Team No. 24

IN THE UNITED STATES COURT OF APPEALS

FOR THE TWELFTH CIRCUIT

CLIMATE HEALTH AND WELFARE NOW,

Plaintiff-Appellant,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Defendant-Appellant,

-and-

COAL, OIL, AND GAS ASSOCIATION,

Intervenor-Appellant

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

Case No. 66-CV-2019

BRIEF OF CLIMATE HEALTH AND WELFARE NOW,

Plaintiff-Appellant

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STATEMENT OF THE ISSUES

I. Did the District Court have jurisdiction over Climate Health and Welfare Now's ("CHAWN") unreasonable delay claim under section 304(a) of the Clean Air Act ("CAA") where the rule sought would be a rule of nationwide applicability subject to review exclusively in the D.C. Circuit under CAA section 307(b)?

II. Did the District Court correctly uphold the Environmental Protection Agency's ("EPA") endangerment of public welfare, where EPA considered reliable science indicating effects on climate and other statutorily listed categories affecting public welfare caused by release of greenhouse gases ("GHG")?

III. Did the District Court err when it rejected EPA's Endangerment Finding of public health, where the EPA considered reliable science indicating severe public health impacts from GHGs through climate change?

IV. Did the EPA unreasonably delay listing GHGs as criteria pollutants under CAA section 108(a) when EPA failed to act within ten years of CHAWN's 2009 Petition?

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

STATEMENT OF JURISDICTION

Climate Health and Welfare Now (CHAWN) appeals from the final opinion and order issued by the District Court for the District of New Union. R. at 2. The United States Court of Appeals for the Twelfth Circuit has jurisdiction over this case under 28 U.S.C. § 1291 (2018). Pursuant to 28 U.S.C §§ 1331, this Court also has subject matter jurisdiction where CHAWN's claims arise out of the CAA. 42 U.S.C. § 7604. As discussed below, section 307(b) of the CAA provides jurisdiction with the Circuit Court of Appeals. *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 593 (1980).

STATEMENT OF THE FACTS

EPA's 2009 Endangerment Finding: GHGs May Endanger Human Health and Welfare

In 1999, environmental groups petitioned EPA to find that GHG emissions from automobiles posed a danger to human health and the environment under CAA section 202 ("Section 202 Petition"). R. at 6. In 2003, EPA denied this Section 202 Petition, claiming GHGs were not air pollutants and should be regulated through avenues besides the CAA. R. at 6. In 2007, the U.S. Supreme Court disagreed with EPA, holding that GHGs were capable of CAA regulation and directed EPA to respond to the Section 202 Petition to determine whether GHGs may endanger human health or welfare. *Id*; *Massachusetts v. E.P.A.*, 549 U.S. 497 (2007).

As directed by the U.S. Supreme Court, EPA examined potential effects on public health and welfare from GHGs. In 2009, EPA issued a formal finding that GHGs may endanger human health and welfare under CAA Section 202 ("Endangerment Finding"). *Id.* In the Endangerment Finding, EPA determined GHGs may endanger public health and welfare by increasing global temperatures and changing storm frequency and precipitation patterns. R. at 6-7. Specifically, GHG driven impacts were expected to endanger public health by increasing the prevalence of ozone pollution, heat related deaths, and insect borne diseases, and to endanger public welfare by reducing agricultural productivity and water supplies, and increasing property and economic damage due to storms and rising sea levels. *Id*.

CHAWN's 2009 Petition to List GHGs as Criteria Pollutants Under CAA Section 108

In 2009, CHAWN and other environmental organizations petitioned EPA to list GHGs as a criteria pollutant under CAA section 108 ("Section 108 Petition"). R. at 5. The Section 108 Petition asserted that EPA had a non-discretionary duty to list GHGs as criteria pollutants following the EPA's 2009 Endangerment Finding. *Id*. Listing a criteria pollutant under section

108 triggers a cascade of regulatory responses in place to protect the public health and welfare, including: EPA proposal of primary and secondary National Ambient Air Quality Standards (NAAQS) for the pollutant; final NAAQS designation; an obligation by each state to submit a plan for compliance with primary NAAQS; and consequences for states failing to submit satisfactory plans or failing to meet compliance deadlines. R. at 8.

Post-Endangerment Finding: EPA GHG Regulation Under the CAA

In 2010, EPA began taking regulatory action to limit GHG emissions for new passenger vehicles and trucks. R. at 7. In 2015, EPA's efforts to regulate GHGs culminated in the Clean Power Plan regulations. In 2017, the Trump EPA administration began a series of GHG-focused regulatory rollback actions, including relaxing GHG emissions standards. R. at 7.

EPA's Failure to List GHGs as Criteria Pollutants Under CAA Section 108

EPA has not taken any action on CHAWN's 2009 Section 108 Petition, neither to grant or to deny. R. at 5, 7-8. EPA has failed to invoke its authority to designate GHGs as a criteria pollutant under CAA section 108. *Id.* On April 1, 2019, CHAWN properly served notice of its intention to sue EPA for unreasonable delay concerning CHAWN's 2009 petition and for failing to regulate GHGs as criteria pollutants. R. at 5. EPA took no action in response to CHAWN's notice, and on October 15, 2019, CHAWN commenced the current suit seeking an order directing EPA to publish a new list of criteria pollutants including GHGs. *Id*.

PROCEDURAL HISTORY

CHAWN filed a citizen suit under CAA section 304 to compel the EPA administrator to list GHGs under CAA section 108(a) as criteria pollutants subject to the NAAQS program. R. at 4. The District Court granted COGA's motion to intervene as a defendant in the action. *Id.* The

parties agreed on the basic underlying administrative record and cross moved for summary judgement. *Id.*

Although the District of New Union may not have been the proper venue for the section 304 claim, the Court determined that it had jurisdiction over the claim because EPA and COGA waived the issue by not objecting to venue. R. at 12. The Court granted CHAWN's motion for summary judgement in part and declared that: (1) the Endangerment Finding is valid with respect to an endangerment to public welfare; (2) EPA has unreasonably delayed action on responding to Plaintiff's petition for designation of GHGs as criteria pollutants, and has unreasonably delayed designating GHGs as criteria pollutants; and (3) EPA has a non-discretionary duty to designate GHGs as a criteria pollutant. *Id.* The Court ordered EPA to publish a notice of a proposed rule designating GHGs as criteria pollutants as well as publish a final rule to that effect. R. at 12-13.

The Court also granted COGA's motion for summary judgement in part. R. at 13. The Court declared that the portion of the Endangerment Finding determining GHGs to endanger public health is contrary to law and vacated the Endangerment Finding to that extent. *Id.*

STANDARD OF REVIEW

This court raises *sua sponte* the issue of whether the District Court of New Union had jurisdiction to hear CHAWN's unreasonable delay claim brought under CAA section 304(a). R. at 2. This issue is a matter of law, and appellate courts independently review conclusions of law under the *de novo* standard. *Monasky* v. *Taglieri*, 140 S. Ct. 719, 730 (2020).

Challenges to the 2009 EPA Endangerment Finding should be viewed through the lens of CAA § 307(d)(9). CAA § 307(d)(9) requires use of the "arbitrary and capricious" standard to reverse agency action. 42 U.S.C.A. § 7607. The arbitrary and capricious standard is narrow, requiring the EPA show a "rational connection between the facts found and the choice made."

Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). Concerning the endangerment of public welfare, the District Court resolved questions of fact, thus review for clear error should be applied. *Monasky*, 140 S. Ct. at 730. Regarding the endangerment of public health, the District Court reviewed a question of law, thus the Twelfth Circuit should review under the *de novo* standard. *Id.*

The issues of whether EPA has unreasonably delayed agency action and whether EPA has a non-discretionary duty to list GHGs are matters of law and should be reviewed under the *de novo* standard. *Pullman-Standard v. Swint*, 456 U.S. 273 (1982).

