C.A. No. 20-000123

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

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

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Defendant-Appellant

-and-

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

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

Brief of United States Environmental Protection Agency
Defendant-Appellant

TEAM #26

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STATEMENT OF JURISDICTION

The United States District Court for the District of New Union improperly concluded it possessed federal question jurisdiction under 28 U.S.C. § 1331 and jurisdiction under the citizen suit provision of the Clean Air Act (CAA), 42 U.S.C. § 7604(a)(2). The rule sought had nationwide applicability and must be brought to the United States Court of Appeals for the District of Columbia pursuant to 42 U.S.C § 7607(b)(1). The District Court entered its judgment on September 1, 2020, granting Plaintiff's, Climate Health and Welfare Now (CHAWN), motion for summary judgment in part and Defendant's, Coal, Oil, and Gas Association (COGA), cross motion for summary judgment in part. All parties filed a timely notice of appeal. This Court has jurisdiction over the order of the District Court pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES

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

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

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

IV. Does the Environmental Protection Agency's (EPA) ten-year delay in taking any action on listing Greenhouse Gases (GHGs) as criteria pollutants under CAA § 108(a) constitute an unreasonable delay?

V. 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 CASE

I. FACTS

The Clean Air Act (CAA) was enacted to "protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." 42 U.S.C. § 7401(b). To achieve such a goal, CAA directs the Environmental Protection Agency (EPA) Administrator to compile and periodically revise a list of "criteria pollutants" of which EPA may regulate. 42 U.S.C. § 7408(a). Criteria pollutants are substances that produce emissions that "cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare," and result from "numerous or diverse mobile or stationary sources." 42 U.S.C. § 7408(a)(1). Once established as a criteria pollutant, EPA must propose and finalize both primary and secondary national ambient air quality standards (NAAQS), meaning EPA establishes allowable concentrations of the criteria pollutant in the ambient air. *Id.* §§ 7408(b), 7409(a)(2).

Pursuant to EPA's authority to designate criteria pollutants, in 1999, a number of environmental groups petitioned (202 Petition) EPA to make a finding that Greenhouse Gas (GHG) emissions from automobiles posed a danger to human health and the environment. *Climate Health & Welfare Now v. EPA*, No. 66-CV-2019, slip op. at 6 (D. New Union Sept. 1, 2020). Such a finding would impose a duty on EPA to regulate GHG emissions from mobile sources. *Id*. On September 8, 2003, EPA denied this petition. *Id*. Litigation ensued culminating in the Supreme Court of United States deciding GHGs meet the definition of "air pollutants" under

the CAA, thereby providing a mechanism by which EPA could regulate GHGs. *Massachusetts v. EPA*, 549 U.S. 497, 528 (2007).

As a result of *Massachusetts*, not only could EPA regulate GHGs, but EPA was required to respond to the 202 petition to determine whether GHGs present an endangerment to public health or welfare. *Slip op*. at 6. Therefore, on December 15, 2009, EPA issued a finding ("Endangerment Finding") that (1) defined a group of GHGs as a single air pollutant; (2) found GHGs were emitted by numerous mobile sources; and (3) emissions from GHGs endanger public health and welfare by, among other things, changing storm frequency and precipitation patterns, and increasing global temperatures, ozone pollution, heat related deaths, and insect borne diseases. *Id*. at 6–7.

Following the Endangerment Finding, EPA initiated a number of regulatory actions aimed at limiting GHG emissions. *Id*. at 7. These actions included establishing GHG emission limits for defined vehicles, adopting New Source Performance Standards and Best Available Control Technology to apply to new major sources of GHGs, limiting the scope of permitting and review requirements that would apply to GHG sources via the Tailoring Rule, and issuing the Clean Power Plan regulations that directed states to modify their CAA implementation plans. *Id*. None of these regulatory initiatives "survive[d] completely intact." *Id.* Moreover, in 2017 the new EPA administration issued a series of regulatory rollback actions, however the Endangerment Finding has been left unchanged and EPA has not sought a rulemaking to rescind the Endangerment Finding. *Id*.

