Team No. 25

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C.A. No. 20-000123

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IN THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

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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.

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

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

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Oral Argument Requested

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STATEMENT OF JURISDICTION

This case involves an appeal from the District Court for the District of New Union. Record (R.) at 1. The District Court properly exercised jurisdiction over the unreasonable delay claim, brought as a citizen suit claim arising under Clean Air Act (CAA) § 304(a)(3); 42 U.S.C. § 7604(a)(3) (2018). However, the District Court improperly asserted jurisdiction over the challenge to the Endangerment Finding because jurisdiction over substantive challenges to EPA actions rests solely in the federal circuit courts. 42 U.S.C. § 7607(b)(1). This Court also does not have jurisdiction to reconsider the merits of the Endangerment Finding because the defendant-intervenor did not bring its challenge in a timely manner. *Id.* This Court does have jurisdiction over this case because it is an appeal from a final decision in a district court of the United States. 28 U.S.C. § 1291 (2020). The notice of appeal was filed in a timely manner. Fed. R. App. P. 4(a).

STATEMENT OF THE ISSUES

I. Did the District Court have jurisdiction over the unreasonable delay claim brought under CAA § 304(a) where the rule sought would be a rule of nationwide applicability subject to review exclusively in the D.C. Circuit under CAA § 307(b)?

II. Does this Court have jurisdiction over the substantive challenge to the 2009 Endangerment Finding arising under CAA § 307(b)(1)?

III. Is the EPA's 2009 Endangerment Finding valid regarding endangerment of public welfare?

IV. Is the 2009 Endangerment Finding valid regarding endangerment of public health?

V. Does the EPA's ten-year delay in listing GHGs as a criteria pollutant under CAA § 108(a) constitute an unreasonable delay?

VI. 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

I. Factual Background

The Clean Air Act is a comprehensive statutory scheme enacted to regulate dangerous airborne pollutants that threaten the health and welfare of the American people. R. at 6. The Environmental Protection Agency (EPA) is responsible for deciding which pollutants pose an immediate danger to public health and welfare. *Id.* Upon determining that a certain pollutant imperils the public, the EPA promulgates this determination by publishing an endangerment finding. *Id.* Because the Act is centrally concerned with limiting harmful atmospheric concentrations of dangerous airborne pollutants, an endangerment finding necessitates subsequent regulation of those pollutants which the EPA formally declared to be dangerous. *See* David R. Wooley & Elizabeth M. Morss, *Introduction* to *The Clean Air Act Handbook* § 1:1 (2020).

A critical piece of such subsequent regulation is Section 108 of the Act, which tasks the EPA with regulating dangerous pollutants—referred to as "criteria pollutants"—under the National Ambient Air Quality Standards (NAAQS) program. R. at 6. The NAAQS program requires the EPA to establish two types of regulatory standards for criteria pollutants: primary NAAQS, which seek to control criteria pollutants that endanger public health, and secondary NAAQS, which address pollutants that endanger public welfare. *Id.*

The current controversy began in 1999, when various environmental groups petitioned the EPA to make a finding that high concentrations of greenhouse gases (GHGs) endanger public health and welfare under the Act. *Id.* The EPA resisted this petition, asserting that it was not authorized to make an endangerment finding regarding GHGs because such a decision—which could have broad economic implications—should be made by Congress. *Id.* In 2007, the Supreme Court directly disagreed with the EPA by holding that GHGs are precisely the type of dangerous pollutants that the agency should consider. *Id.*

Consequently, the EPA considered the issue and issued an endangerment finding in 2009 (Endangerment Finding), classifying a group of six GHGs as a single air pollutant that endangers public health and welfare. *Id.* at 6–7. The agency cited numerous scientific reasons supporting the Endangerment Finding, such as a rise in atmospheric-heat and heat-related deaths, expansive property damage and negative economic impact, and a surge of insect-borne diseases. *Id.* at 7. The Endangerment Finding did face legal challenges, but both the D.C. Circuit and the U.S. Supreme Court upheld its validity in 2012 and 2014 respectively. *Id.* The current administration, beginning in 2017, did alter some regulations based upon the Endangerment Finding, but has not attempted to formally rescind or alter the finding. *Id.*

Directly after the EPA issued the Endangerment Finding, a group of organizations and individuals—including the Appellee, Climate Health and Welfare Now (CHAWN)—petitioned the EPA to fulfill its mandatory duty, per the Act, to list GHGs as a criteria pollutant and issue regulatory NAAQS. *Id.* at 5. The EPA ignored the petition; to date, it has not responded to the petitioners nor established a timetable for listing. *Id.* Accordingly, in 2019, CHAWN served the EPA with notice of its intent to file a citizen suit, asserting that the agency had unreasonably delayed in fulfilling its statutory responsibility to list GHGs as a criteria pollutant, and seeking enforcement of this non-discretionary duty. *Id.* Again, the EPA ignored this notice and, approximately six and half months later, CHAWN filed the current lawsuit in the District Court for the District of New Union (District Court). *Id.*

II. Procedural History

CHAWN asserts both that the EPA must fulfill its mandatory duty to list GHGs as a criteria pollutant and that the agency's delay of ten years is per se unreasonable. *Id.* at 5. The Coal, Oil, and Gas Association (COGA)—an organization advancing the interests of the fossil fuel industry—intervened in the suit, asserting that the EPA does not have a nondiscretionary duty to

list and that the Endangerment Finding itself is contrary to law. *Id.* The EPA also argues that its duty to list dangerous pollutants as criteria pollutants is discretionary, and that its delay of ten years is reasonable. *Id.* The EPA also advances a new and novel position regarding the Endangerment Finding, stating that it is valid in finding that GHGs endanger public welfare but invalid regarding endangerment to public health. *Id.*

The EPA and COGA both answered CHAWN's complaint without objecting to venue. *Id.* CHAWN and COGA both filed motions for summary judgment. *Id.* at 5. The District Court granted CHAWN's motion in part, holding that the finding of endangerment to public welfare is valid, that the Act subjects the EPA to a mandatory duty to list dangerous pollutants as criteria pollutants, and that the agency has unreasonably delayed in doing so. *Id.* at 13–14. The District Court wrongfully granted COGA's motion in part, engaging in a substantive review of the Endangerment Finding and holding that the finding of endangerment regarding public health was contrary to congressional intent and therefore invalid. *Id.* All parties timely filed a notice of appeal with this Court. *Id.* at 2.

SUMMARY OF THE ARGUMENT

Not only is the EPA's failure to list GHGs contrary to law, it also poses a grave threat to human life and the environment—as the agency itself declared in the Endangerment Finding. This Court should affirm that the Endangerment Finding is valid with respect to endangerment to public welfare; that the EPA has a nondiscretionary duty to designate GHGs as a criteria air pollutant; and that the EPA has unreasonably delayed doing so. This Court should reverse the District Court's holding that the portion of the Endangerment Finding pertaining to public health is contrary to law. We address the issues in the order presented by this Court.

First, the District Court correctly exercised jurisdiction over the unreasonable delay claim. Section 304 of the Act allows citizens to bring unreasonable delay claims in district courts, so long

as such claims are filed in accordance with Section 307(b)(1), which contains a provision stating that suits of nationwide effect should be filed within the D.C. Circuit. However, this provision is uniformly considered a venue-setting provision, rather than a jurisdictional one. *E.g. Texas v. EPA*, 829 F.3d 405, 418 (5th Cir. 2016). Venue requirements are waived when all defendants choose not to object; therefore, because both COGA and the EPA chose not to object to the choice of venue, it was proper for the District Court to hear the case.

Second, this Court does not have jurisdiction to reconsider the validity of the Endangerment Finding and neither did the District Court. Section 307(b)(1) of the Act stipulates that any challenges to EPA actions, such as the Endangerment Finding, must be brought within sixty days of the finding's promulgation. The Act does allow one exception to this filing deadline, for grounds that arose after the sixty-day window; however, COGA has not asserted a ground sufficient to justify rehashing the Endangerment Finding's merits. Because COGA failed to bring its challenge within sixty days of approval of the Endangerment Finding and because its claims are substantially based upon that Endangerment Finding—rather than solely on grounds arising after such sixty days—COGA's challenge to the Endangerment Finding should not be heard. Additionally, even if COGA had met the statutory requirements for judicial review of the Endangerment Finding, the District Court did not have jurisdiction to review COGA's challenge to the finding because Section 307(b)(1) vests jurisdiction over such challenges solely in the circuit courts. *Dalton Trucking v. EPA*, 808 F.3d 875, 879 (D.C. Cir. 2015). Accordingly, this Court should give no deference to the District Court's conclusion that the Endangerment Finding regarding public health is contrary to law.