SUMMARY OF THE ARGUMENT

The District Court had jurisdiction over CHAWN's unreasonable delay claim under CAA section 304(a). Section 304(a) provides jurisdiction over unreasonable delay claims for District Courts within the Circuit in which such actions are reviewable under section 307(b). Section 307(b) serves dual functions as both a broad conferral of jurisdiction on the Circuit Courts of Appeals and a provision of specific venue requirements. Although the D.C. District Court may have been the proper venue, the text and legislative history are definitive that the filing provisions of 307(b) are not jurisdictional. Additionally, this Court owes no deference to EPA's interpretation of jurisdiction under section 307(b). Finally, a policy argument to the contrary is suited for the halls of Congress rather than this court. EPA's failure to bring a bring the defense of improper venue waived the issued. Therefore, the New Union District Court had jurisdiction over the unreasonable delay claim under section 304(a).

CHAWN's petition for agency action concerning the EPA Endangerment Finding was filed timely. However, COGA's challenge was roughly ten years after the time limit had expired. Regardless of whether COGA's challenge was timely, the EPA Endangerment Finding should be

upheld for both public welfare and public health based on the plain meaning of the CAA, agency deference, and supporting precedent.

Concerning public welfare, the CAA defines "effects on welfare" to include effects on climate. The EPA Endangerment Finding relied on peer reviewed, reliable, scientific inquiry to conclude that GHGs have an effect on climate. Based on the plain text of the CAA, GHGs endanger public welfare by having an effect on climate. EPA's Endangerment Finding not only provides a scientific basis but also a well-reasoned legal opinion for its position. To the extent the CAA is not clear in covering GHGs and their effect on climate, EPA should receive deference. Lastly, the D.C. Circuit has already adjudicated this issue and upheld the EPA Endangerment Finding.

Concerning public health, the text of the CAA is broad enough to include indirect effects from air pollutants. GHGs do not directly impact human health. However, GHGs indirectly pose severe public health implications by driving climate change. The CAA definition section does not prohibit EPA from considering climate change in terms of endangering public health. To the extent the CAA is not clear in allowing indirect effects from climate change when considering endangerment to public health, the EPA Endangerment Finding should receive deference under U.S. Supreme Court precedent. Lastly, the CAA is rooted in the "precautionary principle," that focuses EPA on preventing future harm. The CAA should have the flexibility to deal with future harms to public health from the release of GHGs.

This court should uphold the lower court's determination that EPA unreasonably delayed action. This court should also enforce the lower court's order for EPA to publish notice of a proposed rule designating GHGs as criteria pollutants and publish a final rule designating GHGs as criteria pollutants. EPA's ten-year delay was unreasonable under the D.C. Circuit's factors.

There was no rule of reason governing the delay and delays of eight to ten years are uniformly unreasonable. Contrary to the mandate of the precautionary approach, this delay demonstrates dilatory inaction. EPA itself determined that human health and welfare were under threat, making this delay less tolerable than those ordinarily reasonable in the sphere of economic regulation. Competing priorities are no excuse to delay in protecting human health and welfare. EPA had seven years to act before issuance of the 2017 Executive Order. Moreover, the magnitude of risk presented to human health and welfare far outweigh any priorities presented. Unreasonable delay need not result from impropriety, but EPA's failure to act for over ten years is patently improper.

Finally, this court should affirm the lower court's holding that EPA has a non-discretionary duty to designate GHGs as a criteria pollutant. A non-discretionary duty to list is not unique to section 108(a)(1); EPA also has a non-discretionary duty to list hazardous air pollutants under section 112(b)(1)(A). An analysis of the plain text, structure, and legislative history of the CAA demonstrates this is a non-discretionary duty. Under the plain text of the statute, the Administrator has a mandatory duty to publish a list of air pollutants that meet certain criteria. Interpreting this duty as discretionary would defy section 108 and the CAA as a whole. The Administrator could bypass the timetable outlined in sections 108–110 and rely solely on section 211, which complements section 108. According to the legislative history surrounding the 1990 CAA amendments a district court must determine if EPA has a non-discretionary duty when evaluating unreasonable delay claims. Where EPA had a non-discretionary duty it was required to list GHGs once it determined GHGs may endanger public health or welfare.

ARGUMENT

I. The District Court had jurisdiction over CHAWN's unreasonable delay claim under CAA section 304(a).

Section 304(a) of the CAA establishes that a suit compelling agency action that is unreasonably delayed "may only be filed in a United States District Court within the circuit in which such action would be reviewable under section [307(b)] of this title…." 42 U.S.C. § 7604. Section 307(b)(1) provides:

> a petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard… or any other nationally applicable regulations promulgated, or final action taken, by the administrator under this chapter *may be filed only* in the United States Court of Appeals for the District of Columbia. 42 U.S.C. § 7607(b)(1). (emphasis added).

Additionally, section 307(b)(1) states that agency action "which is locally or regionally applicable *may be filed only* in the United States Court of Appeals for the appropriate circuit." *Id.* (emphasis added). As the District Court noted, designation of GHGs as criteria pollutants is a nationally applicable regulation. R. at 12. Thus, under sections 304(a) and 307(b), the proper venue for an unreasonable delay claim was the District Court for the District of Columbia.

However, the District Court correctly held that the filing provisions of 307(b) are non-jurisdictional venue requirements. Pursuant to the Federal Rules of Civil Procedure, the failure to raise this purely venue issue waives the defense. FED. R. CIV. P. 12(h)(1); *see Texas Mun. Power Agency v. EPA*, 89 F.3d 858, 867 (D.C. Cir. 1996). The District Court asserted jurisdiction over the claim because neither the EPA nor COGA raised the issue.

This Court should affirm the District Court's analysis for four reasons. First, section 307(b) serves dual functions as both a broad conferral of jurisdiction on the Circuit Courts of Appeals and as a provision of venue requirements. Second, the text and legislative history of section 307(b) identify the filing provisions as non-jurisdictional. Third, the Court owes no

deference to the EPA's interpretation of 307(b) when determining jurisdiction. Finally, it is not the task of the court to rewrite a venue provision to restrict its own jurisdiction. Therefore, the District Court had jurisdiction over the unreasonable delay claim under CAA section 304(a).

A. Section 307(b) serves dual functions as both a broad conferral of jurisdiction upon the Circuit Courts of Appeals and as a provision of venue requirements.

Section 307(b) is a "conferral of jurisdiction upon the courts of appeals. *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 593 (1980). Under *Harrison*, section 307(b) broadly provides review in the Circuit Courts of Appeals for agency actions under the CAA. *Id.* After *Harrison*, some courts issued decisions that appeared to construe jurisdiction and venue to be coterminous, that they had the same boundaries, under section 307(b). *See Natural Res. Def. Council v. EPA*, 643 F.3d 311, 317 (D.C. Cir. 2011).

The D.C. Circuit cleared up this confusion by distinguishing between the jurisdictional and venue functions of section 307(b). *Dalton Trucking, Inc. v. EPA*, 808 F.3d 875, 879 (D.C. Cir. 2015).. In *Dalton Trucking*, the Court explained that section 307(b) is an "undeniable vesting" of jurisdiction in both the D.C. Circuit and the regional Circuit Courts. *Id.* However, the Court stressed that "section 307(b) is also a venue provision, specifying which types of… challenges can be filed in which federal circuit courts." *Id.* The court emphasized that "jurisdiction and venue are not coterminous" under section 307(b). *Id.*

Circuit Courts that have read the filing provisions of 307(b)(1) as jurisdictional have not addressed the issue head on. *e.g. Monongahela Power Co. v. Reilly*, 980 F.2d 272, 275–76 (4th Cir. 1992). Rather, these courts merely did so in passing en route to determining whether agency actions were nationally or regionally applicable. *Id.* Such courts resolved section 307(b) disputes on different grounds and never resolved this issue. *Id.* Case law addressing section 307(b)

directly has concluded that 307(b) serves the dual functions of both a broad conferral of jurisdiction upon the Circuit Courts of Appeals and a provision of specific venue requirements.