Regardless, EPA has not yet designated GHGs as criteria pollutants pursuant to CAA § 108. *Id*. As a result, a coalition of environmental organizations, including Plaintiff, Climate Health and Welfare Now (CHAWN), filed a petition demanding EPA list GHGs as criteria

pollutants. *Id*. at 5. The petition asserted that EPA, having made the relevant finding that GHGs endanger public health and welfare, has a non-discretionary duty to list GHG as criteria pollutants. *Id*. The EPA has taken no actions on the petition. *Id*.

II. PROCEDURAL HISTORY

On April 1, 2019, CHAWN properly served notice of its intention to sue EPA for its failure to comply with its "mandatory duty" to list GHGs as a criteria pollutant and unreasonable delay in listing GHGs as criteria pollutants in the face of a finding that GHGs endanger public health and welfare. *Id*. at 5. On October 15, 2019, CHAWN commenced this lawsuit pursuant to the citizen suit provision of CAA. *Id*.; *see* 42 U.S.C. § 7604(a)(2). Coal, Oil, and Gas Association (COGA), "a trade association representing the economic interests of fossil fuel companies," moved to intervene as of right pursuant to Fed. R. Civ. P. 24(a) "asserting that the grant of CHAWN's requested relief would result in regulatory limits that would severely limit, or completely destroy, the market for its products." *Slip op*. at 5. On November 30, 2019, COGA's motion was granted and both COGA and EPA answered CHAWN's complaint with COGA asserting a cross-claim against EPA "seeking a declaration that the 2009 Endangerment Finding is unsupported by the record and contrary to law." *Id*.

The United States District Court for the District of New Union concluded it possessed jurisdiction under the citizen suit provision of CAA and pursuant to federal question jurisdiction under 28 U.S.C. § 1331. *Id*. Neither Defendants raised an objection to venue. *Id*. Moreover, the District Court found CHAWN sufficiently established injury in fact, causation, and redressability for Article III standing. *Id*. at 5–6. On August 15, 2020, Judge Romulus N. Remus issued an order in the case finding (1) the Endangerment Finding was "valid with respect to an endangerment to public welfare;" (2) EPA unreasonably delayed both "responding to Plaintiff's

petition for designation of GHGs as a criteria pollutant" and actually "designating GHGs as a criteria pollutant;" and (3) EPA has a non-discretionary duty to designate GHGs as a criteria pollutant. *Id*. at 13. COGA's cross motion was also partially granted and the court invalidated the Endangerment Finding as it related to GHGs endangering public health. *Id*. at 14. CHAWN, COGA, and EPA have each filed a timely Notice of Appeal. *Id*. at 2.

SUMMARY OF ARGUMENT

This Court should reverse the District Court's conclusion that it had jurisdiction over CHAWN's unreasonable delay in designating GHGs as a criteria pollutant, and the District Court's holding that the Endangerment Finding was valid with respect to an endangerment of public welfare. This Court should affirm the District Court's conclusion that the Endangerment Finding that GHGs endanger public health is contrary to law. This is the only conclusion of the District Court that this Court should affirm. This Court should reverse the District Court's holding that EPA unreasonably delayed designating GHGs as a criteria pollutant and that EPA has a non-discretionary duty to designate GHGs as a criteria pollutant.

First, the District Court did not have jurisdiction over CHAWN's unreasonable delay claim because the rule sought had nationwide applicability and, pursuant to CAA section 307(b)(1), is subject to the exclusive jurisdiction of the Court of Appeals for the District of Columbia (D.C. Circuit). While unreasonable delay claims are to be brought in district courts of the United States, unreasonable delay of rules with nationwide applicability must still be brought in the D.C. Circuit. Further, section 307(b)(1) is a conferral of jurisdiction, not venue. As a result, EPA did not "waive" jurisdiction by failing to raise an objection to the District Court.

Second, the 2009 Endangerment Finding is valid with respect to a finding of an endangerment to public welfare based on the available scientific evidence that indicates that

GHGs have an effect on the climate, including effects on global temperatures, and agriculture. To determine whether the EPA's finding is valid, this Court must first analyze congress' express intent when writing the statute. Given that Congress defined "welfare" to include effects on the climate, the 2009 Endangerment Finding, with respect to its finding of an endangerment to public welfare, is valid.