Third, the 2009 Endangerment Finding is valid with respect to an endangerment of public welfare. As the D.C. Circuit has already ruled, the EPA made a rational determination based on

the record before it when making the 2009 Endangerment Finding. *Coal. for Responsible Regul., Inc. v. EPA*, 684 F.3d 102 (D.C. Cir. 2012), *aff'd in part, rev'd in part sub nom. Util. Air Regul. Grp. v. EPA*, 573 U.S. 302 (2014). An Endangerment Finding is a purely scientific judgment and the EPA may not consider absurd results or policy impacts of any potential finding. *Massachusetts v. EPA*, 549 U.S. 497, 501 (2007).

Fourth, the Endangerment Finding is valid with respect to an endangerment of public health because the EPA's interpretation of the Act, as embedded in the 2009 Endangerment Finding, must receive *Chevron* deference. Although the District Court correctly used the two-pronged *Chevron* test, its analysis under the first prong was incorrect. The plain language and structure of the Act do not support the co-respondents' contention that Congress spoke to the precise question of whether indirect health hazards flowing from climate change may be included as endangerment to public health but not public welfare. As such, the EPA's interpretation of the statute regarding the issue must receive deference. Although the EPA has now—for the first time in this litigation—suddenly changed its interpretation, it has not gone through the proper rulemaking procedures and has not offered a sufficiently reasonable explanation for its decision to reverse course. As such, this new interpretation may not receive deference.

Fifth, the EPA's ten-year delay in listing GHGs as a criteria air pollutant constitutes an unreasonable delay. In determining whether an agency has unreasonable delayed action, courts generally apply the six-factor test from *Telecommunications Research & Action Center v. FCC (TRAC)*, 750 F.2d 70, 80 (D.C. Cir. 1984). Because the EPA has delayed action for over ten years, endangering human health and welfare and causing irreversible harm to people and property, the test points firmly to a finding of unreasonable delay. The EPA's suggestion that Executive Order 13771 (EO) prevents it from listing GHGs is not supported by the EO itself. Nothing in the EO

prevents an agency from fulfilling its mandatory duties, such as the EPA's duty following the 2009 Endangerment Finding, to list GHGs as a criteria air pollutant.

Finally, the EPA's duty to list GHGs as a criteria air pollutant is indeed a mandatory one, as is made clear by the language of Section 108, congressional intent, and long-standing legal precedent. If the EPA were to maintain discretion in choosing whether or not to list pollutants that nonetheless met the criteria under Section 108(a)(1), that section's mandatory language, as exhibited by its repeated use of "shall," would constitute mere surplusage. *See Nat'l Res. Def. Council v. Train*, 545 F.2d 320 (2d Cir. 1976). As *Train* made clear, such a reading also runs directly counter to Congressional intent, and "would vitiate the public policy underlying the enactment of the 1970 Amendments." *Id.* at 324.

STANDARD OF REVIEW

Circuit Courts review a district court's grant of a motion for summary judgment de novo. *Arakaki v. Hawaii*, 314 F.3d 1091, 1094 (9th Cir. 2002).

ARGUMENT

I. THE DISTRICT COURT HAD JURISDICTION OVER THE UNREASONABLE DELAY CLAIM BECAUSE IT IS WELL-SETTLED THAT SECTION 307(B)(1) IS A VENUE-SETTING PROVISION AND THE DEFENDANTS WAIVED ANY OBJECTION TO IMPROPER VENUE BY NOT RAISING IT BEFORE THE DISTRICT COURT.

Citizen suits asserting that the EPA has unreasonably delayed in taking specific nondiscretionary actions may only be filed in a district court where such nondiscretionary actions are reviewable under Section 307(b)(1) of the Act. CAA § 304(a)(3). This section establishes that challenges to "nationally applicable" EPA actions or rules "may only be filed" with the U.S. Court of Appeals for the District of Columbia, whereas challenges to locally- or regionally-applicable EPA actions or rules should be filed within the appropriate local circuit. *Id.* § 307(b)(1). This specific provision within Section 307(b)(1) is uniformly considered to be a venue-setting provision, not jurisdictional. As discussed below, courts have held that the provision establishes

venue because its legislative history, specific language, and common sense heavily support such an interpretation. Because the defendants did not object to improper venue before the District Court, they waived this objection and the District Court's subsequent adjudication of the unreasonable delay claim was proper. R. at 5.

A. The requirement that challenges to nationally applicable EPA actions should be filed within the D.C. Circuit is best read as a venue requirement because of the statute's legislative history, the specific language it employs, and common sense.

The citizen suit provision of the Act allows private citizens to request that district courts compel the EPA to take action in two related yet different situations: when the agency has not performed a statutory, nondiscretionary duty or when it unreasonably delayed performing such a duty. CAA § 304(a)(2–3). While district courts have jurisdiction over both claims, unreasonable delay challenges have a unique venue requirement in that challenges seeking to compel these actions "may only be filed in a United States District Court within the circuit in which such action would be reviewable" under Section 307(b). *Id.* Section 307(b)(1), in turn, states that challenges to nationally applicable actions "may be filed only" with the Court of Appeals for the District of Columbia, whereas challenges to locally- or regionally-applicable actions "may be filed only" with the Court of Appeals of the appropriate circuit for that locality or region. *Id.* § 307(b)(1).

Section 307(b)(1) has necessitated substantial judicial interpretation because it establishes both jurisdictional and venue requirements. On a basic level, it is a jurisdictional statute that grants federal circuit courts—not district courts—sole jurisdiction over substantive challenges to official EPA actions and rules. *Id.* § 307(b)(1–2) (stating that challenges to many enumerated actions, or rules, including challenges to all "final" agency actions, should be raised before circuit courts); *Harrison v. PPG Indus.*, 446 U.S. 578, 593 (1980) (describing Section 307(b) as a logical "conferral of jurisdiction upon the courts of appeals" and not upon district courts). Additionally, there is a decidedly jurisdictional provision within Section 307(b)(1) ordering that challenges to

final EPA actions or rules must be brought within 60 days of when such rule or action was posted in the Federal Register. *Tex. Mun. Power Agency v. EPA*, 89 F.3d 858, 867 (D.C. Cir. 1996) (per curiam) (stating that this 60-day filing provision is "clearly jurisdictional").

However, Section 307(b)(1)'s provision stating that challenges to rules of nationwide applicability "may be filed only" in the D.C. Circuit is widely considered a venue-setting provision, rather than jurisdictional. *New York v. EPA*, 133 F.3d 987, 990 (7th Cir. 1998) (Posner, C.J., unanimous opinion) (stating that [p]rovisions, such as Section 307(b)(1), which establish where a suit should be filed, rather than what type of court may hear it, typically establish venue rather than jurisdiction); *Dalton Trucking*, 808 F.3d at 879 (explaining that Section 307(b)(1) confers subject-matter jurisdiction upon the circuit courts while simultaneously establishing venue and that "subject matter jurisdiction and venue are not coterminous."); *Texas v. EPA*, 829 F.3d 405, 418 (5th Cir. 2016) (holding that § 307(b)(1) is a "two-fold provision" that confers jurisdiction upon circuit courts and delineates the appropriate venue for challenges). While Section 307(b)(1)'s wording can be confusing upon first reading, this provision within Section 307(b)(1) is best read as a venue requirement. *See Nat'l Wildlife Fed'n v. Browner*, 237 F.3d 670, 673–74 (D.C. Cir. 2001) (describing the statutory analysis undertaken by the court in *Texas Municipal Power Agency* as "difficult" because of the "jurisdictional language" used within Section 307(b)(1), yet affirming that the provision specifies venue). Every circuit court to consider this provision has concluded that it is a venue requirement for three central reasons: the legislative intent behind the provision, the specific language used in the statute, and a common-sense, definitional understanding of the terms "jurisdiction" and "venue."