B. The text and legislative history of 307(b)(1) identify the filing provisions as non-jurisdictional venue requirements.

Jurisdiction "addresses the power of the court to adjudicate" while venue "addresses the place where that adjudicatory authority may be exercised." *U.S. Int'l Trade Comm'n v. ASAT, Inc.*, 411 F.3d 245, 248 (D.C. Cir. 2005). The D.C. Circuit has clearly and repeatedly determined that the filing provisions of section 307(b) are not jurisdictional. *E.g. Dalton Trucking,* 808 F.3d at 879; *Texas Mun. Power Agency*, 89 F.3d at 867.

In *Texas Mun. Power*, the court relied on the plain text and "unequivocal" legislative history support reading section 307(b)(1) as "prescribing the choice among circuits and not the power of a particular federal circuit court to hear a claim." 89 F.3d at 867. This analysis is consistent with the U.S. Supreme Court's repeated instruction for courts to avoid inferring jurisdictional limitations when a statute does not expressly limit jurisdiction. *Texas v. EPA*, 829 F.3d at 418; *See Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153 (2013).

Absent a "clear statement" from Congress that a rule is jurisdictional, "courts should treat the restriction as non-jurisdictional in character." *Sebelius*, 568 U.S. at 153. The U.S. Supreme Court adopted this "readily administrable bright line rule" in order to "ward off profligate use of the term 'jurisdiction.'" *Id.* Courts consider the text and legislative history to determine whether a provision is jurisdictional. *Id.*; *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 166 (2010).

Neither the text nor legislative history provide such a clear statement from Congress that the filing provisions of section 307(b)(1) are jurisdictional. Thus, this Court should treat the filing provisions as non-jurisdictional.

1. The text of 307(b)(1) does not provide a clear statement that its filing provisions are jurisdictional.

Congress did not define section 307(b) as jurisdictional in its title. Section 307 is titled "Administrative proceedings and judicial review" and subsection (b) is titled "Judicial review." 42 U.S.C. § 7607. While "judicial review" is related to jurisdiction, these titles do not clearly label the provisions as jurisdictional. The omission of the word "jurisdiction" is stark when compared to the title of subsection 304(a): "Authority to bring civil action; jurisdiction." 42 U.S.C. § 7604. By including "jurisdiction" in the title of another subsection within the same subchapter, Congress showed that it understands how to clearly define a code section as jurisdictional in its title. Accordingly, the title of section 307(b)(1) indicates that Congress did not intend the entirely of section 307(b)(1) to be jurisdictional.

Further, nowhere in the body of the text does section 307(b)(1) use the word "jurisdiction" or "jurisdictional." 42 U.S.C. § 7607; *Dalton Trucking Inc.*, 808 F.3d at 879. Instead, the text expressly refers to where petitions may "file" rather than the power of courts to hear claims. *Id.* While the use of the word "only" to modify where petitioners may file does provide mandatory language, it applies to the actions of the petitioners, not the court. *Id.*; *See Texas Mun. Power Agency*, 89 F.3d at 867. Thus, the text of 307(b)(1) does not provide a clear statement that its filing provisions are jurisdictional.

2. The legislative history of 307(b)(1) does not provide a clear statement that its filing provisions are jurisdictional.

The legislative history of 307(b)(1) demonstrates that Congress did not provide a clear statement that the filing provisions are jurisdictional. The House Report on the 1977 amendments to section 307 shows that Congress intended the filing provisions to regard only venue. *See* H.R. REP. NO. 95-294, at 323 (1977). In the report, the House Committee stated that the inclusion of

the filing provisions was "intended to clarify some questions relating to venue for review of rules or orders under the act." *Id*. The Committee emphasized that it adopted the provisions to approve a recommendation from the Administrative Conference of the United States "that deals with venue." *Id.* The Committee expressly adopted the recommendation titled "Venue in the Courts of Appeals." ADMIN. CONFERENCE OF THE U.S., JUDICIAL REVIEW UNDER THE CLEAN AIR ACT AND FEDERAL WATER POLLUTION CONTROL ACT (1976), https://www.acus.gov/recommendation/judicial-review-under-under-clean-air-act-and-federal-water-pollution-control-act.

Additionally, the House Committee did not expressly define the filing provisions as jurisdictional. *See* H.R. REP. NO. 95-294, at 322 (1977). This omission is significant when compared to the Committee's clear statement that the 60-day time limit for filing claims is jurisdictional. *Id.* The report states that "the court of appeals is without jurisdiction to consider a petition filed later than 60 days after the publication of the promulgated rule." *Id.* The Committee stated that its intention was to "strictly limit section 307 challenges to those which are actually filed within that time." *Id.* Courts have referred to these statements to hold that the 60-day time limit is jurisdictional. *E.g. Utah v. EPA*, 765 F.3d 1257, 1258–1269 (10th Cir. 2014). Nowhere in the record did Congress use definitive language for the filing provisions. Thus, the legislative history of section 307(b)(1) does not provide a clear statement that the filing provision is jurisdictional. This "unequivocal characterization in the legislative history" shows that the filing provisions regard only venue and not jurisdiction. *Texas Mun. Power Agency*, 89 F.3d at 867.

Neither the text nor the legislative history of section 307(b)(1) provides a clear statement from Congress that the filing provisions are jurisdictional. Therefore, courts should treat the provisions as non-jurisdictional in character.

C. The Court owes no deference to the EPA's interpretation of 307(b) when determining jurisdiction.

Federal courts have widely established that the determination of jurisdiction is exclusively the province of the court regardless of agency interpretation. *Murphy Exploration & Prod. Co. v. Dep't of Interior*, 252 F.3d 473, 478–80 (D.C. Cir. 2001); *Bechtel v. Competitive Techs., Inc.*, 448 F.3d 469, 478 (2d Cir. 2006); *Verizon Md., Inc. v. Global NAPS, Inc.*, 377 F.3d 355, 383 (4th Cir. 2004); *Shweika v. Dep't of Homeland Sec.*, 723 F.3d 710, 718 (6th Cir. 2013); *Lindstrom v. United States*, 510 F.3d 1191, 1195 n.3 (10th Cir. 2007).

In *Murphy*, the Court stated that deference does not apply to statutes that confer jurisdiction on federal courts. 252 F.3d at 478. The Court explained that such statutes do not impart agency deference because they grant power to courts rather than delegating authority to administrative agencies. *Id.* at 479. Moreover, the Court emphasized that no deference is due because "the jurisdiction of courts is outside agencies' expertise." *Id.*

In *Texas v. EPA*, the Court applied this established rule to its determination of jurisdiction under section 307(b). 829 F.3d at 418. As in *Murphy* and *Texas v. EPA*, section 307(b) grants power to courts. It does not delegate authority to the EPA to interpret jurisdiction. Further, the determination of jurisdiction is beyond the expertise of the EPA. Thus, the determination of jurisdiction under 307(b) is exclusively the province of this Court and no deference is owed to EPA's interpretation.

D. It is not the task of the court to rewrite a section 307(b)(1) to restrict its own jurisdiction.

The D.C. Circuit may be the more convenient venue for the EPA; however, it is the task of the Court to determine the Congressional intent of the statute rather than "to determine which would be the ideal forum for judicial review." *Harrison*, 446 U.S. at 593.