Third, the 2009 Endangerment Finding with respect to a finding of an endangerment to public health is not valid due to a lack of scientific evidence. The EPA's finding must be given great deference and may only be reversed where it is found to be unreasonable. The EPA is also allowed great deference to revise NAAQS. The EPAs finding with respect to an endangerment of public health was unsupported by scientific evidence, and therefore is invalid.

Fourth, EPA's ten-year delay in taking action to list GHGs as criteria pollutants under CAA section 108(a) does not constitute an unreasonable delay because EPA has not violated any deadlines imposed by CAA. Alternatively, the interests of CHAWN will not be irreparably harmed through EPA's delay, therefore such delay is not unreasonable.

Fifth, EPA does not have a non-discretionary duty to designate GHGs as a criteria pollutant under CAA section 108 based on the 2009 Endangerment Finding. In order to impose a nondiscretionary duty, "a duty of timeliness must 'categorically mandate' that all specified action be taken by a date-certain deadline." *Sierra Club v. Thomas*, 828 F.2d 783, 791 (D.C. Cir. 1987). CAA provides no deadline or timeframe by which EPA must comply in designating criteria pollutants. Therefore, EPA has a discretionary duty to designate criteria pollutants.

ARGUMENT

I. THE DISTRICT COURT DID NOT HAVE JURISDICTION OVER CHAWN'S UNREASONABLE DELAY CLAIM BECAUSE THE RULE SOUGHT HAD NATIONWIDE APPLICABILITY SUBJECT TO REVIEW EXCLUSIVELY IN THE D.C. CIRCUIT

CAA established "a comprehensive program for controlling and improving the nation's air quality through both state and federal regulation." *Sierra Club v. EPA*, 774 F.3d 383, 386 (7th Cir. 2014). To do so, the EPA Administrator is charged with "identifying air pollutants that endanger public health and welfare and with formulating [NAAQS] that specify the maximum permissible concentrations of those pollutants in the ambient air." *Id*.

CAA provides enforcement mechanisms, one of which is the citizen suit provision, which allows an individual or group to bring suit against any person, the United States, or other government instrumentality or agency "who is alleged to have violated . . . an emission standard or limitation under [CAA]." 42 U.S.C. § 7604(a)(1); *see Nat'l Parks and Conservation Ass'n, Inc. v. Tenn. Valley Auth.*, 502 F.3d 1316, 1318 (11th Cir. 2007) (allowing a group to bring a citizen suit under the CAA). A suit may also be brought "against the [EPA] Administrator where there is alleged failure of the Administrator to perform any act or duty . . . which is not discretionary." 42 U.S.C. § 7604(a)(2).

Beyond simply allowing an individual or group to bring a suit to enforce the provisions of CAA, Congress explicitly allocated jurisdiction for specific categories of claims arising from CAA. *See id.* § 7607(b)(1). Specifically, a petition for review of an EPA Administrator's actions under CAA with nationwide applicability are to be reviewed in the D.C. Circuit. *Id*.

A. Listing GHGs as a Criteria Pollutant Would Have Nationwide Applicability and thus Must be Heard in The D.C. Circuit Regardless of an Unreasonable Delay Claim

The jurisdiction in which a claimant is required to file a petition for review of an Administrator's action "depends entirely on--and is fixed by--the nature of the agency's action." *S. Ill. Power Coop. v. EPA*, 863 F.3d 666, 670 (7th Cir. 2017). Neither the scope of the petitioner's challenge nor the effects complained of have a role in determining jurisdiction. *Id.* at 668; *ATK Launch Systems, Inc. v. EPA*, 651 F.3d 1194, 1197 (10th Cir. 2011). Rather, the jurisdiction inquiry proceeds by "determining if the challenged regulation is 'nationally applicably' or 'locally or regionally applicable.'" *ATK Launch Systems*, 651 F.3d at 1197.