First, Congress intended Section 307(b)(1) to be a venue-setting provision rather than jurisdictional—the provision was unequivocally characterized "in the legislative history as a venue

provision." *Tex. Mun. Power Agency*, 89 F.3d at 867 (quoting H.R. Rep. No. 95-294, 1st Sess. 323–24 (1977)). This legislative history described the 1977 amendments to Section 307(b)(1) as "venue proposals" and stated that the amendments were designed to clarify "some questions relating to venue," as set forth in the provision. *See PPG Indus. v. Harrison*, 587 F.2d 237, 243 n.6 (5th Cir. 1979) (providing in full the relevant text of H.R. Rep. No. 95-294, 1st Sess. 323–24 (1977)); *see also Harrison*, 446 U.S. at 590–91.

Second, courts have placed heavy emphasis upon the language used in Section 307(b)(1), noting that the statute focuses on where parties may "file" rather than which courts have jurisdictional authority. *Tex. Mun. Power Agency*, 89 F.3d at 867; *New York*, 133 F.3d at 990; *Dalton Trucking*, 808 F.3d at 879 (stating that § 307(b)(1) is a venue provision because of "its terms and legislative history"). The very framework of the provision—directing parties to file claims with particular circuits—indicates that the provision is concerned with delineating where petitioners should file challenges rather than limiting a circuit's power to hear a controversy. *Texas*, 829 F.3d at 318 ("The statute is not framed as a limitation on the power of the courts but as an instruction to petitioner"); *Nat'l Wildlife Fed'n*, 237 F.3d at 673. The provision's structure and specific wording illustrate that it was written for litigants, not courts; accordingly, it is best understood as a venue-requirement. *Tex. Mun. Power Agency*, 89 F.3d at 867.

Third, as Chief Judge Posner argued, the definitional differences between "jurisdiction" and "venue" show that the common-sense understanding of this provision is that it establishes venue rather than jurisdiction. *New York*, 133 F.3d at 990. The Chief Judge defined "jurisdiction" as descriptive of a court's power: a court simply does not have authority to pass judgment on a case if it lacks jurisdiction. *Id.*; *see also Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006) (clarifying that subject-matter jurisdiction is the presence of statutory or constitutional authority

to consider a case). Jurisdictional issues occur when one *type* of court does not have authority to judge a specific type of case because neither the Constitution nor Congress has given it authority to hear that type of case. *New York*, 133 F.3d at 990. Importantly, Section 307(b)(1) does not seek to limit the actual authority given to individual circuit courts—it gives them full power to review substantive challenges to EPA actions and rules. *Id.* Instead, the provision delineates venue based upon the *effects* of an EPA action (national effect vs. local effect), rather than upon a circuit court's actual ability to consider such an action. *Id.* By not limiting the power of certain circuit courts to judge challenges brought against EPA actions, and instead steering a subset of these challenges to the D.C. Circuit, this provision within Section 307(b)(1) logically operates as a venue requirement. *Id.*

Because this point is somewhat abstract, consider this metaphor. A grocery store has two different check-out lanes, one for customers with ten items or fewer and the other for customers with more than ten items. Both lanes are staffed by equally qualified cashiers authorized to ring up customers. If a customer with twelve items decides to go through the ten-item-or-less lane, this violation of lane rules would not, on its own, prevent the cashier from selling groceries to the conniving customer because the rule is predicated upon efficiency for customers rather than upon each cashier's authority to sell groceries. Likewise, Section 307(b)(1) gives all circuit courts equal authority to consider the legality of EPA actions and rules, but then directs certain challenges to specific circuits—to specific lanes. The nationally applicable provision's delineation of venue is also predicated upon efficiency: the D.C. Circuit's familiarity with administrative law and small geographic area of jurisdiction enable it to more efficiently review nationally applicable EPA actions. However, if both parties choose to litigate nationally applicable EPA actions in a less-efficient circuit, that less-efficient circuit has jurisdiction to consider the case and render judgment.

Such an action would not be "usurpative" of another court's authority because each circuit court has equal statutory authority; accordingly, this error only implicates venue. *New York*, 133 F.3d at 990.

If a suit is filed in the wrong venue but all defendants choose not to object to the improper venue, the objection is waived and it is proper for that venue to consider the case or controversy. Fed. R. Civ. P. 12(h)(1); *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 168 (1939) (stating that an objection to venue is a "privilege" which "may be lost" by a "failure to assert it seasonably"). When considering whether an objection to improper venue can be waived in cases where a substantive challenge to an EPA action or rule is filed in the wrong circuit, courts have consistently affirmed that it can. *Dalton Trucking*, 808 F.3d at 879 ("a party's failure to object to venue may waive the issue"); *Tex. Mun. Power Agency*, 89 F.3d at 867 ("Section 307(b)(1) is a venue provision, the application of which can be waived."); *New York*, 133 F.3d at 990 (stating that, even if venue were improper, it would not be "usurpative" for one circuit court to assert jurisdiction over a CAA challenge in the absence of an objection).

B. The Defendants waived their objection to improper venue by not raising it before the District Court.

Here, because Defendants COGA and EPA did not object to venue at the District Court, they waived this objection and the District Court's successive decision was proper. R. at 5, 12. CHAWN initially served the EPA with notice of its intent to file a citizen suit seeking to compel agency action due to "unreasonable delay in carrying out [the EPA's] non-discretionary duty to designate GHGs." *Id.* at 5. After 180 days had expired, CHAWN initiated the lawsuit and then filed a complaint that the District Court described as "sufficiently broad" to put both Defendants on notice that unreasonable delay was at issue in this case. *Id.* at 12.

By waiting 180 days to file this lawsuit after giving the EPA its initial notice of intent, CHAWN also constructively provided the Defendants with notice that unreasonable delay was an

issue in this case. If CHAWN had only intended to challenge the EPA's failure to carry out its nondiscretionary duty to list GHGs as a criteria pollutant, then it would have only needed to provide the EPA with 60 days' notice. *See* CAA § 304(b)(2). Conversely, a challenge asserting unreasonable delay requires notice of 180 days. *See id.* § 304(a)(3).

If either COGA or the EPA were confused about the scope of CHAWN's lawsuit, they had a procedural remedy available—they could have filed a motion for a more definite statement. Fed. R. Civ. P. 12(e). However, rather than seeking clarification, the Defendants answered CHAWN's complaint and filed briefs rebutting the unreasonable delay claim on its merits. R. at 5, 12. While the EPA is now asking this Court to dismiss the case for lack of jurisdiction, citing Section 307(b)(1), this request is meritless because the EPA has frequently objected to improper venue in the past when unreasonable delay challenges were filed in the wrong circuit. R. at 1; *E.g. Sierra Club v. EPA*, 926 F.3d 844, 846 (D.C. Cir. 2019); *S. Il. Power Coop. v. EPA*, 863 F.3d 666, 670 (7th Cir. 2017). Accordingly, it is clear that both Defendants deliberately waived their objection to venue by neither filing a 12(b)(3) motion to dismiss for improper venue nor by raising the issue in their pleadings. Fed. R. Civ. P. 12(h)(1)(B).

II. THE ENDANGERMENT FINDING SHOULD NOT BE RECONSIDERED BY THIS COURT BECAUSE COGA'S CHALLENGE IS BARRED BY SECTION 307(b), AND THIS COURT SHOULD GIVE NO DEFERENCE TO THE DISTRICT COURT'S ERRONEOUS CONSIDERATION OF THE FINDING BECAUSE IT DID NOT HAVE JURISDICTION TO REVIEW THE MERITS OF FINAL EPA ACTIONS.

This Court lacks jurisdiction to reconsider the validity of the Endangerment Finding because COGA did not challenge the finding within 60 days of its promulgation, and no grounds have arisen that justify its tardy challenge. Additionally, this Court should give no deference to the District Court's holding that the Endangerment Finding regarding public health is contrary to law because district courts lack authority to substantively review final agency actions. As such, this Court should refrain from rehashing the Endangerment Finding's validity and affirm that the

finding of endangerment to public health is lawful.