In *Harrison*, the plaintiff challenged regionally applicable CAA regulations of its industrial facility. *Id.* at 584. Prior to the lawsuit, Congress amended section 307(b) to vest exclusive review in the Circuit Courts for "any other final action of the administrator." *Id.*; 42 U.S.C. § 7607(b)(1). Section 307(b)(1) had previously directed suits to the District Courts except those concerning specific EPA actions. *Id.* The plaintiff claimed that the District Court and not the Fifth Circuit had jurisdiction to over its claim "as a matter of policy." *Id.* at 593. The plaintiff argued that "the basic purpose of § 307(b)(1)—to provide prompt pre-enforcement review of EPA action—would be better served by providing for judicial review… in a district court." *Id.*

The U.S. Supreme Court rejected this argument and held that section 307(b)(1) is a general "conferral of jurisdiction upon the courts of appeals." *Id.* The court explained that the policy argument is one "to be addressed to Congress, not this Court." *Id.* The court emphasized that "it is not our task to determine which would be the ideal forum for judicial review." *Id.* Instead, the court held that its role is to determine what Congress intended in enacting the section 307(b) amendments. *Id.* Rather than consider policy, the court focused on the language and legislative history of the statute to determine that section 307(b)(1) is a general "conferral of jurisdiction upon the courts of appeals" for challenges to EPA actions under the CAA. *Id.*

The posture of the policy argument in *Harrison* is analogous to such a claim in this case. The EPA may argue that the New Union District Court did not have jurisdiction under 304(a) because the D.C. District Court is the more convenient forum for this claim. However, as in *Harrison,* the court's task is to determine Congressional intent rather than the ideal forum. This policy argument falls flat because the text and legislative history of the section 307(b)(1) resolve this question. *See* Part I.A. They both demonstrate that Congress intended the filing provisions to regard venue and not jurisdiction. Resolving this issue based upon a policy argument

incongruous to Congressional intent would constitute a rewriting of section 307(b)(1) by this court in order to restrict its own jurisdiction.

Section 304(a) provides jurisdiction over unreasonable delay claims for District Courts within the Circuit in which such an action be reviewable under section 307(b). Section 307(b) serves dual functions as both a broad conferral of jurisdiction on the Circuit Courts of Appeals and a provision of specific venue requirements. While the D.C. District Court may have been the proper venue, the text and legislative history are definitive that the filing provisions of 307(b) are not jurisdictional. Additionally, this Court owes no deference to EPA's interpretation of jurisdiction under section 307(b). Finally, a policy argument to the contrary is suited for the halls of Congress rather than this court. The EPA's failure to bring a bring the defense of improper venue waived the issued. Therefore, the District Court had jurisdiction over the unreasonable delay claim under section 304(a).

II. EPA's Endangerment Finding properly classified GHGs as air pollutants because they cause or contribute to air pollution and reasonably endanger public welfare.

The District Court erred by allowing COGA's challenge because the challenge was not timely. However, the District Court correctly upheld EPA's Endangerment Finding for public welfare. In upholding the Endangerment finding for public welfare, the District Court rejected COGA's claims that EPA's Endangerment Finding would bring an "absurd" result, and that the science EPA relied on was too uncertain. R. at 9. The EPA Endangerment Finding for public welfare should be upheld for three reasons. First, COGA's challenge was not timely. Second, the plain meaning of the CAA and U.S. Supreme Court precedent show that the Administrator can determine that GHGs endanger public welfare. Third, EPA should receive deference for its scientific expertise in questions surrounding the scientific inquiry and the certainty of climate change.

A. COGA's challenge to the 2009 Endangerment Finding was not timely because it was filed 10 years later, not within 60 days of promulgation.

An interested party wishing to challenge EPA regulations under the CAA must do so within 60 days from the notice of potential EPA action appears in the Federal Registrar. 42 U.S.C. § 7607. There is one exception to the 60-day filing deadline: if the "petition is based solely on grounds" that arose after 60 days from promulgation, then a petition can be filed 60 days from when the grounds arose. 42 U.S.C. § 7607. Time limits like this one "serve the important purpose of imparting finality into the administrative process." *Natural Res. Def. Council v. Nuclear Regulatory Comm'n*, 666 F.2d 595, 602 (D.C. Cir. 1981). COGA's challenge is untimely for two reasons. First, because CHAWN's petition for EPA action occurred 11 years ago, COGA's had to file its challenge contemporaneously for it to be timely. Second, COGA directly challenges the substance of the Endangerment Finding rather than basing its petition "solely on" recent developments.

CHAWN's Petition was timely, occurring "shortly after" the EPA Endangerment Finding was promulgated. R. at 5. COGA claims its challenge is timely based on implications that would result if CHAWN's petition is successful. To the extent that CHAWN's petition constitutes grounds arising after the 60-day window had closed, COGA was required to file its challenge within 60-days of CHAWN filing its 202 Petition 10 years ago.

Second, even if COGA's challenge is timely under the exception, it goes beyond CHAWN's petition, and is not "based solely on" recent developments. COGA challenges not only CHAWN's petition but the substance of EPA's Endangerment Finding. COGA should have joined litigation in *Coalition for Responsible Regulation* when the same issues were timely raised. While COGA is barred from challenging CHAWN's petition, COGA can still achieve its

goals in the future. To the extent EPA has a non-discretionary duty to regulate GHGs under the CAA, it will promulgate future regulations which COGA can then challenge.

B. The plain meaning of the CAA and U.S. Supreme Court precedent show the Administrator can determine GHGs endanger public welfare.

Second, under §7602, if an air pollutant has an effect on "water, crops…[or] climate" then it has an effect on public welfare. 42 U.S.C. §7602. EPA's Endangerment Finding indicates GHGs contributes to or causes climate change and thus has an effect on public welfare. Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496, 66,496–546 (Dec. 15, 2009) (to be codified at 40 C.F.R. Ch. I) The change in climate also negatively affects crop production and water availability. *Id.* at 66,496–546. Under §7602, GHGs have both a direct effect on public welfare by changing the climate and an indirect effect on public welfare by affecting crop production and water availability. Where the Administrator finds an endangerment to elements statutorily listed under welfare, the Endangerment Finding of public welfare should be upheld.

EPA's Endangerment Finding is an incremental step toward solving climate change. The U.S. Supreme Court has noted that an agency action does not need to solve a problem in one regulatory swoop. Rather, it can take incremental steps towards resolving a problem. *Massachusetts v. EPA*, 549 U.S. 497, 499 (2007). In this instance COGA correctly notes that GHGs are released internationally and many states could find themselves out of attainment in the future. Decreasing GHGs from automobile emission will not solve climate change on its own. However, under *Massachusetts v. EPA*, EPA is allowed to take steps toward fixing a problem rather than attempting to solve it in one action. Having many, or all states, out of attainment does not create an absurd result. To the contrary, it fulfills the very purpose of section 7521 by incentivizing actions that protect human health and welfare.

C. EPA should receive deference for its scientific expertise in questions regarding scientific inquiry and certainty of climate change.

Third, EPA's determination on climate change was rational where it relied on peer reviewed scientific literature from national and international organizations. The District Court followed *Coalition for Responsible Regulations*, emphasizing that reviewing EPA's climate change determination is highly deferential to EPA's scientific inquiry. R. at 9. The Court in *Chevron* acknowledged that judges are not experts in every field and should defer to agency decisions. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984). In this instance, EPA relied on scientific evidence from respected sources while making its determination. Thus, it should receive deference.

