties under that statute.

The statute provides that EPA shall revise the air pollutant list to include "emissions of which. . . cause or contribute to air pollution which may *reasonably be anticipated* to endanger public health or welfare." 42 U.S.C. § 7408(a)(1)(A) (emphasis added). Only "proof of demonstrable harm caused by the suspect pollutant," is required. *See Ethyl Corp. v. Envtl. Protec. Agency*, 541 F.2d 1, 15 (D.C. Cir. 1976). And, "once the decision is made the standards promulgated must be preventive in nature." *Id*.

When considering challenges to an agency's interpretation of the statute it administers, courts apply the *Chevron* two-step test. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). At step one, courts must determine whether the issue in question is explicitly addressed by the statute. If the statute is explicit and unambiguous, the court must decide whether the challenged action is in accordance with the express command of the law. *Id*. at 842-843. If, however, the statute is silent or ambiguous, the court must determine under step two of *Chevron* whether "the agency's answer is based on a permissible construction of the statute." *Id*. at 843-844. To determine whether an agency's construction of the statute is permissible, a court should avoid "imposing its own construction of the statute." *Chevron, 467 U.S. at 843.* Instead, controlling weight should be given to an agency's interpretation of a statute it administers, in deference to the agency's expertise on the matter. *Chevron, 467 U.S. at* at 844. Thus, courts are highly deferential to an agency's interpretation, so long as it is a reasonable interpretation of the statute. *City of Arlington, Texas v. F.C.C.*, 569 U.S. 290, 296 (2013); *see also Coalition for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102, 119 (D.C. Cir. 2012) (EPA entitled to deference as its Endangerment Finding is rationally based in scientific data). In

general, courts will only overturn an agency's interpretation found to be "procedurally defective, arbitrary, capricious, or manifestly contrary to the statute." *U.S. v. Mead Corp.*, 533 U.S. 218, 227 (2001); *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 214 (1988) (striking down an HHS regulation setting retroactive cost limits for healthcare provider Medicare costs because the statute did not explicitly or impliedly "express authorization for retroactive cost-limit rules").

The Endangerment Finding is valid with respect to both public health and public welfare because, although the terms are not expressly defined by the Clean Air Act, EPA's original interpretation that climate change threatens both is reasonable and therefore entitled to deference.

(A) The 2009 Endangerment Finding Is Valid with Respect To Public Welfare.

CAA § 302(h) provides "all language referring to *effects on welfare* includes, but is not limited to, effects on. . . climate. . . whether caused by transformation, conversion, or combination with other air pollutants." 42 U.S.C. § 7602(h) (emphasis added). The term "public welfare" remains undefined by the CAA. *See* Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 FR 66496-01, 66510. Courts have found that "the term 'public welfare' encompasses a wide variety of effects on soil, plants, wildlife and biota, property damage, aesthetic concerns, and other non-health-related impacts such as hazards to economic values and personal comfort." See *Murray Energy Corp. v. Envtl. Protec. Agency*, 936 F.3d 597, 604 (D.C. Cir. 2019).

To find an agency interpretation reasonable, a court need not conclude that it is the *best* interpretation, merely that it is "rationally related to the goals" of the statute. *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 388 (1999). In *Chevron*, the Court upheld EPA regulation allowing SIPs not to consider new plant modifications as "new sources" subject to permitting requirements under the CAA, in part because EPA "advanced a reasonable explanation for its conclusion that the regulations serve the environmental objectives," of the Act. *Chevron*, 467

U.S. at 862; *see also Chemical Mfrs. Ass'n v. Natural Resources Defense Council, Inc.*, 470 U.S. 116, 130 (1985) (EPA acted reasonably in issuing variances from toxic pollutant effluent limitations under the Clean Water Act because legislative history shows Congress intended regulations under the Act to "take into account the diversity within each industry by establishing appropriate subcategories").

The District Court correctly upheld the Endangerment Finding with respect to public welfare. As a preliminary matter, this court must determine whether the agency's Endangerment Finding as it relates to public welfare is based on a permissible construction of the statutory language. Although the statute could be construed as ambiguous regarding public welfare, EPA's finding that GHGs, due to their effect on climate, endanger public welfare is reasonable given the statute's provision under "effects on welfare." 42 U.S.C. § 7602(h).

EPA has the delegated authority to administer the CAA. 42 U.S.C. § 7601(a)(1). Per *Chevron*, this delegation represents a congressional vote of confidence in EPA's expertise in the matters governed by the Act. Further, the inclusion of "climate" under the definition of "effects on welfare" is highly indicative of congressional intent for EPA, when considering public welfare, to take into account exactly the type of phenomena that are found in the Endangerment Finding to result from the release of GHGs into the atmosphere. If in *Chemical Mfrs.*, the Court found legislative history sufficient to find EPA's action reasonable in the face of ambiguity, there should be no question of the reasonableness of EPA's action here, where the plain meaning of the statutory language indicates congressional intent that EPA take climate into consideration pursuant to CAA § 302(h). Given this guidance from Congress, it is eminently reasonable for EPA to conclude, on the basis of extensive scientific evidence, that the "effects on climate" caused by GHG pollution endangers public welfare. As noted in *Coalition for Responsible*

Regulation, Inc., the extent of this scientific evidence more than exceeds the reasonable explanation relied on in *Chevron*. The case law is clear that even if this Court or COGA could devise an alternative, better interpretation, EPA's Endangerment Finding remains entitled to deference under *Chevron* so long as its construction is *reasonable*. *City of Arlington*, 569 U.S. at 296 (emphasis added).