A. This Court does not have jurisdiction over COGA's substantive challenge to the Endangerment Finding because the challenge was not filed within sixty days of the finding's issuance and was not solely based on grounds arising after the sixtieth day.

The Act sets a clear statutory deadline for judicial review of EPA actions or rules. CAA § 307(b)(1). It provides a 60-day window for a petition seeking judicial review, beginning at the date of promulgation or approval of an action under the statute. *Id.* There is an exception to this deadline, however, for petitions "based solely on grounds arising after such sixtieth day," requiring such a petition to be filed "within sixty days after such grounds arise." *Id.*

Here, the 60-day window during which the 2009 Endangerment Finding could be challenged has long since elapsed. Resultantly, COGA invokes the exception, claiming that the existence of a mandatory duty to list GHGs as a criteria air pollutant constitutes such grounds. R. at 8. COGA's assertion is both illogical and contrary to law.

First, COGA does not assert that this duty was recently promulgated or newly enacted in law, only that CHAWN's citizen suit challenge gives the duty some new relevance. *Id.* However, such a duty is hardly novel but is instead well-established by case law. *See generally Train*, 545 F.2d at 320; *infra* Section VI. The grounds that COGA asserts here are therefore nothing but the affirmation or restatement of an already-settled issue of law and is not sufficient to authorize renewed scrutiny of the finding. This is simply COGA's attempt to re-litigate substantive challenges to the Endangerment Finding that it either raised or should have raised when the rule was initially issued in 2009.

Further, even if this case were construed to involve a new mandatory duty to list GHGs, such a duty is not the *sole* grounds that COGA bases its petition for review on, as required by Section 307(b)(1). After all, COGA is seeking to attack the Endangerment Finding itself, not just the subsequent duty to list that follows such a finding. COGA is not merely seeking to establish

that the Endangerment Finding is invalid in the context of an unreasonable delay claim; it is re-asserting challenges that it brought years ago and adding a few new theories that it thought up in the meantime. Thus, because COGA has not based its petition solely on new grounds and is rather using this litigation as a vehicle to renew its 2009 assault upon the Endangerment Finding, the Act bars judicial review of the Endangerment Finding in this context.

B. The District Court did not have jurisdiction to consider whether the Endangerment Finding was valid because such considerations belong to federal circuit courts.

While the District Court did have jurisdiction to consider CHAWN's citizen suit claims under Section 304, *supra* Section I.A, it did not have jurisdiction to consider whether the Endangerment Finding was valid. The citizen suit statute is a way for private citizens to ask district courts to compel agency action when the agency is failing to comply with an existing nondiscretionary duty or when it has unreasonably delayed in taking a nondiscretionary action. CAA § 304(a). Accordingly, citizens seeking a court order forcing the EPA to fulfill its mandatory duties should bring a citizen suit under Section 304(a). *Del. Valley Citizens Council for Clean Air v. Davis*, 932 F.2d 256, 265 (3d Cir. 1991).

Conversely, parties seeking to challenge a newly promulgated EPA action or rule should raise that challenge under Section 307(b), which vests jurisdiction over substantive challenges to agency rules and actions in federal appellate courts. *E.g. Dalton Trucking*, 808 F.3d at 879. Accordingly, district courts do not have authority to engage in substantive review of final agency rules or actions because that responsibility belongs to circuit courts. *United Steelworkers v. Or. Steel Mills*, 322 F.3d 1222, 1226 (10th Cir. 2003) (holding that citizens challenging final agency actions must raise these challenges with circuit courts under Section 307(b) while citizens seeking enforcement of pre-existing agency responsibilities should raise these claims with district courts under Section 304(a)).

Here, the District Court completely lacked jurisdiction to consider whether the Endangerment Finding was valid because the finding was a final agency action over which circuit courts have exclusive jurisdiction. Nevertheless, the District Court engaged in a substantive review of the finding because "any duty of the EPA administrator to act under CAA § 108(a) turns on the existence of a prior valid determination of endangerment." R. at 8–10. To back up this assertion, the District Court cited *Zook v. McCarthy,* 52 F. Supp.3d 69 (D.D.C. 2014); R. at 8. However, *Zook* only holds that the EPA cannot be compelled to list pollutants as criteria pollutants if it has not first issued a formal finding of endangerment regarding those pollutants. *Zook*, 52 F. Supp 3d at 74–75. *Zook* does not authorize district courts to weigh the merits of an endangerment finding before considering whether the EPA has failed to perform (or unreasonably delayed performing) a nondiscretionary duty to list GHGs as a criteria pollutant.

Other than *Zook,* the District Court cited no support for its assertion that it needed to consider the validity of the Endangerment Finding before considering whether the EPA had a nondiscretionary duty to list GHGs as a criteria pollutant under Section 108(a). The reason for this lack of support is obvious: Section 307(b)(1) clearly states that only circuit courts have jurisdiction to consider final agency actions such as the Endangerment Finding. Where a court does not have jurisdiction over an issue, subsequent review cannot be justified. Accordingly, this Court should afford no deference to the District Court's unauthorized consideration of the Endangerment Finding and should leave it wholly intact.

III. THE EPA'S 2009 ENDANGERMENT FINDING IS VALID WITH RESPECT TO AN ENDANGERMENT OF PUBLIC WELFARE BECAUSE SUCH A FINDING CONSTITUTES A RATIONAL DETERMINATION BASED ON THE RECORD.

A. The District Court correctly ruled that the EPA's Endangerment Finding constitutes a rational determination based on the record before it.

Even if COGA had filed a timely petition for review, the District Court was correct in finding that the EPA's Endangerment Finding for public welfare passed the appropriate standard

of review. The standard of review for final agency actions under the Act is the arbitrary and capricious standard, which presumes the agency action to be valid provided it meets a minimum rationality standard. *Nat'l Res. Def. Council v. EPA*, 194 F.3d 130, 136 (D.C. Cir. 1999). This standard of review is highly deferential. The court must ask whether the EPA made a rational determination based on the administrative record before it. *Id.* Deference to an agency decision is heightened further when that agency decision is predicated upon evaluation of complex scientific data within that agency's area of technical expertise. *Am. Farm Bureau Fed'n v. EPA*, 559 F.3d 512, 519 (D.C. Cir. 2009) ("[E]xtreme degree of deference to the agency when it is evaluating scientific data within its technical expertise"); *Ethyl Corp. v. EPA*, 541 F.2d 1, 36 (D.C. Cir. 1978) (en banc).

Here, the EPA's determination that GHGs constituted an endangerment to public welfare and public health was entirely rational based on the record before it. R. at 6–7. The Endangerment Finding was consistent with the published materials of the vast majority of peer reviewed scientific literature and several international and national scientific review bodies. Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496, 66,510 (Dec. 15, 2009). In addition, the notice and comment period yielded 52 pages of findings and legal determinations, 210 pages of supporting technical and scientific analysis, and nearly 600 pages of responses to comments. Ronald Cass et al., *Administrative Law:Cases & Materials* 443 (7th ed. 2016). Two-thirds of the comments supported the Endangerment Finding and, as such, the EPA was rational in making a determination in accordance with the clear majority of comments received. 74 Fed. Reg. at 66,500.

The D.C. Circuit already reached such a conclusion in *Coalition for Responsible Regulation, Inc*. 684 F.3d at 120 (finding that "[t]he body of scientific evidence marshaled by EPA

in support of the Endangerment Finding is substantial"). As that court noted, not only did the EPA rely on a substantial body of scientific work suggesting it "very likely" that GHG emissions contribute to climate change, but the EPA also utilized three categories of evidence to make their finding: a basic physical understanding of the impacts of various natural and manmade changes on the climate; historical estimates of past climate change; and computer-based climate model simulations. *Id.* at 120–21.

The fact that there may be some uncertainty regarding the exact scope and magnitude of the dangers posed by GHGs and climate change does not affect the validity of the EPA's determination that pollution from GHGs was "reasonably anticipated to endanger public health or welfare." CAA § 108(a)(1)(A); *Coal. for Responsible Regul., Inc.*, 684 F.3d at 121–22. Where a statute is precautionary in nature, some uncertainty surrounding the scope and causation of harms will not affect the validity of an agency's expert determination. *See Ethyl Corp.*, 541 F.2d at 28 ("The Administrator may apply his expertise to draw conclusions from suspected, but not completely substantiated, relationships between facts, from trends among facts, from theoretical projections from imperfect data . . .").