There are three jurisdiction designations mandated by CAA. *See* 42 U.S.C. § 7607(b)(1). First, it is clear that "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." *Id* (emphasis added). Second, a petition for review of an agency action that is "locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit." *Id*. Finally, a final agency action that is locally or regionally applicable must also be filed in the D.C. Circuit if the agency action "is based on a determination of nationwide scope or effect." *Id*.

Also relevant to this case is section 304 of the CAA which provides that the district courts of the United States have jurisdiction "to enforce such an emission standard or limitation or such an order, or to order the Administrator to perform such act or duty, as the case may be," or nondiscretionary action, and "have jurisdiction to compel . . . agency action unreasonably delayed." *Id.* § 7604(a). Therefore, an unreasonable delay claim may be brought in the district courts of the United States, *id.* § 7604(a), but a petition for review of an Administrator's action

with nationwide applicability must be brought in the D.C. Circuit, *id.* § 7607(b)(1). This, however, does not create an inherent conflict as "[a] nondiscretionary duty suit may be brought in the district court where venue is otherwise proper under the general venue statute . . . while an unreasonable delay suit *must* be brought in the United States District Court for the District of Columbia if the challenged action has nationwide scope or effect." *New Jersey v. Wheeler*, -- F.Supp.3d--, 2020 WL 4331604 (July 28, 2020) (emphasis added).

CAA also goes on to provide a list of some agency actions that have nationwide applicability and are thus to be brought in the D.C. Circuit. *See* 42 U.S.C. § 7607(b)(1). One such agency action is "promulgating any national primary or secondary ambient air quality standard." *Id*. Promulgating national primary or secondary ambient air quality standards occurs only after a pollutant is designated as a criteria pollutant. *See id.* § 7408(a). Therefore, as the District Court noted, the listing of GHGs as a criteria pollutant is certainly an action that has nationwide applicability.

Here, CHAWN brought suit against EPA in the United States District Court for the District of New Union for "unreasonable delay in carrying out its non-discretionary duty to designate GHGs as a criteria pollutant as demanded in the December 15, 2009 petition for rulemaking." *Slip op*. at 5. The District Court for the District of New Union did not have jurisdiction to hear this claim because the claim was for unreasonable delay of an action that has nationwide applicability. Listing GHGs as a criteria pollutant undoubtedly has nationwide applicability. The District Court agreed listing GHGs as a criteria pollutant is "a category which would certainly include the designation of a criteria pollutant." *Id.* at 12. Therefore, such a claim must be filed within the D.C. Circuit.

B. Section 307(B)(1) Confers Jurisdiction to the D.C. Circuit and is Therefore Not Waivable

The Supreme Court of the United States made it clear section 307(b)(1) of the CAA "is a 'conferral of jurisdiction upon the courts of appeals[.]'" *Sierra Club v. EPA*, 955 F.3d 56, 61 (D.C. Cir. 2020) (quoting *Harrison v. PPG Industries*, 446 U.S. 578, 593 (1980)). The D.C. Circuit agreed section 307(b)(1) "undeniabl[y] vest[ed]" subject matter jurisdiction in both the D.C. Circuit and regional Courts of Appeals. *Dalton Trucking, Inc. v. EPA*, 808 F.3d 875, 879 (D.C. Cir. 2015). This clear mandate, however, has gotten muddied in case law inconsistent with the Supreme Court's ruling with courts inferring section 307(b)(1) has a "dual function[]" of venue and jurisdiction. *Id*. However, the two concepts of venue and jurisdiction are quite different. *See Wachovia Bank v. Schmidt*, 546 U.S. 303, 316 (2006).

Venue is defined as "the geographic specification of the proper court or courts for the litigation of a civil action that is within the subject-matter jurisdiction of the district courts in general." 28 U.S.C. § 1390. Subject matter jurisdiction of federal courts, on the other hand, is "their power to adjudicate," it "is a grant of authority to them by Congress." *Neirbo Co. v. Bethlehem Shipbuilding Corp*., 308 U.S. 165, 167–168 (1939). While "[v]enue is largely a matter of litigational convenience," "[s]ubject matter jurisdiction . . . concerns a court's competence to adjudicate a particular category of cases." *Wachovia Bank*, 546 U.S. at 316. Accordingly, venue may be waived if it is not timely raised, while subject matter jurisdiction "must be considered by the court on its own motion, even if no party raises an objection." *Id.*; *see also Reeb v. Econ. Opportunity Atlanta, Inc.*, 516 F.2d 924, 926 (5th Cir. 1975) ("The courts, however, have to make their own determination whether the district court has jurisdiction, rather than defer to the [federal agency] in the first instance.").