Moreover, the District Court was correct in rejecting COGA's argument that the "regulatory absurdity" of the Endangerment Finding's conclusion with respect to public welfare renders it unreasonable. R. at 9. This type of argument has been explicitly rejected by the D.C. Circuit, as the statutory language "does not leave room for the EPA to consider," whether regulation would be absurd. *Coalition for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102, 119 (D.C. Cir. 2012); *see also Massachusetts v. EPA*, 549 U.S. 497, 501 (2007) (EPA's policy judgments and "laundry list of reasons not to regulate. . . do not amount to a reasoned justification for refusing to form a scientific judgment"). Rather, EPA's conclusions in an Endangerment Finding must be based *solely* on scientific determinations of whether or not GHGs endanger public welfare. *Id.*

(B) The 2009 Endangerment Finding is Valid with Respect to Public Health.

CHAWN believes that the District Court erred in concluding that, because "effects…on climate" is included in the definition for "effects on welfare," the statute unambiguously precludes EPA from finding that GHG pollution endangers "public health." Further, we believe EPA's Endangerment Finding with regard to public health is reasonable, and therefore entitled to deference, because only proof of "demonstrable harm," rather than "direct harm," is required to support a finding of danger to public health. *Ethyl Corp. v. Envtl. Protec. Agency*, 541 F.2d 1, 15 (D.C. Cir. 1976).

Additionally, CHAWN agrees with the District Court's conclusion that the EPA's new position with respect to public health is not entitled to deference, as it was adopted in the course of the instant litigation, supported neither by formal rulemaking procedures nor by the record.

1. *The 2009 Endangerment Finding's interpretation of the Act related to public health is entitled to deference under step two of Chevron analysis.*

Although the term "public health" is undefined in the CAA, and therefore ambiguous, EPA's conclusion that climatic impact can endanger public health is entitled to deference as it is rationally based. The analysis required of courts under step two of the *Chevron* test has been discussed at length above. This reasonableness analysis, however, does not apply merely when the statute is ambiguous as to a statutory term, but also where Congress has left a "gap in the statutory language." *See Chevron*, 467 U.S. at 843 ("The power of an administrative agency to administer a congressionally created. . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." (*quoting Morton v. Ruiz*, 415 U.S. 199, 231 (1974))). Courts have found such a "gap" to exist where Congress failed to define a key statutory term. *Id.* (finding the lack of a definition for "stationary source" in the relevant portion of the Clean Air Act to be a "gap," which the EPA was authorized to fill). Where such a gap exists, Courts have found *Chevron* deference to be appropriate. *Id.* at 866. Additionally, public health has been interpreted by the Supreme Court to mean "the health of the public." *Whitman v. Am. Trucking Associations*, 531 U.S. 457, 466 (2001); *see also Murray Energy Corp. v. Envtl. Protec. Agency*, 936 F.3d at 604 (D.C. Cir. 2019) ("public health includes adverse health effects. . ."). When previously considering the term EPA has, by its own regulations, looked at morbidity and other factors like "acute or chronic health effects, as well as mortality." *See* Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 FR 66496-01. In determining the permissibility of an

agency's construction of a statute, the court need not decide whether the agency has found the *best* interpretation. An interpretation which is merely reasonable and "rationally related to the goals of the statute," will be entitled to *Chevron* deference. *City of Arlington*, 569 U.S. at 296; *AT&T Corp.*, 525 U.S. at 388.

The District Court erred in failing to defer to the Endangerment Finding's interpretation of public health under step two of the *Chevron* analysis. In doing so, it concludes that the inclusion of "effects. . . on climate" in the statutory definition of "welfare" precludes the inclusion of any of the climate effects of GHGs within the undefined statutory term "public health." R. at 9. This conclusion misconstrues the language of CAA § 302(h). Recall, neither the term "public welfare" nor the term "public health" are *expressly* defined by the CAA. It appears the District Court failed to consider that the definition of public health is clearly a "gap" which Congress entrusted the EPA to fill. Had Congress intended to provide an explicit definition for a term that appears so frequently in the text of the statute, often in conjunction with the phrase "public welfare," it would have done so. The fact that this important statutory term is given no definition is a clear, implicit authorization for EPA to define the term, pursuant to its delegated authority to administer the CAA. Consequently, the Court is required under *Chevron* to inquire into the reasonableness of the EPA's interpretation before denying deference to that interpretation. The District Court failed to make such an inquiry.