The Clean Air Act is precautionary in nature, as evidenced by its plain language. Section 108(a)(1)(A) directs the EPA to set standards for air pollutants whose emissions "cause or contribute to air pollution which *may reasonably be anticipated* to endanger public health or welfare." CAA § 108(a) (emphasis added). As such, some uncertainty surrounding the scope and causation of such harms does not affect the validity of the EPA's expert determination. Very few areas of scientific research boast complete, uncontested mastery over their subject matter and an Endangerment Finding requires no such thing, instead simply requiring that the agency finds that the pollutants are "reasonably anticipated to endanger" the public health or public welfare. *Id.*

Here, although there may exist some uncertainty concerning the magnitude of the harms caused by GHG emissions, the EPA nonetheless made a rational, expert determination based on the record before it and therefore survives arbitrary and capricious review.

B. The EPA cannot consider potential absurd regulatory policy impacts in making an Endangerment Finding because such a finding is a purely scientific judgment.

The District Court correctly ruled that the EPA may not consider any potentially absurd results in making its Endangerment Finding. R. at 9. The EPA's determination in making an Endangerment Finding is a purely scientific judgment and cannot include consideration of potential absurd regulatory or policy impacts. The Act requires an Endangerment Finding to be a "scientific judgment." *Coal. for Responsible Regul., Inc.*, 684 F.3d at 117–18. As such, the EPA cannot consider policy judgments. *Id.*; *see also Massachusetts*, 549 U.S. at 501 (even a "laundry list of reasons not to regulate" has "nothing to do" with whether GHG emissions contribute to climate change or may endanger public health or welfare, and therefore cannot be considered). The additional layer of regulatory absurdity that COGA alleges here does nothing to change this well-established principle.

Even if the EPA could consider absurd policy impact—which it cannot—it is not clear here that the potential absurd policy impacts on states and industry would be as dramatic as COGA alleges. First, states would not—as COGA suggests—face the mandatory loss of federal highway funding as a result of noncompliance with GHG NAAQS. CAA § 179(a), (b)(1); R. at 9. Such a sanction is discretionary, as indeed are all other possible, relevant sanctions—the EPA administrator "*may* impose" them. CAA § 179(b)(1) (emphasis added). Further, the EPA has shown that it recognizes the difficulties and burdens that industry and states may face in having to comply with regulations pertaining to GHG emissions. In promulgating its Tailoring Rule, which relieves all but the largest emitters from GHG regulation under the PSD and Title V programs, the EPA acted to relieve otherwise-regulated parties from such burdens. There is no reason to suggest

that it would not do something similar here after it has set NAAQS for GHGs. In addition, the EPA may use its discretion in considering whether to impose sanctions on states whose implementation plans fail to comply with GHG NAAQS.

Because an Endangerment Finding is purely a scientific judgment, the EPA may not consider potential policy implications. Here, in any case, those potential policy implications are not as absurd or burdensome as COGA suggests.

IV. THE 2009 ENDANGERMENT FINDING FOR PUBLIC HEALTH WAS VALID BECAUSE THE EPA'S 2009 INTERPRETATION OF THE CLEAN AIR ACT IS ENTITLED TO *CHEVRON* DEFERENCE.

The EPA's 2009 Endangerment Finding for public health is valid because the agency's interpretation of endangerment to "public health" as including indirect hazards stemming from climate change must receive deference. Congress did not express a specific intention to allow indirect effects on "public welfare" but not "public health." Therefore, the Court must apply *Chevron* deference to EPA's 2009 Endangerment Finding, including its reading that endangerment to "public health" includes indirect health impacts flowing from climate change.

The standard of review is the two-step test announced by the Court in *Chevron v. Nat. Res. Def. Council*, 467 U.S. 837 (1984). Under *Chevron,* a reviewing court must first look to the statute's explicit language. *Id.* at 843. If Congress's intent is clear and unambiguous from the text itself, the matter ends there and an agency's interpretation receives no deference. *Id.* at 843–44 (a court must ask whether Congress has "directly spoken to the precise question at issue"). If the statute's meaning is unclear, however, the reviewing court must apply deference to the agency's interpretation, so long as such interpretation is reasonable. *Id.* at 844.

A. The language and structure of the Act do not show that Congress clearly saw indirect health hazards flowing from climate change as endangering "public welfare" but not "public health."

The language and structure of the Act, in particular Sections 108 and 302, do not suggest that Congress has "directly spoken to the precise issue" at hand. While Congress did include effects

on "climate" in its expansive, non-exhaustive list of effects on "public welfare," it does not follow that therefore Congress intended to exclude such effects from endangerment to "public health." CAA § 302(h). In its definitions section, the Act provides a list of examples of effects on welfare. *Id.* The list is non-exhaustive. *Id.* ("All language referring to effects on welfare *includes, but is not limited to* . . .") (emphasis added). This list includes "effects on . . . climate . . ." *Id.* There is, however, no equivalent definition of effects on public health. *Id.* Perhaps if the Act had given an attendant, similarly structured definition of "public health" and had omitted the term "climate," co-respondents' argument might carry more weight. The Act, however, gives no such definition of "public health" nor does its structure suggest that the statute seeks to distinguish between "public health" and "public welfare" when it comes to including indirect climate impacts.

Further, Congress's definition of welfare primarily works to illustrate how expansively Congress viewed "public welfare." Indeed, the non-exhaustive list includes effects on "personal comfort and well-being," which are surely also to be included in effects on "public health." *Id.* As such, by including an effect in its "public welfare" definition, Congress was not implicitly excluding that effect from its definition of "public health." It therefore follows that by including effects on climate in its "public welfare" definition, Congress was not implicitly excluding such effects from its definition of "public health."

Because Congress did not show any specific intent regarding whether or not indirect health hazards stemming from climate effects were included in its conception of endangerment to "public health," the EPA's interpretation that such indirect hazards are indeed included—as embodied in its 2009 Endangerment Finding—must receive deference.

B. The EPA's newfound interpretation of the Act cannot receive deference because it amounts to a legislative rule and has not gone through the proper notice-and-comment procedures.

Because Congress did not speak directly to whether "public health" excluded indirect health hazards stemming from climate change, this Court must apply deference to the EPA's interpretation as evidenced in its 2009 Endangerment Finding. Although the EPA now claims that endangerment of "public health" cannot be read to include indirect impacts stemming from climate change, this newfound position is not entitled to deference, as the District Court acknowledged. R. at 10. Here, the EPA's newfound interpretation of the statute was espoused for the first time in this litigation and has not gone through the proper rulemaking procedures, including notice-and-comment procedures. *Id.* As the District Court noted, the EPA has not sought by rulemaking to rescind the Endangerment Finding. R. at 8.

The EPA's sudden, reversed interpretation of Section 108(a)(1)(A) amounts to a legislative rule, requiring it to undergo the requisite notice-and-comment procedures as required by the Administrative Procedure Act (APA). The APA requires agency actions performed under an agency's informal rulemaking power to go through certain procedures, including a notice-and-comment process. APA § 553, 25 U.S.C. § 553 (2018). The APA distinguishes between legislative rules and interpretive rules, however, exempting interpretive rules from notice-and-comment requirements. *Id.* § 553(b)(3)(A), *see Hoctor v. USDA*, 82 F.3d 165, 167 (7th Cir. 1996). Courts have used the "legal effects test" to determine whether a given rule is legislative or interpretive. *See Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993). According to the test, a legislative rule is one that, *inter alia*, directly alters the legal rights of the public by effectively amending a prior legislative rule. *Id.* By contrast, an interpretive rule is one that merely describes how the agency intends to act in the future in interpreting and applying existing norms. *Id.* Courts have also defined an interpretive rule even more narrowly, as one that simply "ascertain[s]" the meaning of a statutory term. *Hoctor*, 82 F.3d 165 at 170. In *National*

Family Planning v. Sullivan, the D.C. Circuit held that an agency's amendment of a prior regulation amounted to a legislative rule where it repudiated or substantially amended the effect of the previous rule on the public. 979 F.2d 227, 241 (D.C. Cir. 1992). Conversely, the court provided examples of interpretive rules, such as those that merely clarify a statutory term, remind a party of existing statutory duties, or merely track the statutory requirements and thus simply explain something the statute already required. *Id.* at 237.