III. EPA's Endangerment Finding properly classified GHGs as air pollution which reasonably endangers public health.

The District Court erred when interpreting the CAA to exclude indirect impacts affecting public health such as: higher morbidity rates from increased heat waves; greater exposure to ozone; biological hazards; and extreme weather events like flooding. This court should reverse the District Court's ruling for three reasons. First, under the plain meaning of the CAA, the Administrator can make endangerment findings from indirect effects on public health. Second, to the extent the CAA is unclear or ambiguous, EPA's Endangerment Finding should be given deference under *Chevron* and *Mead*. Third, relevant case law supports EPA's Endangerment Finding as part of the "precautionary principle" espoused in the CAA.

A. CAA sections 7602 and 7521 are clear: they authorize the Administrator to evaluate indirect effects from GHGs when evaluating impacts on public health.

The District Court erred in reading CAA section 7602 as limiting the operative text of section 7521. The plain meaning of the CAA is broad enough to include indirect impacts on

public health for two reasons. First, the text of section 7602 does not limit the operative text of 7521. Second, section 7521 is broad enough to include GHGs and their indirect effects.

1. CAA section 7602(h) provides examples of effects on "welfare" but does not limit potential effects on "public health."

CAA section 7602(h) reads in relevant part: "language referring to effects on welfare includes…effects on soils, water, crops, manmade materials… and climate." The text of 7602(h) makes clear that having an effect on any listed item implicates welfare; but 7602(h) is silent on downstream effects. 42 U.S.C. § 7602. The effect of GHGs on climate does not trigger the endangerment of human health. Rather, the effect climate change may reasonably have on public health is what triggers endangerment of public health. Effect is defined as the "power to bring about a result." *Effect*, MERRIAM WEBSTER, https://www.merriam-webster.com/dictionary/effect (last visited Nov. 11, 2020). In this instance, GHGs affect, or have the power to bring about a result concerning climate. Therefore, GHGs affect welfare under section 7602(h). The change in climate has the power to bring about a result, or affects, public health. Climate change affects human health in several ways including: increased morbidity from heat waves; increased exposure to ozone; increased exposure to biological pathogens; and increased exposure to extreme weather events such as flooding. Section 7602 does not preclude secondary effects on public health from analysis under §7521 because §7602 does not consider such effects. Finding that an air pollutant endangers public welfare by affecting one of the items listed under 7602(h) does not preclude a finding that an air pollutant also endangers public health. For example, SO_2 and NO_x are both air pollutants that affect soils, water, crops, and manmade materials. SO_2 and NO_x also cause health problems. EPA, NITROGEN OXIDES (NOX), WHY AND HOW THEY ARE CONTROLLED (1999) https://www3.epa.gov/ttncatc1/dir1/fnoxdoc.pdf;

Sulfur Dioxide Basics, EPA, https://www.epa.gov/so2-pollution/sulfur-dioxide-basics for sulfur oxide (last visited Nov. 11, 2020). SO2 and NOx are properly categorized as endangering public welfare and public health under the CAA. *Id.*

Section 7602 only implicates effects on climate and not climate's effects on public health. Considering it is common practice for air pollutants to affect public health and welfare, GHG analysis under 7521 should not be precluded by 7602.

2. 42 USC § 7521 is broad enough to include secondary effects from climate change that implicate public health as having an effect on public health.

42 USC § 7521 states that "[t]he Administrator shall by regulation prescribe…standards applicable to the emission of any *air pollutant*, which in his judgment cause, or contribute to, air pollution which *may reasonably be anticipated to endanger public health* or welfare." (emphasis added). Three terms are particularly relevant to the current inquiry and require further investigation: "air pollutant," "may reasonably be anticipated to endanger," and "public health."

Congressed defined "air pollutant" under the CAA as "any air pollution agent including any physical, chemical, biological, radioactive substance or matter which is emitted into or otherwise enters the ambient air." 42 U.S.C.A. § 7602. The U.S. Supreme Court found that "greenhouse gases fit well within the Act's capacious definition of 'air pollutant,'" concluding that "EPA has statutory authority to regulate emission of such gases from new motor vehicles." *Massachusetts*, 549 U.S. at 500–532.

Congress intentionally adopted a precautionary approach when it amended the CAA's language to include the phrase "may reasonably be anticipated to endanger." 74 Fed. Reg. at 66,506–09. Previous to the 1977 CAA amendment, the text read "will endanger." The court in *Ethyl* noted that "case law and dictionary definition agree that endanger means something less than actual harm." *Ethyl Corp. v. EPA*, 541 F.2d 1, 13 (D.C. Cir. 1976). *Ethyl* challenged EPA

regulations of lead under the CAA. The court in *Ethyl* explained that lead enters the body from multiple sources, and a "cumulative impact approach," was appropriate to determine endangerment of public health. 541 F.2d at 31. Congress "relied heavily on the *en banc* decision in *Ethyl,"* when it amended the CAA in 1977. 74 Fed. Reg. at 66,506. Congressional endorsement of the *Ethyl* reasoning indicates that Congress intended the CAA to prevent perceived threats where the actual air pollutant itself may not be entirely responsible for the threat. The plain meaning of the text "may reasonably be anticipated to endanger" is broad in its meaning and precautionary in nature.

The U.S. Supreme Court rejected alternative definitions of "public health," instead relying on "the health of the public." *Whitman v. Am. Trucking Associations*, 531 U.S. 457, 466 (2001). Merriam-Webster defines health as "the general condition of the body," and public as "of or relating to people in general." *Health*, MERRIAM WEBSTER, https://www.merriam-webster.com/dictionary/health (last visited Nov. 11, 2020). Taken together, "public health" under the CAA means the general condition of people's bodies. Essentially public health boils down to the physical condition of people.

The operative parts of § 7521 taken together are broad enough to include indirect impacts from GHGs. § 7521 requires the Administrator to set standards for air pollutants that can threaten the physical condition of people. The best available scientific models indicate that climate change is anticipated to cause heat waves (increasing morbidity), increase in ozone exposure (damaging respiratory systems and increase morbidity), increase exposure to pathogens (causing health complications and death), and extreme weather events like flooding. 74 Fed. Reg. at 66,497; *Health Effects of Ozone in the General Population*, EPA, https://www.epa.gov/ozone-pollution-and-your-patients-health/health-effects-ozone-general-population (last visited Nov. 11,

2020); *The Hazards of Bloodborne Pathogens*, A TRAIN EDUCATION, https://www.atrainceu.com/content/1-hazards-bloodborne-pathogens (last visited Nov. 11, 2020).

The text of CAA § 7602 does not limit analysis of indirect effects and § 7521 is broad enough to include indirect effects from climate change.

B. To the extent the CAA is ambiguous, the EPA Endangerment Finding should receive *Chevron* deference.

Chevron contains a two-step analysis. *Chevron*, 467 U.S. at 843. First, Courts look to whether Congress has spoken to the issue at hand. *Id.* Second, if the statute is silent or ambiguous, Courts then consider whether the agency's interpretation is permissible. *Id.* As noted above, the CAA is clear: § 7602 does not limit § 7521 and § 7521 is broad enough to include secondary effects from climate change that endanger public health. If the CAA is not clear under *Chevron*, the Court should afford EPA's interpretation deference because it is reasonable. *Id.* at 844. In this instance, EPA has changed its position on the Endangerment Finding. As the Supreme Court noted in *National Cable & Telecommunications Association* ("*NCTA*") "[a]gency inconsistency is not a basis for declining to analyze the agency's interpretation under the *Chevron* framework." 545 U.S. 967, 981 (2005). Under *NCTA,* the court should examine which EPA position warrants *Chevron* step two analysis and then examine if EPA's position is reasonable under *Chevron*.