Various courts have disregarded section 307(b)(1)'s clear mandate leading to confusion and inconsistent results. For example, in *Texas Municipal Power Agency*, the court held section 307(b)(1) is a conveyance of venue and is therefore waived when not raised. *Texas Mun. Power Agency v. EPA*, 89 F.3d 858, 867 (D.C. Cir. 1996) (agreeing with petitioner's "contention that § 307(b)(1) is a venue provision"). Other courts have concluded section 307(b)(1) is a "two-fold provision" conveying both jurisdiction and venue. *See e.g., Texas v. EPA*, 829 F.3d 405, 418 (5th Cir. 2016). For example, in *Texas v. EPA*, the court held section 307(b)(1) first "confer[s] jurisdiction upon the courts of appeals" and second allocated "petitions between the regional circuits and D.C. Circuit delineat[ing] the appropriate venue for challenges." *Id*.

However, these courts disregard the sound reasoning in *Harrison*. In *Harrison*, when the Supreme Court declared section 307(b)(1) of CAA conveyed jurisdiction, the court reviewed the legislative history of section 307. *Harrison*, 446 U.S. at 590. This inquiry revealed Congress' clear intent that "'any nationally applicable regulations promulgated by the Administrator under the [CAA can] be reviewed *only* in the U.S. Court of Appeals for the District of Columbia.'" *Id.* (quoting H.R. Rep. No. 95-924, pp. 323-24 (1977)) (emphasis added); *see also* 41 Fed. Reg. 56,767, 57,768 (Dec. 31, 1967) (stating the Administrative Conference of the United States took the position that section 307(b) of the CAA requires "certain nationally applicable standards are to be reviewed only in the Court of Appeals for the District of Columbia").

Here, the District Court erroneously relied on *Texas Municipal Power Agency* and concluded section 307(b)(1) is "not jurisdictional" but is a "venue requirement" and "is thus waived if not asserted by the defendant." *Slip op*. at 12. However, the Supreme Court, CAA, and the legislative history of section 307 make it clear—section 307(b)(1) is a conveyance of jurisdiction and is thus not waivable by the defendant. Rather, this question of jurisdiction must

be raised by the court on its own, the defendant need not raise such a question. The District Court did not have jurisdiction to hear CHAWN's unreasonable delay claim due to the fact that the rule sought would have nationwide application making the D.C. Circuit the proper court. EPA had no duty to object as this is a question of jurisdiction and the District Court alone needed to consider if they were the appropriate court.

II. THE 2009 ENDANGERMENT FINDING IS VALID WITH RESPECT TO AN ENDANGERMENT OF PUBLIC WELFARE

An agency's action will be reversed only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 42 U.S.C. § 7607(d)(9)(A); *see also* 5 U.S.C. § 706; *Ethyl Corp. v. EPA*, 51 F.3d 1053, 1064 (D.C. Cir. 1995). To determine whether an agency's finding is valid, the Court must first give deference to express congressional intent. *Chevron, U.S.A. v. NRDC*, 467 U.S. 837, 844 (1984). If Congress' intent is explicit, the court must defer to the congressional interpretation. *Id.* Where Congress' intent is not explicit, and the statute is ambiguous, the Court must look to see whether the agency's interpretation is reasonable. *Id.*

EPA recognizes two types of NAAQS: primary and secondary. 36 Fed. Reg. 8186 (1971). Section 108 of CAA indicates that the purpose of primary and secondary ambient air quality standards is to restrict air pollutants that "cause or contribute to air pollution" and "which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7408(a)(1). These NAAQS must be based upon "scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare [that] may be expected from the presence of such pollutant in the ambient air, in varying qualities." *Id.* § 7408(a)(2). Scientific

evidence must be evaluated by a "weight of the evidence" approach. *Mississippi v. EPA*, 744 F.3d 1334, 1344 (D.C. Cir. 2013).