COGA argues, and the EPA "now" agrees, that the endangerment to public health that Congress contemplated in the statutory language includes only "direct health hazards of air contaminants due to respiration or other personal exposure." R. at 10. However, the "direct" or "indirect" nature of the health hazard is unimportant. As required by *Ethyl Corp*, the Endangerment Finding provides ample proof of "demonstrable harm caused by the suspect

pollutant." R. at 9. EPA's Endangerment Finding defines the effects of GHGs which pose immediate health risks as a danger to "public health." R. at 7. This Finding made a connection, however attenuated, that climate change will cause an increase in heat related deaths and insect borne disease. R. at 7. And, the District Court has agreed EPA had a rational basis to make such a finding. R. at 9. It appears then, the Endangerment Finding determination that GHGs may "reasonably be anticipated" to endanger public health, is a reasonable one.

It bears repeating that the goal of the Clean Air Act is to "protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." 42 U.S.C. § 7401(b)(2). Given the gravity of the harms which may result from climate change brought about by GHG pollution, the Endangerment Finding's conclusions, which would subject GHGs to the highest level of regulation, are manifestly responsive to that goal. Because both precedent as well as the purpose and plain language of the CAA point to the reasonableness of EPA's Endangerment Finding, the Court must defer to the agency's expertly drawn conclusion that GHGs endanger public health.

2. EPA's new litigation position that GHGs do not endanger public health is not entitled to deference.

As discussed at length above, an agency is entitled to deference for reasonable interpretations of the statutes they administer. *City of Arlington*, 569 U.S. at 296. However, not all agency actions are of the sort entitled to deference under this standard. The Supreme Court has held "deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate." *Bowen*, 488 U.S. at 213 (noting that even if the court were to depart from this rule, it would not do so for an agency interpretation which is neither reasoned nor *consistent*) (emphasis added). The Supreme Court has also held that the use of formal notice-and-comment rulemaking procedures, while not strictly required to entitle an

agency's action to *Chevron* deference, is a "very good indicator" that such deference is due, especially where Congress has provided for a "formal administrative procedure." *Mead*, 533 U.S. at 230-31. In a later case, the Court clarified that in the absence of formal rulemaking procedures, deference may still be afforded to agency interpretation where that interpretation is "one of long standing," indicating the "careful consideration the Agency has given the question over a long period of time." *Barnhart v. Walton*, 535 U.S. 212, 221-22 (2002).

As the District Court noted, the EPA "espoused for the first time in this litigation" the newfound position that the effects of GHG pollution do not endanger public health in a complete reversal from its position in both its Endangerment Finding and in *Coalition for Responsible Regulation*, where it was called upon to defend the Finding. R. at 9-10. The Court further noted that this new interpretation of public health was "never subjected to notice and comment rulemaking." *Id*. These two facts alone would be sufficient under *Bowen* and *Mead* to deny deference to the EPA's new position. Deference would be inappropriate even considering the situations in which courts have decided to overlook the absence of formal rulemaking procedures. Far from being "long standing," as required by *Barnhart*, the EPA has suddenly decided in the course of the instant litigation to overturn an interpretation of public health which it not only adopted more than ten years ago–and upon which it based regulatory action limiting GHG emissions–but which it continued to maintain even when it began to roll back those regulatory actions. R. at 6-7. Surely, in the course of those rollbacks, EPA must have reviewed its own Endangerment Finding on which they were based to determine whether deregulation was reasonable. That fact that EPA failed to formally change the Endangerment Finding even in the face of the rollbacks demonstrates that, in its expert consideration, it must have considered its characterization of GHGs as a danger to public health to remain valid. R. at 8. If EPA wished to

alter its position the agency could have rescinded its Endangerment Finding. Yet, the agency has failed to take any such action. R. at 7. Moreover, EPA has not shown, nor is there any evidence in the record, that its newfound position is reasoned, consistent, or the result of careful consideration. *Bowen*, 488 U.S. at 213; *Barnhart*, 535 U.S. at 221-22.

III. EPA'S ENDANGERMENT FINDING TRIGGERS A NON-DISCRETIONARY DUTY TO LIST GREENHOUSE GASES AS CRITERIA POLLUTANTS.

CHAWN respectfully requests that the Court uphold the District Court's ruling that EPA has a non-discretionary duty to designate greenhouse gases as criteria pollutants under CAA § 108(a). Both the statutory structure and specific language in the statute indicate that EPA has a nondiscretionary duty to list pollutants that are determined to meet the criteria under the aforementioned statute.