Here, the EPA's new interpretation of "public health" constitutes a legislative rule because, like in *Sullivan*, it effectively repudiates its prior interpretation of the term, as presented in the 2009 Endangerment Finding. Further, this rule does not fall under any definition of an interpretive rule. Under the *Hoctor* test, interpreting an "endanger[ment] to "public health" to include only *direct* health hazards is not a mere ascertainment of the plain meaning of that statutory term. Nor can such an interpretation be said to merely describe how the EPA intends to act in the future in interpreting and applying existing norms. Indeed, rather than a new application or interpretation of its existing stance, the EPA's new interpretation of Section 108 is in fact a direct reversal of existing norms. Finally, the EPA's new interpretation does not fit any of the examples of interpretive rules provided by the D.C. Circuit in *Sullivan*. It does not merely remind a party of existing statutory duties, it does not merely explain something the statute already required, and it does not merely clarify a statutory term. Thus, this rule cannot be an interpretive rule and is instead a legislative rule that must undergo notice-and-comment procedures in order to receive deference.

Not only does the EPA's newfound interpretation constitute a legislative rule requiring notice-and-comment procedures, but such an interpretation also amounts to an effective rescission of its 2009 Endangerment Finding for public health. As such, it must be accompanied, in the very least, by a sufficient explanation for its reasons. While an agency may change its course and reverse

prior actions, it is "obligated to explain its reasons for doing so." *Motor Vehicle Mfrs. Assn. v. State Farm Mutual Auto. Ins.*, 463 U.S. 29, 56 (1983). A "reasoned analysis" must address every "important aspect of the problem"—otherwise the rescission is arbitrary and capricious. *Id.* at 43, 57. Further, where significant reliance interests will be engendered by the rescission, a well-reasoned analysis will show that it has fully considered those reliance interests and weighed them against policy concerns. *Dept. of Homeland Sec. v. Regents of the Univ.*, 140 S. Ct. 1891, 1915 (2020).

Here, in addition to not going through the proper rulemaking procedures, the EPA has not provided a sufficient "reasoned analysis" for its rescission of its prior Endangerment Finding for public health. The EPA's explanation for its new position is that Congress did not intend for indirect effects to be sufficient to support a finding of endangerment to public health. R. at 10. However, the EPA has historically argued that the statute *is* ambiguous on this point and that indirect effects *can* support a public health finding, and now offers no reasons for its sudden about-face. The EPA has defended the Endangerment Finding, which found that indirect effects can endanger public health, for eleven years. The EPA has not pointed to any judicial holdings, or new congressional guidance, that supports its new-found understanding of "public health." Rather, the EPA is merely joining COGA in advancing a novel legal theory and is hoping that this Court will attach to that theory the force of law. The EPA's adoption of this new argument is especially troubling because the agency is charged with safeguarding the health of the American public; the decision to regulate, or not regulate, GHGs is not one that should be abdicated without full scientific consideration by the agency. This furtive change-of-mind is clearly arbitrary and capricious, especially when considered against the backdrop of our country's reliance on the EPA to regulate pollutants which endanger its public health.

Ultimately, the EPA's newfound position is a legislative action falling under EPA's rulemaking authority that has not undergone the required notice-and-comment procedures under APA § 553. Additionally, it is arbitrary and capricious in nature, and is therefore invalid and cannot receive deference.

C. EPA's 2009 interpretation of the Act is reasonable and therefore must receive deference.

The EPA's interpretation of the phrase "endanger[ment to] public health," as evidenced in its 2009 Endangerment Finding, must receive deference because it is a reasonable interpretation of the statute. This reasonableness standard is deferential. *Chevron*, 467 U.S. 837 at 844, 864–65 (recognizing that policy judgments are better left to agencies and legislatures than to judges). As detailed above, Congress did not speak to the issue of whether endangerment of public health could include indirect hazards. In its Endangerment Finding, the EPA interpreted the phrase "endanger" to include indirect dangers stemming from climate change. The plain meaning of "endanger," according to Black's Law Dictionary is "an instance of putting someone or something in danger." *Endanger*, *Black's Law Dictionary* (7th ed. 1999). "Danger," in turn, is defined as "exposure to harm, loss, pain, or other negative result." *Danger*, *Black's Law Dictionary*. Because neither definition suggests any particular level of immediacy or directness, the EPA's interpretation that "endanger" can include indirect dangers is a reasonable one.

The EPA's interpretation of "endanger[ment to] public health" is a reasonable one under *Chevron's* deferential second prong. Therefore, this Court should give deference to the EPA's 2009 Endangerment Finding for public health and uphold it as valid.

V. THE EPA HAS UNREASONABLY DELAYED LISTING GHGS AS A CRITERIA POLLUTANT BECAUSE ITS DELAY ENDANGERS HUMAN HEALTH AND WELFARE AND, EVEN TEN YEARS AFTER ISSUING AN ENDANGERMENT FINDING, THE AGENCY STILL PROVIDES NO CONCRETE TIMELINE FOR ACTING.

Because the EPA's delay in listing GHGs as a criteria pollutant endangers human health and welfare—threatening to cause irreversible harm to people and property—and the EPA offers

no concrete timeline for acting, the Agency's ten-year delay is unreasonable. Courts generally apply six factors (the *TRAC* factors) in evaluating whether an agency unreasonably delayed action. *TRAC*, 750 F.2d at 70; *A Community Voice v. EPA*, 878 F.3d 779 (9th Cir. 2017) (affirming the continued use of the *TRAC* factors in assessing unreasonable delay claims); *see also In re Int'l Chem. Workers Union*, 958 F.2d 1144 (D.C. Cir. 1992); *Sierra Club v. Thomas*, 828 F.2d 783 (D.C. Cir. 1987). The *TRAC* factors are as follows: 1) the time agencies take to make decisions must be governed by a rule of reason; 2) where Congress has provided in an enabling statute, a timetable, or other indication of speed with which it expects an agency to proceed, that statutory scheme may supply content for a rule of reason; 3) delays that might be reasonable in a sphere of economic regulation are less tolerable when human health and welfare are at stake; 4) courts should consider the effect of expediting delayed action on agency activities of higher or competing priority; 5) courts should take into account the nature and extent of the interests prejudiced by delay; 6) and courts need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed. *Id.* at 80 (quoting *Pub. Citizen Health Rsch. Grp. v. FDA (PCHRG)*, 740 F.2d 21, 34 (D.C. Cir. 1984) (citations omitted). Notably, when applying the *TRAC* factors in assessing agency delays of more than eight to ten years, courts have uniformly held them to be unreasonable. *A Community Voice*, 878 F.3d at 779; *Pesticide Action Network N. America v. EPA (In re PAN)*, 798 F.3d 809 (9th Cir. 2015); *In re Core Commc'ns, Inc. (In re Core)*, 531 F.3d 779 (D.C. Cir. 2008).

A. The EPA has not followed a rule of reason in delaying action on listing GHGs where, after ten years, it continues to delay without presenting a concrete timeline for acting.

The EPA cannot be said to be following a rule of reason concerning when it plans to list GHGs as a criteria pollutant where, after ignoring this mandatory duty for ten years, it still declines to set forth a concrete timeline for taking action. The time agencies take to make decisions must

be governed by a "rule of reason." *TRAC*, 750 F.2d at 80 (quoting *Potomac Elec. Power Co. v. ICC* (*PEPCO)*, 702 F.2d 1026, 1034 (D.C. Cir. 1983)). An agency has "stretched the 'rule of reason' beyond its limits" where it has delayed for more than a few years and has not provided a concrete timeline for acting, in which case it has instead only presented a "roadmap for further delay." *A Community Voice*, 878 F.3d at 886. Importantly, courts are prone to treat agencies favorably where they demonstrate an intention to proceed with the action at issue expeditiously. *In re City of Va. Beach*, 42 F.3d 881, 886 (4th Cir. 1994) (holding that a four-and-a-half year delay concerning human health and welfare was reasonable where the agency demonstrated that "the project was a high priority and would be expedited"). Though it is not determinative, this first *TRAC* factor has consistently been referred to as the most important of the six *TRAC* factors. *Id*.; *In re Core*, 531 F.3d at 855.