1. EPA's newfound position, taken for the first time in this litigation, should not receive *Chevron* deference.

In *U.S. v Mead*, the U.S. Supreme Court explained the amount of deference an agency should receive depends on the actions of that agency. 533 U.S. 218, 219 (2001). In *Mead*, the court examined tariff classifications by the U.S. Customs Service. *Id.* Where the Customs

Service did not go through notice and comment period, the tariff was not published and contained little to no reasoning the Court did not defer to the agency interpretation. *Id.*

EPA's newfound position should not receive deference under *Chevron* based on the Supreme Court's analysis in *Mead.* Similar to the Customs Service in *Mead,* the EPA's newfound position does not contain a reasoned analysis. EPA's newfound position has not gone through notice and comment period, is not published, and has no official explanation. R. at 10.

The EPA's Endangerment Finding should receive deference under *Chevron* because it went through notice and comment period, was published, relies on expertise, and is persuasive. The EPA Endangerment Finding went through rule making procedures including notice and comment period and was published in the Federal Register as a Final Rule. 74 Fed. Reg. at 66,496. In addressing the endangerment of public health, EPA relied on its expertise while analyzing scientific data from U.S. Global Climate Research Program, the Intergovernmental Panel on Climate Change, and the National Research Council. *Id.* at 66,497.

EPA's Endangerment Finding contains a thorough and persuasive analysis explaining climate change's endangerment of public health. The Endangerment Finding examined the statutory framework of the CAA, and legislative considerations such as the *Ethyl* decision. *Id.* at 66,505. The finding was grounded by the use of "public" in the statute, guiding EPA to focus on "how people are affected by the air pollution," giving weight to the "common sense meaning of the term public health." *Id.* at 66,528. The Endangerment Finding explained how indirect effects on human health by air pollutants had been examined in the past. *Id.* at 66,527–28. For example, when EPA examined exposure to ozone's effect on public health, it also considered the positive effect ozone has by blocking UV-B rays. *Id.* EPA acted similarly with climate change by examining indirect effects of an air pollutant that directly impact public health. *Id.*

2. EPA's Endangerment Finding is reasonable under *Chevron*.

Under *Motor Vehicle Mfrss Ass'n v. State Farm*, an agency position is reasonable if the agency examines relevant data and provides an explanation for its action. 463 U.S. 29 at 43. Even where agency reasoning is not clear, if it can be "discerned," courts should uphold agency action. *Id.* Agency actions are arbitrary and capricious when they rely on factors Congress did not intend for them to rely on, fail to consider an important aspect of the problem, or come to a conclusion that is implausible. *Id.*

In this instance, EPA's Endangerment Finding carefully examined data from leading scientific organizations and then explained its determination. 74 Fed. Reg. at 66,496. EPA also examined case law surrounding the CAA, alternative interpretations, and legislative history. *Id.* EPA relied on the plain meaning of the text in the CAA. *Id.* EPA avoided using any factors Congress did not intend, such as cost of implementation. 74 Fed. Reg. at 496–546. EPA's conclusion is not only plausible, but it also provides a thorough analysis of why its interpretation makes the most sense. The agency's reasoning is clear and its conclusion should be upheld.

C. EPA's Endangerment Finding is supported by case law.

Two cases in particular support EPA's Endangerment Finding. First, *Massachusetts v. EPA* challenged EPA's failure to regulate GHGs under the CAA. *Massachusetts*, 549 U.S. at 532. EPA interpreted "pollutant" to exclude GHGs under the CAA. *Id.* The U.S. Supreme Court concluded that GHGs are pollutants under the CAA. *Id.* The Court went on to explain that Congress may not have understood the link between GHGs and global warming. *Id.* However, the Court emphasized that Congress used "broad language" intentionally to give the CAA flexibility for changing times. *Id.* The Court concluded that EPA "has the statutory authority to regulate the emission of such gases [GHGs] from new motor vehicles." *Id.*

Second, *Coalition for Responsible Regulation* ("*CRR*") upheld EPA's Endangerment Finding for GHGs under public health and welfare. *Coalition for Responsible Regulation,* 684 F.3d at 121. The District Court did not follow *CRR*'s analysis, concluding that *CRR* did not touch on endangerment to public health and welfare separately. But the District Court erred in its reading of *CRR. CRR* states in part:

> EPA determined that anthropogenically induced climate change threatens *both* public health *and* public welfare. It found that extreme weather events, changes in air quality, increases in food-and water-borne pathogens, and increases in temperatures are likely to have *adverse health effects*. *Id.* at 66,497–98. The record also supports EPA's conclusion that climate change *endangers human welfare* by creating risk to food production and agriculture, forestry, energy, infrastructure, ecosystems, and wildlife. *Id.* (emphasis added).

The *CRR* court examined EPA's analysis that GHG's endanger both public health and public welfare based on separate effects and endorsed EPA's reasoning. The court anchored its ruling in the precautionary aspect of the CAA, concluding that "EPA's interpretation of the CAA was compelled by the statute." 684 F.3d at 116

These cases indicate that the CAA is broad enough to regulate GHGs to prevent endangerment of public health. *Massachusetts v EPA* explicitly acknowledges EPA's ability to regulate GHGs and the scope of the CAA. *Massachusetts*, 549 U.S. at 532. *CRR* accepts and endorses EPA's application of the CAA to both public health and welfare. *Coalition for Responsible Regulation,* 684 F.3d at 121.

The New Union District Court erred in its analysis and should be overruled for three reasons. First, the text of §7601 does not prohibit considering indirect effects of GHGs when evaluating endangerment of public health. The text of §7521 is broad enough to include indirect effects of GHGs that endanger public health. Second, to the extent the CAA is ambiguous the

court should give deference to EPA's Endangerment Finding under *Mead.* Third, case law supports allowing EPA to prevent endangerment of public health under the CAA.

IV. EPA's ten-year delay on listing GHGs as criteria pollutants was unreasonable.

This court should uphold the District Court's determination that EPA unreasonably delayed by not responding to CHAWN's Section 108 Petition and not designating GHGs as a criteria pollutant. This court should also enforce the District Court's order that EPA publish notice of a proposed rule designating GHGs as a criteria pollutant and publish a final rule designating GHGs as criteria pollutants.

Under CAA section 304, District Courts are authorized to "compel agency action…unreasonably delayed." 42 U.S.C. § 7604(a). Courts assess unreasonable delay by weighing six factors: (1) agency action "must be governed by a rule of reason;" (2) this rule of reason may be informed by a timetable or other expectation of timeliness within the enabling statute; (3) "delays…reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake;" (4) "the effect of expediting delayed action on agency activities of a higher or competing priority;" (5) "the nature and extent of the interests prejudiced by delay;" and (6) "impropriety" need not be found on the part of the agency. *Telecomm. Research & Action Ctr. v. F.C.C.*, 750 F.2d 70 (D.C. Cir. 1984) *("TRAC")*.

A. EPA's delay is not governed by a rule of reason.

The first and most important *TRAC* factor provides that a "rule of reason" must govern the time agencies take to make decisions. 750 F.2d at 80; *In Re Core Commc'ns, Inc.*, 531 F.3d 849, 855–857 (D.C. Cir. 2008). Absent a rule of reason, "excessive delay saps the public confidence in an agency's ability to discharge its responsibilities and creates uncertainty for parties." *Potomac Electric Power Co. v. ICC*, 702 F.2d 1026, 1034 (D.C.Cir.1983).

In *MCI Telecommunications Corp. v. FCC*, the D.C. Circuit held that the rule of reason governing the 1934 Communications Act assumed that the reasonable time within which rates would be finally decided was on the order of "months, occasionally a year or two, but never several years or a decade." 627 F.2d 322, 340 (holding FCC's four-year delay in determining a just and reasonable tariff was unreasonable). Courts have uniformly held delays of eight to ten years to be unreasonable, and label delays of six years or more as "egregious." *See, e.g., In Re Core Commc'ns, Inc.*, 531 F.3d 849 (D.C. Cir. 2008); *In re A Cmty. Voice v. EPA*, 878 F.3d 779 (9th Cir. 2017) (emphasis added).