Similar to their duty in analyzing whether a delay is unreasonable, courts have a duty to determine what constitutes a nondiscretionary act. *See WildEarth Guardians v. Jackson*, 885 F. Supp. 2d 1112, 1116 (D.N.M. 2012) (nondiscretionary duty can be found "by inference from the overall statutory scheme."); *see also Sierra Club v. Thomas*, 828 F.2d 783, 790 (1987) (nondiscretionary duty of timeliness may exist even when not explicitly stated in statute if "readily-ascertainable by reference to some other fixed date or event."); *cf. Chevron v. NRDC*, 467 U.S. 837, 865 (1984) (agency is entitled to deference when it provides a reasonable interpretation to an ambiguous statute). If a nondiscretionary duty is found, "district courts. . . have jurisdiction over citizen suits to compel EPA to perform nondiscretionary acts or duties." *Massachusetts v. E.P.A.*, 415 F.3d 50, 53 (D.C. Cir. 2005), *rev'd on other grounds*, 549 U.S. 497 (2007). The statute makes clear that EPA's listing duty is a nondiscretionary duty only after EPA has determined it meets the criteria in §§ 108(a)(1)(A) and (B)." *Zook v. McCarthy*, 52 F. Supp. 3d 69, 74 (D.D.C. 2014) (EPA did not have nondiscretionary duty to regulate without an

endangerment finding), *aff'd sub nom*. *Zook v. Envtl. Protec. Agency*, 611 Fed. Appx. 725 (D.C. Cir. 2015) (duty to regulate is "triggered" by an endangerment finding). The nondiscretionary duty to list a pollutant is thus triggered when EPA determines that the pollutant meets the criteria established in § 108(a). *Nat'l Res. Def. Council, Inc. v. Train*, 545 F.2d 320, 325 (2d Cir. 1976) (EPA is required to list pollutants that "meet the two requisites set forth in section 108"); *see also Friends of the Earth v. United States EPA*, 934 F. Supp. 2d 40, 51 (D.D.C. 2013) (EPA "judgment" triggers a mandatory duty); *Ctr. for Biological Diversity v. EPA*, 749 F.3d 1079, 1083 (2014) ("EPA is required to regulate any airborne pollutant which. . . may be reasonably anticipated to endanger public health or welfare.").

Unlike *Zook*, where the lack of an Endangerment Finding precluded the mandatory regulation of a pollutant, EPA has made its own Endangerment Finding in this case. This Endangerment Finding thus triggers the mandatory duty to regulate as noted by *Friends of the Earth, Ctr. for Biological Diversity,* and *Train.* EPA attempts to argue that it is not required to designate greenhouse gases as criteria pollutants because § 108(a)(1)(C) limits its requirement to only designate those pollutants that EPA "plans to issue air quality criteria. . . " R. at 13. Even if this were a valid argument, notwithstanding its pure mandatory duty under § 108(a)(1)(A) to list pollutants that are determined to endanger the public health or welfare, EPA would have to reasonably interpret said provision in the statute. Furthermore, while *Chevron* allows for agencies to receive deference for reasonable interpretations of ambiguous statutes, EPA in this case claims that it is entitled to discretion on its decision to refrain from listing greenhouse gases as criteria pollutants. In order to be entitled to such discretion, EPA must "ground its reasons for action or inaction in the statute rather than on 'reasoning divorced from the statutory text.'" *Util. Air Reg. Group v. EPA.*, 573 U.S. 302, 318 (2014), *citing Massachusetts v. EPA,* 549 U.S. at

535. However, EPA does not provide any justification for its single argument in refusing to list a pollutant that has severe consequences to the public and the environment. Accordingly, EPA's interpretation of § 108(a)(1)(C) is unreasonable because it utterly rejects the nature and goals of the CAA. EPA lacks the necessary reasoning to interpret the statute this way. Therefore, EPA should not be entitled to deference. *Oxygenated Fuels Ass'n v. Davis*, 331 F.3d 665, 666 (9th Cir. 2003) ("Congress enacted Clean Air Act 'to protect and enhance the quality of the Nation's air so as to promote public health and welfare. . .'"); *see also Ctr. for Biological Diversity v. EPA*, 749 F.3d 1079, 1083 (EPA must promulgate NAAQs for pollutants the agency deems to be criteria air pollutants); *see also Chem. Mfrs. Ass'n v. EPA*, 217 F.3d 861, 866 (D.C. Cir. 2000) (EPA itself recognized that its regulations must be consistent with the Clean Air Act's goals).

Moreover, the specific language of the relevant statute states that, "the Administrator *shall*, from time to time, issue proposed emission standards applicable to the emission of any air pollutant from any class or classes of aircraft engines which in his judgment causes, or contributes to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7408(a)(1) (emphasis added). Courts have typically held that the word "shall" triggers a mandatory duty to act. *Bennett v. Spear*, 520 U.S. 154, 175 (1997) ("shall" mandates the agency to take into consideration the required factors); *see also Allied Pilots Ass'n v. Pension Benefit Guar. Corp.*, 334 F.3d 93, 98 (D.C. Cir. 2003) ("it is a well-recognized principle that 'shall' is the language of command."). Accordingly, the mandatory language and statutory interpretation of the statute indicate that EPA has failed to take any action where it has a nondiscretionary duty to act.

IV. THE EPA HAS UNREASONABLY DELAYED IN TAKING ANY ACTION ON A NONDISCRETIONARY DUTY TO LIST GREENHOUSE GASES AS CRITERIA POLLUTANTS.