A Community Voice concerned a petition to compel the EPA to act on a rulemaking petition under the Toxic Substances Act. 878 F.3d at 879. There, the EPA had not acted on the petition for eight years and provided only speculative dates four and six years into the future for when it might take final action. *Id.* Here, the EPA has delayed action two years longer than it did in *A Community Voice* and has similarly failed to provide a concrete timeline. Moreover, in stark contrast to the agency in *In re City of Virginia Beach*, the EPA has actually indicated through its actions that it only intends to continue to delay action. With the transition to a new presidential administration in 2017, the EPA began to implement a series of rollbacks to loosen GHG regulation, including relaxing GHG emissions limitations on motor vehicles and power plants. R. at 7. Additionally, as the EPA asserted to the District Court, it is deprioritizing regulation in furtherance of an executive order. R. at 13; *infra* Section V.C (addressing this improper reliance). And crucially, in this litigation itself, the EPA remains silent on when it will list GHGs. Therefore, the EPA's actions,

which exemplify open defiance of its statutory duty, present no more than a "roadmap for further delay." Accordingly, this critical factor weighs heavily in favor of finding the EPA's delay unreasonable.

B. Because the EPA's ten-year delay endangers the health and welfare of Americans, this factor weighs in favor of unreasonable delay.

The EPA's ten-year delay is especially unreasonable because according to the Agency's own findings, GHGs endanger human health and welfare. R. at 7. Delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are concerned. *TRAC*, 750 F.2d at 80 (quoting *PEPCO*, 702 F.2d at 1034). The EPA's delay is especially unjustifiable where the agency itself has determined that the delay could be harmful to human health or welfare. *In re PAN*, 798 F.3d at 814; *see also A Community Voice*, 878 F.3d at 787 (where, in granting mandamus for eight-year delay by the EPA, the fact that the EPA itself acknowledged that lead poisoning is the number one environmental health threat in the United States for children ages six and younger helped to tip the scales in favor of unreasonable delay). In *In re PAN*, the court held that the EPA's eight-year delay in responding to a petition was unreasonable where the EPA declined to offer a timetable for finalizing a decision regarding the pesticide chlorpyrifos and where the EPA through regulations and determinations had recognized the harmful effects of chlorpyrifos. *In re PAN*, 798 F. 3d at 809. Specifically, the EPA had imposed new, more stringent labeling requirements on the chemical and reported that it posed such a significant threat to water supplies that a nationwide ban on the pesticide may have been justified. *Id.* at 814.

Here, the dangers posed by the EPA's refusal to list GHGs are well-documented. According to the EPA's own 2009 Endangerment Finding, by increasing global temperatures and changing storm frequency and precipitation patterns, GHGs cause "an increase in ozone pollution due to hotter temperatures, an increase in heat related deaths, and the prevalence of insect borne

diseases . . . as well as endanger[] public welfare by reducing agricultural productivity, reducing water supplies, and increasing property and economic damage due to storms and rising sea levels." R. at 7. Like the findings in *In re PAN* and *A Community Voice*, the EPA's own findings offer proof that GHGs are dangerous to humans. Therefore, further delay in listing of GHGs as a criteria pollutant is unconscionable. As such, this factor weighs in favor of finding unreasonable delay.

C. Because the EPA improperly relied on Executive Order 13771, and its inaction here prejudices human health interests, listing GHGs as a criteria pollutant will not detract from the EPA's ability to carry out priorities of higher or competing order.

Although the EPA relies on the EO to justify its delay in listing GHGs as a criteria pollutant, this reliance is improper. R. at 13. The EPA asserts that in furtherance of the EO it must prioritize reducing regulations on business and economic activity over all other regulatory action. *Id.* One of the factors courts consider in evaluating unreasonable delay is the effect of expediting delayed action on agency activities of higher or competing priority. *TRAC*, 750 F.2d at 80 (quoting *PEPCO*, 702 F.2d at 1034). The EO states that "for every one new regulation issued, at least two prior regulations be identified for elimination" but also clearly stipulates that "nothing in this order shall be construed to impair the authority granted by law to an executive department or agency" and "this order shall be implemented consistent with applicable law." Exec. Order 13,771, 82 Fed. Reg. 9339, 9339 (Jan. 30, 2017). However much the EO may urge deregulation, it clearly stops short of overriding statutory directives. Under the Act, the EPA is mandated to list GHGs as a criteria pollutant. *Supra* Section VI. Therefore, because the EO by its own terms does not impair or otherwise affect the legal authority of agency heads, and must be implemented consistent with applicable law, it does not exempt the EPA from listing GHGs as a criteria pollutant.

Furthermore, where considerable human health interests are prejudiced by delay, the EPA can have no competing or higher priorities. *In re PAN*, 798 F.3d at 814. *In re PAN* concerned a mandamus petition to compel the EPA to respond to a petition concerning a pesticide. *Id.* There,

the Court had denied the first petition because the EPA supplied a concrete timeline for taking action, had officially certified the safety of the pesticide years earlier, and had numerous competing priorities to handle. *Id.* However, two years later, it reversed its decision on the grounds that new information published by the EPA revealed significant health risks associated with the pesticide. *Id.* This time, the court did not even consider the EPA's other priorities, holding that given the health risks at stake, it had "little difficulty concluding [the EPA] should be compelled to act quickly to resolve the administrative petition." *Id.* Here, where the EPA's own findings reveal that GHGs will lead to "an increase in heat related deaths, and the prevalence of insect borne diseases," listing GHGs as a criteria pollutant should be one of the agency's highest priorities.

VI. CONGRESS UNAMBIGUOUSLY INTENDED TO CREATE A NONDISCRETIONARY DUTY UNDER SECTION 108(a)(1) AND, THEREFORE, BECAUSE THE EPA HAS SATISFIED THE CONDITIONS OF SECTION 108(a)(1)(A) AND (B), THE EPA IS OBLIGATED TO LIST GHGS AS A CRITERIA POLLUTANT.

Having determined that GHGs endanger human health and welfare and that their presence in the ambient air results from numerous or diverse mobile or stationary sources (under Section 108(a)(1)(A–B)), the EPA has a nondiscretionary duty to list GHGs as a criteria pollutant. R. at 6–7; CAA § 108(a)(1). Section 108(a)(1), the provision under which this duty arises, reads as follows:

> For the purpose of establishing national primary and secondary ambient air quality standards, the Administrator *shall*, within 30 days of December 31, 1970, 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. *Id.* (emphasis added).

Co-respondents dispute that this section creates a mandatory duty, arguing that the phrase "but for which he plans" in Section 108(a)(1)(C) grants the EPA final discretion to list only those criteria pollutants for which it chooses to promulgate air quality criteria. R. at 2; CAA 108(a)(1)(C). This precise argument was wholly rejected 45 years ago in *Natural Resources*

Defense Council v. Train. 545 F.2d at 320. There, the court denied the EPA's claim of unfettered discretion based on the mandatory language, overall structure, and legislative history of the Act, finding that adopting the EPA's position "would vitiate the public policy underlying the enactment of the 1970 Amendments." *Id.* Decided one half-century ago, *Train* has gone unchallenged and remains good law today. *See Ctr. for Biological Diversity v. EPA*, 749 F.3d 1079, 1083 (D.C. Cir. 2014); and *Zook*, 52 F.Supp.3d at 74 ("[The Act] makes clear that EPA's listing duty is a nondiscretionary duty to list any pollutant that EPA has determined meets the criteria in Section 108(a)(1)(A) and (B)"). And importantly, as discussed below, even when scrutinized under the later-developed *Chevron* analysis, *Train* survives. By substituting GHGs for "lead," the facts of the instant case are nearly identical to the facts in *Train*.