In the instant case, EPA has delayed action on CHAWN's petition for ten years. EPA argues this delay satisfies the rule of reason because regulation of GHGs as criteria pollutants would require the resolution of thorny science and policy issues. Specifically, EPA is concerned with determining the correct GHG NAAQS and the appropriate response to states unable to comply with implementation plans. This could not be further from the truth. EPA had no such issue determining the correct NAAQS for lead even though states unable to comply with implementation plans faced direct EPA regulation of emissions and the loss of federal highway funding. This delay undermines public confidence in EPA's ability to ensure public health and welfare. It also creates uncertainty for private and public parties, such as car manufacturers and states, that must comply with the CAA or face stiff penalties. EPA's delay goes beyond simply lacking rule of reason, it is an egregious stall tactic.

B. The CAA prompts proactive, not dilatory, action by EPA.

The second *TRAC* factor provides that the "statutory scheme may supply content for this rule of reason" when "Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed." 750 F.2d at 80. In other words, "[t]he reasonableness of

the delay must be judged in the context of the statute which authorizes the agency's action.'' *Public Citizen Health Rsch Group v. Auchter*, 702 F.2d 1150, 1158 n. 30 (D.C.Cir.1983). In *Auchter*, the D.C. Circuit determined that a six-year delay by the Occupational Health and Safety Health Administration ("OSHA") in creating a workplace exposure standard for a toxic chemical was unreasonable in the context of the Act. 702 F.2d at 1158. The Court emphasized that the purpose of OSHA is to provide safe and healthful working conditions. *Id.* Similarly, the purpose 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. EPA's delay to list pollutants that it determined can harm human health and welfare is contrary to the purpose of the CAA and frustrates Congressional intent. Further, as explained in Part III, Congress intentionally adopted a precautionary and preventative approach with the 1977 CAA amendments. Thus, within the context of the statute, action by EPA should be proactive, not dilatory.

C. EPA itself determined human health and welfare are at stake.

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." 750 F.2d at 80. In *Auchter*, the D.C. Circuit held that three-year delay by OSHA was simply too long given the risk of danger the pesticide posed to workers and their offspring, regardless of resulting economic consequences. 702 F.2d at 1157. In *In re A Community Voice*, the Ninth Circuit held that eight-year delay by EPA on a rulemaking petition for lead in home environments was unreasonable when there was "a clear threat to human welfare" that EPA itself had acknowledged. 878 F.3d 779, 787. In the case at hand, GHG emissions, which EPA declared a threat to human health and welfare over a decade ago, pose an existential threat to current and future generations of Americans. EPA raises economic considerations concerning the resolution of policy issues as an

excuse for delay. While this might suffice as an excuse in the world of pure economics, the human health and welfare risks in this case tip the scale in CHAWN's favor. Agencies must move "expeditiously" when public health might be at stake. *Public Citizen Health Rsch. Grp. v. FDA*, 740 F.2d 21, 34 (D.C. Cir. 1984). Ten years have passed and EPA still has not moved to address the existential threat of GHG emissions. A ten-year delay is far from expeditious.

D. Effects on other priorities are dwarfed by risks to human health and welfare.

The fourth *TRAC* factor provides "the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority." 750 F.2d at 80. The Ninth Circuit has held that an eight-year delay by EPA in the face of risks to human health and welfare are unreasonable regardless of competing priorities. *See, e.g*. *In re A Community Voice*, 878 F.3d at 787 (eight years was an unreasonable delay for EPA to act on a rulemaking petition regarding lead in home environments even assuming EPA had numerous competing priorities); *see also In re Pesticide Action Network*, 798 F.3d 809 at 814 (six-year delay by EPA regarding a petition to ban a pesticide was reasonable due to the "complexity of the issue" and the presence of competing priorities, but did not justify agency delay after eight years).

In the case at hand, EPA alleges that a requirement to act on the GHG criteria pollutant question would interfere with agency activities of a higher priority than the regulation of GHGs, principally the Executive Order establishing the reduction of regulatory burdens on business and economic activity as the highest priority. Exec. Order No. 13,771, Reducing Regulation and Controlling Regulatory Costs, 82 Fed. Reg. 9339. R at 12. EPA's rationale is not persuasive because EPA delayed for seven years before the 2017 Executive Order existed. Additionally, while the Executive Order asks the EPA to reduce burdens on business and the economy the EPA cannot ignore its charge to ensure human health and welfare. EPA asks this court to excuse

its delay by weighing the reduction of regulatory burdens on business and economic activity as greater than protecting public health and safety through the regulation of GHGs. The Ninth Circuit confronted similar arguments where regulating pesticides and lead conflicted with higher priority instructions. In those instances, courts ruled against EPA based on concern for public health. Ultimately EPA navigated the complex situation improving the health and welfare of Americans without destroying the automobile and pesticide industry. This court should follow the Ninth Circuit's rationale which prioritizes human health and instructs EPA to navigate complicated regulatory circumstances like it did with lead and pesticides.

E. The interests prejudiced by delay are monumental, if not existential.

The fifth *TRAC* factor provides that "the court should also take into account the nature and extent of the interests prejudiced by delay." 750 F.2d at 80. One example is, *In Re Core Commc'ns, Inc.*, where the Ninth Circuit held that the plaintiff was prejudiced by lower rates of compensation as compared to other carriers resulting from EPA's seven-year delay. 531 F.3d 849, 857 (D.C. Cir. 2008). But, in *Public Citizen Health Rsch Group v. FDA*, the D.C. Circuit stressed the grave responsibility that the District Court had to ensure agency action did not "jeopardize the lives of hundreds of children" at risk from inadequate warning labels on aspirin products. 740 F.2d at 35.

The nature and extent of the interests prejudiced by delay in this case are monumental. The basis is not purely economic as in *In Re Core Commc'ns*, although private parties and states do suffer the negative economic results of regulatory uncertainty in the face of EPA delay. Rather, this delay prejudices the interests of human health and welfare on an order of magnitude completely eclipsing those at risk in *Public Citizen Health Rsch Group v. FDA*. As of 2009, 300,000 people per year had died as a result of climate induced droughts and heat waves, severe

weather events, and other disruptions. CENTER FOR BIOLOGICAL DIVERSITY & 350.ORG, PETITION TO ESTABLISH NATIONAL POLLUTION LIMITS FOR GREENHOUSE GASES PURSUANT TO THE CLEAN AIR ACT 2 (2009). Further, the EPA determined that children, the elderly, and the poor were the most vulnerable groups for risks to human health. Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496, 66,498 (Dec. 15, 2009) (to be codified at 40 C.F.R. Ch. I). EPA also determined that risks to food production, agriculture, forestry, water resources, sea level rise, energy, infrastructure, settlements, ecosystems, and wildlife posed risks to public welfare. *Id.* The risks that EPA's delay pose to human health and welfare are monumental, bordering on existential, and profoundly tip the scale in CHAWN's favor.

F. EPA impropriety is not needed, but is likely present.

The last *TRAC* factor provides that "the court need not find any impropriety lurking behind agency lassitude." 750 F.2d at 80. This factor lowers the bar for unreasonable delay claims, stating an agency need not act improperly for delay to be unreasonable. For instance, in *In re Pesticide Action Network*, the Ninth Circuit held that an EPA delay was unreasonable even though it was proper. 798 F.3d at 814. The Court highlighted that EPA had "a significant history of missing…deadlines it has set" and that EPA's "timetable representations have suffered…from a persistent excess of optimism." *Id.* In this instance EPA's actions go beyond simply missing deadlines it has set; EPA has ignored CHAWN's petition for more than a decade. EPA's actions are at best negligent, and verge on impropriety. Inquiry is necessary concerning impropriety.