CHAWN respectfully asks the Court to affirm the District Court's ruling that EPA's ten-year delay in taking any action on listing GHGs as criteria pollutants under CAA § 108(a) constitutes an unreasonable delay. Pursuant to CAA § 108, EPA "shall from time to time" revise the air pollutant list to include emissions which "cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7408(a)(1). Thus, after EPA makes an endangerment finding, the Administrator is obligated to revise the criteria pollutant list for the purposes of establishing national primary and secondary ambient air quality standards." 42 U.S.C. § 7408. When evaluating whether EPA has unreasonably delayed in taking an action, courts consider "whether the agency's delay is so egregious as to warrant mandamus." *Telecomm. Research & Action Ctr. v. F.C.C. (TRAC),* 750 F.2d 70, 73 (D.C. Cir. 1984). In *TRAC*, the court outlined six factors as a guide to assess unreasonable delay claims. As noted by the District Court these factors include:

> (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.'" *Telecomm. Research & Action Ctr. v. F.C.C. (TRAC)*, 750 F.2d at 80.

The individual analysis of each *TRAC* factor that follows will determine that all six factors weigh in favor of CHAWN, and thus, EPA has wrongfully delayed taking action where it has a nondiscretionary duty under the Clean Air Act to list greenhouse gases as criteria pollutants.

(A) EPA's ten-year delay exceeds the "rule of reason."

EPA provides little reasoning to validate its ten-year delay in taking any action towards listing GHGs as criteria pollutants under CAA § 108(a). Courts have viewed this *TRAC* factor as the most important one, although it is not itself determinative of an unreasonable delay. *In re Core Commc'ns, Inc.*, 531 F.3d 849, 855 (D.C. Cir. 2008). When assessing whether an agency conforms to the "rule of reason," courts look to the length of time that an agency has delayed the action. *Id*. There is "no per se rule as to how long is too long," to wait for agency action. *See In re Int'l Chem. Workers Union*, 958 F.2d 1144, 1149 (1992). A reasonable time for agency action is typically expected to be weeks, months, or even a year or two–but not a decade or even several years. *See MCI Telecomms. Corp. v. FCC*, 627 F.2d 322, 340 (D.C. Cir. 1980) (four-year delay subverts the "just and reasonable" standard); *see also In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 419 (2004) (six-year delay in responding to petition is egregious). Furthermore, if an agency does delay, it must provide a valid reason for its lack of action or provide a timetable to take final action. *See In re A Cmty. Voice*, 878 F.3d 779, 786 (9th Cir. 2017) (eight-year delay unreasonable where EPA failed to provide a "concrete timetable" and instead provided speculative dates, years into the future)*; cf. Wellesley v. Federal Energy Regulatory Com.*, 829 F.2d 275, 277 (1st Cir. 1987) (14-month delay reasonable)*; but cf. In re Pesticide Action Network N. Am., Nat. Res. Def. Council, Inc.*, 798 F.3d 809, 813-14 (9th Cir. 2015) (six-year delay reasonable where EPA provided concrete timeline to take action within the next year).

In the present case, EPA has argued that regulation of GHGs as criteria pollutants would require the "resolution of thorny policy and scientific issues" and thus, its ten-year delay is reasonable. R. at 5, 12. Had EPA provided any sort of concrete timeline to resolve such issues this may have satisfied the "rule of reason," as demonstrated by *In re Pesticide*. However, EPA has failed to provide any such information, or take any action whatsoever. R. at 5, 7, 14. EPA has

failed to provide any timeline at all, let alone a definitive one. R. at 5, 7, 14. Thus, the present situation is distinguishable from *In re Pesticide*, where EPA asserted it would take action within the next year. The agency has simply allowed time to pass without any notice to CHAWN or the public, of any steps being taken. R. at 5. Like *In re A Cmty. Voice,* CHAWN suffers from EPA inaction and lengthy, years-long delay without even an estimated timeline, let alone a concrete one. R. at 5, 7, 14. Moreover, EPA has failed to provide even a speculative actionable timeline. At least EPA offered some sort of uncertain future date *In re A Cmty. Voice*. In the present matter EPA has not proffered such a date. Accordingly, the first *TRAC* factor leans heavily in favor of CHAWN as EPA has delayed for an excessive amount of time without any valid reasoning.

(B) Legislative history in Clean Air Act supports timely actions in listing newfound pollutants under Clean Air Act § 108(a).