In addition to *Train*, and perhaps most crucially, the Court should be especially wary about adopting co-respondents' interpretation of Section 108(a)(1) because it would allow the EPA to bypass the NAAQS scheme construed by Congress as the "heart" of the Act. This would set a dangerous precedent by permitting the EPA to avoid subjecting threatening pollutants to NAAQS regulation going forward.

A. *Train* should be analyzed under *Chevron* Step One and, accordingly, the Court should grant the EPA no deference.

Train, issued eight years before *Chevron*, survives the latter's two-prong test for judicial review of agency statutory interpretation because the Act unambiguously intended to create a mandatory duty in Section 108(a)(1); thus, the Court should give the EPA's interpretation no deference. Eight years after *Train*, the Supreme Court in *Chevron* set forth a two-pronged framework for analyzing agency statutory interpretations. *Chevron*, 467 U.S. at 842. The *Chevron* test first states that, where Congress clearly intends one statutory interpretation, the agency's interpretation receives no deference (*Chevron* Step One). *Id.* ("If the intent of Congress is clear, that is the end of the matter"); *see also supra* Section IV. In determining whether a statute

unambiguously expresses the intent of Congress, courts generally apply all the traditional tools of statutory construction—including looking to the text and structure of the statute as well as its legislative history, if appropriate. *Ctr. for Biological Diversity v. Everson*, 435 F. Supp 3d. 69, 78–79 (D.D.C. 2020) (citing *Chevron*, 467 U.S. at 843 n.9).

In *Chevron*, the statute was silent on the issue of how the statutory term "stationary source" should be interpreted, the structure was not determinative, and the legislative history was conflicting. *Chevron*, 467 U.S. at 842. Consequently, the Court held that the EPA's interpretation should be given deference. *Id.* The facts before us, on the other hand, tell a completely different story. Here, as discussed in detail below, the mandatory language of Section 108(a)(1), the legislative history behind the Act, and the structure of the NAAQS scheme demonstrate that Congress unambiguously intended to make listing criteria pollutants nondiscretionary. Also, as demonstrated below, any ambiguity Section 108(a)(1) may contain stems from a misinterpretation of the provision's language and does not stand up when the Act and the specific NAAQS scheme is viewed holistically. Therefore, it follows that the Court should give the EPA's interpretation no deference. Additionally, it should be noted that though *Train* was decided before the *Chevron* framework was developed, the court employed the exact same approach as the *Chevron* Court to determine whether Section 108(a)(1) was ambiguous, applying the same "traditional tools of statutory construction" to reach its determination.

B. Because Section 108(a)(1) uses mandatory language and the EPA improperly relies on a mistaken reading in reaching its own interpretation of Section 108(a)(1)(C), the plain language in Section 108(a)(1) supports that the EPA has a nondiscretionary duty to list criteria pollutants.

The plain language of Section 108(a)(1)—that EPA "shall" publish and "shall from time to time thereafter revise" a list of criteria air pollutants—is proof that the EPA does not have discretion in listing GHGs as a criteria pollutant. If the EPA were to retain discretion about listing GHGs, this mandatory language would become mere surplusage. *Train*, 545 F.2d at 325; *Zook*, 52

F.Supp.3d at 74 (citing *Bennett v. Spear*, 520 U.S. 154, 175 (1997)) (explaining that the agency's duty was not discretionary when the imperative ''shall'' was used in the statute).

Additionally, as to the specific language in Section 108(a)(1)(C) that the co-respondents rely on, the congressional record suggests that it must be interpreted narrowly to only refer to the "initial list" of pollutants to be issued 30 days after December 31, 1970. *Train*, 545 F.2d at 326. As quoted in *Train*, the Senate Report on S. Rep. N. 4358, 91st Cong., 2d Sess. (1970), contains this language describing Section 108:

> This new section directs the Secretary to publish (initially 30 days after enactment) a list of air pollution agents or combination thereof for which air quality criteria will be issued. He can add to the list periodically. The agents *on the initial list* must include all those pollution agents or combinations of agents which have, or can be expected to have, an adverse effect on health and welfare and which are emitted from widely distributed mobile and stationary sources, and all those for which air quality criteria are planned. (emphasis added).

Reading Section 108(a)(1(C) in conjunction with this congressional record makes evident that the phrase "for which he plans to issue air quality criteria" only applied to the initial list of pollutants published under the Act. Therefore, Section 108(a)(1)(C) does not apply to pollutants that endanger human health or welfare that were not on the initial list, such as GHGs. Moreover, as demonstrated by the following discussion of the Act's broader legislative purpose and the specific NAAQS scheme triggered only by criteria pollutant designation under Section 108(a)(1), co-respondents' interpretation would imperil the Act's goals of reducing air pollution and protecting human health and welfare.

C. The EPA's claim of unfettered discretion would undermine Congress's intent because the NAAQS scheme of Sections 108–110, which focuses exclusively on protecting human health and welfare and is uniquely armed with a timetable for compliance, clearly demonstrates that the scheme was intended as *the* essential mechanism for improving air quality.

The comprehensive, time-bound scheme for creating, implementing, and achieving NAAQS, set out in Sections 108–110, shows that Congress intended listing under Section 108(a)(1) to be nondiscretionary. As noted in *Train*, frustrated with the lack of progress under the

Air Quality Act of 1967, Congress enacted the 1970 Amendments as "a drastic remedy to what was perceived as a serious and otherwise uncheckable problem of air pollution." *Union Elec. Co. v. EPA*, 427 U.S. 246, 256 (1976). Accordingly, Congress added teeth to the Amendments by arming Sections 108–110, the sections of the Act that create NAAQS, with mandatory language and fixed timetables for compliance. *Train*, 545 F.2d at 325. These compliance deadlines, which are directly tied to achieving air quality standards, comprise "the heart of the 1970 Amendments." *Train v. Nat. Res. Def.* Council, 421 U.S. 60, 66 (1975). Crucially, these compliance provisions are only triggered after a pollutant is listed under Section 108(a)(1). Therefore, were the EPA to retain discretion over listing criteria pollutants, it could undermine this deliberate scheme by simply choosing not to list.

Because adopting co-respondents' interpretation would jeopardize the NAAQS scheme, more should be said about this uniquely powerful mechanism for improving air quality. NAAQS are science-based standards that must be set at a level "requisite to protect public health and welfare." CAA § 109(b). Significantly, "requisite" means a level "not lower or higher" than necessary to protect public health and welfare. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 475–476 (2001). Because the EPA cannot consider other factors in developing NAAQS, courts do not allow the EPA to set lenient standards that benefit business and industry. *Id.* at 465.

Additionally, through State Implementation Plans (SIPs), the NAAQS scheme allows the federal government to compel the 50 states to do their individual parts to attain better and more uniform air quality standards nationwide. SIPs require states to develop detailed plans for achieving adequate levels of a certain criteria pollutant in the ambient air and must be approved by the EPA. Because these plans cannot be drafted without the cooperation of the many different entities within states that affect the pollutant in some way, SIPs allow the federal government

influence in areas that, traditionally, are exclusively subject to state and local control, such as transportation and land use policy. The ability to impact intrastate policy nationwide is especially important for the federal government to effectively regulate criteria pollutants that pose non-local problems. GHGs present perhaps the best example of one such non-local problem. GHGs spread across the nation, and indeed, the world. For the federal government to control them effectively, it needs the authority to compel state governments (and local governments, indirectly) across the country to attain a minimum standard necessary to protect public health and welfare. The NAAQS scheme provides it with such authority.

For the above-stated reasons, it cannot reasonably be contended that Congress intended for the comprehensive, time-bound scheme, triggered only by a criteria pollutant listing under Section 108(a)(1), to be bypassed simply at the whim of the EPA. Such unfettered discretion would allow any administration to ignore the well-settled science affirmed by the Endangerment Finding, subvert the Act's intent, and—in the EPA's own words—needlessly cause "endangerment to both public health and public welfare." R. at 7.

CONCLUSION

CHAWN respectfully requests that this Court uphold the validity of the 2009 Endangerment Finding, compel the EPA to fulfill its mandatory duty to list GHGs as a criteria pollutant, and order the EPA to establish primary and secondary NAAQS for GHGs as is required by the Act.