V. The Endangerment Finding triggered a non-discretionary duty to list.

This court should affirm the District Court's holding that EPA has a non-discretionary duty to designate GHGs as criteria pollutants. EPA has a non-discretionary duty to list any

pollutant it determines meets the criteria outlined under CAA section 108(a)(1)(A) and (B). *Zook v. McCarthy*, 52 F.Supp.3d 69, 73 (2014). This non-discretionary duty to list is not unique to CAA section 108(a)(1). EPA also has a non-discretionary duty to list substances found to be hazardous air pollutants under CAA section 112(b)(1)(A). *See Natural Res. Def. Council v. Thomas*, 689 F.Supp. 246, 252 (S.D.N.Y. 1988). EPA's non-discretionary duty to list GHGs as criteria pollutants under CAA section 108 is illustrated by the CAA's plain text, structure, and legislative history.

A. The plain text of CAA section 108(a)(1) imparts a mandatory duty.

CAA section 108(a)(1) states:

> For the purpose of establishing national primary and secondary ambient air quality standards [national pollution caps] the Administrator *shall* within 30 days after December 31, 1970, publish, and *shall* from time to time thereafter revise, a list which includes each air pollutant –
>
> (A) emissions of which, in his judgment, cause or contribute to air pollution which *may reasonably be anticipated to endanger public health or welfare*;
>
> (B) the presence of which in the ambient air results from *numerous* or diverse *mobile* or stationary *sources*; and
>
> (C) for which air quality criteria had not been issued before December 31, 1970, but for which he plans to issue air quality criteria under this section. 42 U.S.C. § 7408(a)(1) (emphasis added).

CAA section 108(a)(1) provides that the Administrator "shall…publish…a list." This mandatory language imposes on the Administrator the non-discretionary duty to publish a list of air pollutants that meet certain criteria. *Natural Resources Defense Council v. Train*, 545 F.2d 320, 324 (2d Cir. 1976). The first criterion requires that emission of the air pollutant "may reasonably be anticipated to endanger the public health or welfare." 42 U.S.C. § 7408(a)(1)(a). EPA's 2009 Endangerment Finding determined that GHGs are reasonably anticipated to

endanger both public health and welfare. Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496, 66,496 (Dec. 15, 2009) (to be codified at 40 C.F.R. Ch. I). The second criterion requires that the presence of the pollutant in the ambient air results from "numerous or diverse mobile or stationary sources." 42 U.S.C. § 7408(a)(1)(b). The Endangerment Finding also determined that GHGs are emitted by mobile sources in the form of automobiles, which are numerous mobile sources. 74 Fed. Reg. at 66,537. Thus, the first two criteria have been satisfied.

The interpretation of the third criterion is at issue in this case. EPA alleges this criterion imparts discretion to the Administrator in the phrase "but for which he plans to issue air quality criteria under this section." R. at 13. However, the Second, Seventh, and D.C. Circuit Court of Appeals have already rejected this argument. *See e.g. Train*, 545 F.2d at 320; *see also Indiana & Michigan Electric Co.*, 509 F.2d at 841; *see also Kennecott Copper Corp.*, 462 F.2d at 857. While these decisions are not binding on this court, the Twelfth Circuit should adopt this position and affirm the decision of the District Court of New Union. R. at 13. Reading discretion into the third criterion would conflict with the earlier mandatory language of CAA section 108(a)(1) and render the opening paragraph "mere surplusage." *Train*, 545 F.2d at 325.

B. A discretionary duty would run counter to the structure of the CAA.

EPA's interpretation of the third criterion defies not only the CAA section 108(a)(1), but the CAA as a whole. The CAA imposes rigid deadlines for attaining air quality standards in sections 108–100. *Train*, 545 F.2d at 325. When a criteria pollutant is listed under section 108, EPA must propose both primary and secondary NAAQS for the pollutant within twelve months of listing. R. at 8; 42 U.S.C. §§ 7408(b), 7409(a)(2). EPA must then propose final NAAQS within 90 days. *Id.* Following EPA promulgation of primary NAAQS, each state has ten years to

submit an implementation plan demonstrating how compliance with the primary NAAQS concentrations will be achieved. R. at 8; 42 U.S.C. § 7502(a)(2)(A). States that fail to submit a satisfactory plan, or fail to meet compliance deadlines face direct EPA regulation of emissions, and loss of federal highway funding. *see* 42 U.S.C. § 7410(c)(1); 42 U.S.C. §7509(a), (b)(1).

If the decision to list a criteria pollutant were discretionary, then EPA could bypass CAA sections 108–100. *Train,* 545 F.2d at 325. Accordingly, establishment of this detailed timetable for the attainment of ambient air quality standards would have been "an exercise in futility." *Id.* at 327. Further, the Administrator cannot rely on the use of other CAA sections to justify discretion under section 108. For instance, Congress enacted CAA section 211 as a supplement to sections 108–110 rather than an alternative. *Id.* at 325. There is no fixed timetable for implementation within CAA section 211. *Id.* at 325. Without a fixed timetable for implementation, section 211 must be interpreted as a means of attaining primary air quality standards in concert with CAA sections 108–110 rather than in lieu of those sections. *Id.* at 325.

C. The legislative history of CAA demonstrates EPA's non-discretionary duty.

Under CAA section 304(a)(2), "any person may commence a civil action…against the [EPA] Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is *not discretionary* with the Administrator." *Sierra Club v. Thomas*, 828 F.2d 783, 787 (D.C. Cir. 1987) (emphasis added). The EPA alleges that listing pollutants under section 108 is a discretionary function, making action under the citizen suit provision improper. *Id.* at 866. However, the *Train* court held that jurisdiction was proper because section 304 allowed for determinations of whether a function was mandatory or discretionary. *Id.* at 866. The Second Circuit Court of Appeals later affirmed the lower court's decision without any issues of jurisdiction. *Train*, 545 F.2d at 320.

Similar to *Train*, CHAWN has brought action against EPA under CAA section 304 for failure to list GHGs as a pollutant under section 108. R. at 3. In this case, EPA alleges that new developments in case law since *Train* provide that there must be a statutory deadline in place for a statutory duty to be non-discretionary under section 304(a)(2). R. at 11. *See Thomas*, 828 F.2d at 790. The District Court determined that the legislative history of the CAA 1990 amendments specified they needed to determine not just whether EPA has unreasonably delayed action, but whether EPA is subject to the underlying non-discretionary duty. *See* S. REP. NO. 101-228, at *3758 (1990) (". . . the court in those cases where plaintiff prevails should also go on to define the scope of EPA's duty and specify the particular actions EPA must take to fulfill that duty within the court-imposed deadline.") R. at 13. This provides an alternate and valid procedure for determining agency discretion. Further, it is settled that once EPA makes a policy determination as to a pollutant—such as the 2009 Endangerment Finding for GHGs—EPA has a nondiscretionary duty to list under section 108(a)(1). *Zook*, 52 F.Supp.3d 69, 74 (2014).

CONCLUSION

For the foregoing reasons, CHAWN requests that this Court affirm the lower court's holding that provisions of 307(b) are non-jurisdictional venue requirements. CHAWN also requests that this Court affirm the lower court's decision concerning EPA's Endangerment Finding for public welfare and reverse the lower court's decision concerning EPA's Endangerment Finding for public health. Lastly, CHAWN requests this court affirm the lower court's decision that EPA unreasonably delayed action and that the EPA has a non-discretionary duty to designate GHGs as a criteria pollutant.