While Clean Air Act § 108(a) does not explicitly provide a timeline for action, legislative history indicates action should be promptly taken in certain matters, like those concerning a danger to the public health and welfare. The second *TRAC* factor requires courts to analyze whether the relevant statute provided any sort of timeline to complete an action, or in the alternative, any indication relating to the speed at which Congress expected an agency to proceed. *Telecomm. Research & Action Ctr. v. F.C.C. (TRAC),* 750 F.2d at 80. An action must "give effect to the unambiguously expressed intent of Congress," in order for a statute to be undisputed. *Chevron*, 467 U.S. at 843. However, when a statute indicates indefinite intervals, such as we see here, deeper judicial review of the language is warranted. *Am. Lung Ass'n v. Reilly*, 962 F.2d 258, 263 (2d Cir. 1992) (statute's "five-year intervals" language did not present an action for unreasonable delay). In *Sierra Club v. Gorsuch*, the court held that where there is no precise timetable in a statutory provision, then the agency is entitled to "considerable deference." *Sierra Club v. Gorsuch*, 715 F.2d 653, 658 (D.C. Cir. 1983). Moreover, statutory

language that contains mandatory language such as "shall" requires agencies to take some sort of action when making an endangerment finding regarding pollutants. *Nat. Res. Def. Council, Inc. v. Train*, 545 F.2d at 325. However, in *Train*, the court turned to the entire legislative history of the CAA when faced with the ambiguous language provided in § 108(a)(1)(C). *Id*. In such case, they delved into the Act's 1970 amendments requiring "issuance of remaining air quality criteria for major pollutants within 13 months of enactment." *Id.* at 326. There were also multiple Senate reports directing the publishing of "air pollution agents or combination thereof for which air quality criteria will be issued," within thirty days of the enactment of the section in the report. *Id*. The court subsequently concluded that while CAA § 108(a) did not list a specific timetable, there were several timetables that were available in the Act's legislative history, and thus the purpose of the CAA as a whole was to promptly carry out those actions. *Id.* at 327.

CAA § 108(a) provides "[f]or the purpose of establishing national primary and secondary ambient air quality standards, the Administrator shall within 30 days after the date of enactment of the Clean Air Amendments of 1970 [enacted Dec. 31, 1970] publish, and *shall from time to time* thereafter revise, a list which includes each air pollutant. . . " 42 U.S.C. § 7408 (emphasis added). Unlike the "five-year interval" language provided in the CAA provision in *American Lung Ass'n*, the language in § 108(a) does not provide such explicit timing in its own section. Rather, it merely states an indefinite time frame which normally grants EPA a high level of deference. However, in this case, the Court must turn to the legislative history behind the CAA as § 108(a) lacks specificity and plain intent. The legislative intent and history behind the Clean Air Act remains the same as it did in *Train*. The mandatory use of the word "shall" requires the agency to take some sort of action promptly even where there is no concrete timeframe specified in a specific section. Thus, it need not matter that there is no explicit requirement of time, as long

as the legislative history behind the Act provides such clarity that provides an estimated timetable for action to be taken.

(C) EPA's own Endangerment Finding provides that greenhouse gas emissions endanger public health and welfare which further justifies taking prompt action in listing them as criteria pollutants and moreover, its lack of action.

EPA's Endangerment Finding alone satisfies the third *TRAC* factor. The third factor provides that any justification of delay that may have been reasonable in the "sphere of economic regulation is less tolerable when human health and welfare are at stake." *Telecomm. Research & Action Ctr. v. F.C.C. (TRAC),* 750 F.2d at 80. Furthermore, the fifth *TRAC* factor provides that "the court should also take into account the nature and extent of the interests prejudiced by delay." *Id*. Courts often examine the third and fifth *TRAC* factors together because of their overlap in considering the effects of a delay. *Muwekma Tribe v. Babbitt*, 133 F. Supp. 2d 30, 39 (D.D.C. 2000). When deciphering whether an action is unreasonably delayed, the court will look to the consequences as a result of the delay. *Cutler v. Hayes*, 818 F.2d 879, 898 (D.C. Cir. 1987). Additionally, the court in *Cutler* found that deference given to an agency's own schedule development is "sharply reduced" if injury is likely to occur from the delay. *Id*. Accordingly, if there is reason to believe that the public's health is at risk, then the agency must expedite taking action. *Pub. Citizen Health Research Grp. v. Auchter*, 702 F.2d 1150, 1159 (1983) (holding that OSHA had to expedite a permanent standard where there was information about a chemical that revealed serious risk of illness to humans and animals); *see also Pub. Citizen Health Research Grp. v. Comm'r, Food & Drug Admin. (CFDA)*, 740 F.2d 21, 34 (1984) (unreasonable delay where agency credited evidence of a causal link between chemical and disease). Lastly, courts often look at whether the delay creates circumstances that appear to frustrate statutory goals or makes the agency appear to be losing its ability to regulate effectively. *Envtl. Def. Fund v. U.S.*

Nuclear Regulatory Comm'n (NRC), 902 F.2d 785, 789 (10th Cir. 1990) (NRC's delay was reasonable because its study was still in progress and this conformed with statutory goals).