Proof of demonstrable harm caused by the pollutant must be provided, and it must be shown that the standards are not "merely precautionary in nature." *Ethyl Corp. v. EPA*, 541 F.2d 1, 14 387 (D.C. Cir.1976). Once demonstrable harm is shown, standards must be preventative in nature. *Id.*

Secondary NAAQS are meant to protect the public welfare from known or anticipated effects of the pollutant in the air. *Id.* The U.S. Code states that:

> Any [NAAQS] prescribed under subsection (a) shall specify a level of air quality the attainment and maintenance of which in the judgment of the Administrator, based on such criteria, is requisite to protect the *public welfare* from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air.

42 U.S.C. § 7409(b)(2) (emphasis added). "Requisite to protect" means that the standard must be neither higher or lower than necessary. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 473, 475–76 (2001).

CAA states that the term "welfare" "includes, but is not limited to, effects on soils, water, crops, vegetation, manmade materials, animals, wildlife, weather, visibility, and *climate*, . . . as well as effects . . . on personal comfort and well-being, whether caused by transformation, conversion, or combination with other air pollutants." 42 U.S.C. § 7602(h) (emphasis added). As indicated by the lower court, Congress specifically included impacts on the "climate" within its definition of "welfare." *See id*.

In *PPG Industries, Inc.*, the court noted that sulfur oxide qualified as a threat to public welfare. *PPG Indus., Inc. v. Costle*, 659 F.2d 1239, 1242 (D.C. Cir. 1981). Evidence showed that when sulfur oxide is emitted in large quantities it results in increased mortality and morbidity. *Id*.

Specifically, at least 4000 deaths could be attributed to the smog resulting from sulfur oxide in London in 1952. *Id*.

In the present case, EPA defined a group of six greenhouse gases as a single "air pollutant," and found that these GHGs were commonly emitted from mobile sources. EPA further found that the emissions of these GHGs may lead to increased global temperatures and altered storm frequency and precipitation patterns. EPA also indicated that these GHGs could lead to an increase in ozone pollution as an effect of hotter temperatures. Furthermore, EPA indicated that these GHGs would lead to reduced agricultural productivity, reduced water supplies, and increased property and economic damage due to storms and rising sea levels.

In making these determinations, EPA relied on scientific evidence from leading climate scientists, who have concluded that the presence of CO2 in our atmosphere is already in the danger zone. Ctr. for Biological Diversity, Petition to Establish National Pollution Limits for Greenhouse Gases Pursuant to the Clean Air Act 20 (Dec. 2, 2009), https://www.biologicaldiversity.org/programs/climate_law_institute/global_warming_litigation/clean_air_act/pdfs/Petition_GHG_pollution_cap_12-2-2009.pdf. Further scientific evidence from the United Nations project indicated that unless atmospheric CO2 is reduced, coral reefs will be lost across the world leading to significant effects on biodiversity. *Id.* Given that Congress specifically indicated that impacts on the environment may be prevented to protect public "welfare," the lower court's decision must be sustained.

III. THE 2009 ENDANGERMENT FINDING IS NOT VALID WITH RESPECT TO AN ENDANGERMENT OF PUBLIC HEALTH

An agency's action will be reversed only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 42 U.S.C. § 7607(d)(9)(A); *see also* 5

U.S.C. § 706; *Ethyl Corp.*, 51 F.3d at 1064. EPA is generally granted significant deference in setting NAAQS. *See Mississippi v. EPA*, 744 at 1341–42; *Lead Indus. Assoc., Inc. v. EPA*, 647 F.2d 1130, 1146 (D.C. Cir. 1980). Courts must review agency decisions to ensure that they adhere to a minimal standard of rationality, but are prohibited from looking at the decision as a scientist would. *See Am. Trucking Assoc., Inc. v. EPA*, 283 F.3d 355, 374 (D.C. Cir. 2002); *Ethyl Corp. v. EPA*, 541 F.2d at 36–37. These standards must not be more or less stringent than necessary. *Whitman*, 531 U.S. at 475–76.