In the present case, the danger that EPA itself found to be imposed by unregulated greenhouse gas emissions weighs heavily in favor of finding an unreasonable delay. EPA found a direct link between unregulated greenhouse gas emissions and an increase of global temperatures and changes to storm frequency and precipitation patterns. These climate change effects result in serious public health risks, such as an increase in heat related deaths and the prevalence of insect borne diseases. Moreover, as the record shows, public welfare is also affected through the reduction of agricultural productivity and water supplies, along with an increase in economic damage from storms and rising sea levels. EPA has not provided any economic justification for delaying any action in listing greenhouse gases as criteria pollutants. However, similar to *Cutler*, where the consequences were greater than any economic reasoning, the deference to EPA's delay should be greatly diminished. Furthermore, the holding in both *Auchter* and *CFDA* apply here because EPA has acknowledged that there is a link between the climate change effects and the greenhouse gas emissions. However, unlike from *NRC*, where the court found no unreasonable delay, this Court should find that EPA's delay is different. While in *NRC*, the agency delayed in taking a final action, it was not unreasonable because it was in the process of a study that was required by the statute. This is not the case in this instance, as EPA has not taken any action at all. This frustrates the purpose of the Clean Air Act, and more specifically § 108(a), which was created to prevent harm and promote public health. Given that EPA has failed to take action on its own scientific finding that the pollutants in question severely affect public health and welfare, EPA's delay rises to the level of unreasonable.

(D) EPA's alleged justifications are insufficient to prove that their delay is not unreasonable.

EPA's contentions that undertaking regulation of GHGs would get in the way of more pressing matters is inadequate under the fourth *TRAC* factor. This factor allows for an agency to justify delayed actions if the agency needs to take action on more "important" matters that take higher priority, if there is an administrative error, or practical difficulty in carrying out a legislative mandate. *Telecomm. Research & Action Ctr. v. F.C.C. (TRAC),* 750 F.2d at 80. In *Auchter*, an agency argued that it had three other ongoing proceedings and thus could not accomplish the litigated action. *Pub. Citizen Health Research Grp. v. Auchter*, 702 F.2d 1150, 1158 (1983). However, the court ruled in such a way because the agency had nearly completed one of the proceedings and the other already had an emergency standard in place in the meantime. *Id*. Therefore, there was only one proceeding left which had a concrete timeline and the litigated action took precedence over the former proceeding. *Id.* at 27; *see also UAW v. Chao*, 361 F.3d 249, 255 (3rd Cir. 2004). Furthermore, in *Chem. Workers Union*, the court ruled that an agency unreasonably delayed promulgating cadmium exposure rules, even when the agency lost a key staff member and had an unanticipated delay in guidelines required for the rulemaking. *In re Int'l Chem. Workers Union*, 958 F.2d at 1150. And even further, other matters or interests are no longer valid when an action has been extensively or repeatedly delayed. *Pub. Citizen Health Research Group v. Chao*, 314 F.3d 143, 145 (3d Cir. 2002) (holding that although the agency had significant competing priorities, the rulemaking's progress over nine years was unreasonable); *see also Muwekma Tribe v. Babbitt*, 133 F. Supp. 2d at 41 (twenty-year delay in processing a petition is unreasonable "notwithstanding competing interests").

In this instance, EPA asserts that taking any action towards listing greenhouse gases as criteria pollutants would interfere with the reduction of regulatory burdens on business and economic activity, its highest priority at the moment. However, even when there were three

ongoing proceedings, as was the case in *Auchter*, the court nonetheless found no excuse for a delay. If the reduction of regulatory burdens has a definite timeline, then it is more than possible to take action for both issues, especially since greenhouse gases have a negative impact on public health and welfare. Moreover, because the EPA has delayed for ten long years, the court should invalidate the reduction of regulatory burdens as a higher priority, given the excessive delay. In *Chao*, the agency delayed for nine years and similarly had other priorities, yet the court still held the agency to an unreasonable delay standard. Along with *Chao*, *Muwekma* also resembles the present matter, because the court also held that when an action is extremely delayed, the justifications are no longer heavily taken into consideration. EPA cannot maintain that the reduction of regulatory burdens stands at a higher priority than listing greenhouse gases that cause severe climate change effects that endanger the public. If EPA were to continue to assert this justification, it must be able to provide specific evidence as required in *UAW* to further determine whether it is a more urgent matter. While a court must consider the higher priorities that an agency provides in excuse for long delays, it must also analyze the severity of the priorities. EPA has also not mentioned any difficulty in carrying out the legislative mandate or pointed to any administrative errors that attribute to its delay. As such, the substantial length of time that has passed overcomes the reasoning EPA has provided for the record.

(E) Although slight, there is some evidence of impropriety by EPA, but the delay is nonetheless unreasonable regardless of the level of impropriety.

While there is minimal impropriety, there need not be any impropriety at all for a court to hold that an agency has unreasonably delayed an action, according to the sixth *TRAC* factor. *Telecomm. Research & Action Ctr. v. F.C.C. (TRAC),* 750 F.2d at 80. In order to show impropriety behind an agency, there must be evidence of bad faith or evidence that an agency has wrongfully singled petitioner out. *In re Barr Labs., Inc.*, 930 F.2d 72, 75 (1991) (finding no

evidence of impropriety because petitioner lacked evidence that it had been singled out for mistreatment); *see also Liberty Fund, Inc. v. Chao*, 394 F. Supp. 2d 105, 120 (D.D.C. 2005) (no impropriety because agency made good faith efforts to attenuate delays); *see also Indep. Mining Co. v. Babbitt*, 885 F. Supp. 1356, 1362 (D. Nev. 1995) (agency acts in bad faith where it takes no action at all or discriminates against a single party). However, when analyzing a bad faith claim, courts tend to give "an exceptional degree of deference" to an agency's motives. *Indep. Mining Co. v. Babbitt*, 885 F. Supp. at 1364 (finding it sufficient for an agency to provide a reasonable explanation for its decision). Nevertheless, it is important to emphasize that impropriety need not be present for the Court to find an action to be unreasonably delayed.

In this case, EPA has acted in bad faith by not taking any action at all. As noted in *Babbitt*, an agency acts in bad faith if it takes no action at all or if it discriminates against one party. Here, while there is no evidence of discrimination, EPA has certainly not taken any action for ten years towards listing greenhouse gases as criteria pollutants. While EPA has provided several explanations to attempt to justify its delay, the explanations provided are simply insufficient when analyzed through the six *TRAC* factors. Accordingly, EPA is undeserving of the high level of deference normally given to the agency as seen in *Babbitt*. *Barr* is distinguished from the present case because in *Barr*, while there was no mistreatment, there was also no bad faith involved. Moreover, in *Liberty Fund*, the court found that the agency made good faith efforts to offset its lengthy delay. This is not the case with EPA, as it has made no attempt to rectify the situation and furthermore still has not taken action to this day. This constitutes bad faith by EPA and consequently this *TRAC* factor also weighs in favor of CHAWN. However, should the Court find that there was no impropriety, the delay is still unreasonable. The application of the previous five *TRAC* factors have indicated that EPA has long delayed taking

action in listing criteria pollutants–from its own endangerment finding–that will help prevent or mitigate risks posed to the public's health.

CONCLUSION

In conclusion, Climate Health and Welfare Now seek remedies in law for the following claims:

On issue one, the District Court correctly exerted jurisdiction by granting CHAWN's motion for summary judgment in part. The District Court had jurisdiction over the unreasonable delay claim despite its implication of a rule of nationwide applicability because the provision requiring such cases be heard in the D.C. Circuit is a venue provision. Improper venue was not asserted by any of the parties, therefore the District Court appropriately exercised jurisdiction.

On issue two, the District Court correctly upheld the Endangerment Finding with respect to public welfare as "climate" is included in the definition of "effects on welfare" under CAA § 302(h). EPA acted within its delegated authority under the CAA to resolve the ambiguity of this undefined term, as EPA based its finding in scientific evidence that GHGs impact climate, resulting in economic and property damage, ultimately endangering the public welfare.

On issue three, the District Court erred in determining the Endangerment Finding with respect to public health is contrary to law. CHAWN asks this court to reverse the District Court ruling invalidating the Endangerment Finding to the extent that it pertains to public health. The term is undefined by law and is thus a gap that EPA has the authority to interpret, so long as the interpretation is reasonable. EPA's interpretation is reasonable because scientific evidence demonstrates a harm in the form of adverse health effects on the public. EPA's newfound position is not entitled to deference as it was adopted as a convenient litigating position.

On issue four, the Court should affirm the District Court's ruling that EPA has a nondiscretionary duty to list GHGs under CAA § 108(a) as a criteria pollutant because the statutory language and usage of the term "shall" demonstrates EPA has an obligatory duty.

On issue five, the Court should affirm the District Court's ruling that EPA's ten-year delay in taking any action on listing GHGs as criteria pollutants under CAA § 108(a), 42 U.S.C. § 7408(a) constitutes an unreasonable delay. EPA has delayed any action for a decade and failed to offer any timeline when it may take affirmative action or inaction. EPA justifications for inaction cannot justify their unreasonable delay. The agency cannot rely on economic priorities to avoid action as this is not grounded in the statute. EPA has failed to expedite action despite the fact that the public's health is at risk.

WHEREFORE, CLIMATE HEALTH AND WELFARE NOW RESPECTFULLY REQUESTS THIS COURT ISSUE A RULING:

1. Finding the District Court of New Union exercised proper jurisdiction.
2. Affirming the District Court of New Union's grant of summary judgment declaring the Endangerment Finding is valid with respect to endangerment of public welfare.
3. Reversing the District Court of New Union's grant of summary judgment declaring the Endangerment Finding is contrary to law, and invalid, with respect to endangerment of public health.
4. Affirming the District Court of New Union's grant of summary judgment finding that the Environmental Protection Agency unreasonably delayed action on responding to the petition to for designation of greenhouse gases as a criteria pollutant.
5. Affirming the District Court of New Union's grant of summary judgment finding that the Environmental Protection Agency has a duty that is not discretionary to designate greenhouse gases as a criteria pollutant.