Primary NAAQS, "prescribed under subsection (a) shall be ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health." 42 U.S.C. § 7409(b)(1). However, CAA fails to define "public health." *Id.* § 7602. Therefore, courts must defer to the agency's interpretation and reverse only where the agency's finding is found to be unreasonable. *Chevron*, 467 U.S. at 844.

NAAQS must "protect not only average healthy individuals, but also 'sensitive citizens'— children, for example, or people with asthma, emphysema, or other conditions rendering them particularly vulnerable to air pollution." *North Carolina v. Tenn. Valley Auth.*, 615 F.3d 291, 310 (4th Cir. 2010) (internal quotation marks omitted). Increased rates of illness as levels of pollutants increase may indicate that the sickness was caused by the pollutant. *See Nat'l Envtl. Dev. Ass'n Clean Air Project v. EPA*, 686 F.3d 803, 807 (D.C. Cir. 2012).

However, the analysis does not end there, as mere correlations with health effects will not be enough to trigger a primary NAAQS. *See Comms. for a Better Env. v. EPA*, 748 F.3d 333, 335 (D.C. Cir. 2014). There must also be evidence that the pollutants *cause* the health effects. *Id*. (emphasis added). Evidence must rule out other possible pollutants that may also lead to the

health effects. *Id.* Despite this, where a statute is merely precautionary in nature, and complete scientific evidence is not yet available, a showing of direct cause-and-effect will not be demanded. *Ethyl Corp.*, 541 F.2d at 28. However, the Court need not reweigh the evidence, there just must be enough to conclude that EPA made a rational decision. *See Am. Petroleum Institute v. Costle,* 665 F.2d 1176, 1185 (D.C. Cir. 1981).

Furthermore, CAA does not require EPA to give the *current* air quality a controlling role in setting NAAQS. *Nat'l Envtl. Dev. Ass'n Clean Air Project*, 686 F.3d at 813. Every aspect of prior NAAQS need not be undermined before a new judgment can be rendered. *Mississippi v. EPA*, 744 F.3d at 1334. CAA further gives the EPA significant discretion to decide when it is appropriate to revise NAAQS. 42 U.S.C. § 7409(d)(1). In fact, EPA must review primary and secondary NAAQS every five years, and must make corrections when necessary based on new available evidence. *Mississippi v. EPA*, 744 F.3d at 1339.

When reviewing prior NAAQS, the court must determine whether a prior NAAQS is no longer be "requisite," meaning "sufficient, but not more than necessary." *Murray Energy Corp. v. EPA*, 936 F.3d 597, 609 (D.C. Cir. 2019); *see Whitman*, 531 U.S. at 473. New rules must be based on "reasoned judgment[s]." *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). However, there must not be so much uncertainty that the action cannot be found to have been reasoned. *Ctr. for Biological Diversity v. EPA*, 749 F.3d 1079, 1089–90 (2014). When EPA reviews NAAQS, it presumably goes against contemporary policy judgments and scientific evidence, therefore, prior NAAQS cannot be presumptively valid. *Mississippi v. EPA*, 744 F.3d at 1343.

The court in *Murray Energy Corporation* reviewed EPA's decision to revise a primary NAAQS under CAA for ground-level ozone. 936 F.3d 597. EPA decided to depart from a prior

NAAQS due to new evidence including clinical studies, epidemiologic evidence, human exposure and health risk assessments. *Id.* at 609. The *Murray Energy Corporation* court held that EPA adequately provided an explanation of the reasons for departing from certain scientific recommendations, new evidence that suggested that the health effects would fall below the standard required, and that therefore the revision must be upheld. *Id.* at 609–12.

The court in *Mississippi v. EPA* reviewed scientific evidence of public health effects from rising ozone levels including epidemiological studies, human exposure studies and health risk assessments. 744 F.3d at 1349. The court held that the EPA's treatment of the evidence was not arbitrary and capricious because the EPA considered the entire body of evidence available when making their decision, and because the body of evidence supported EPA's decision. *See id*.

In *American Trucking* the court reviewed whether a primary NAAQS was arbitrary and capricious based on the available scientific evidence. 283 F.3d at 371. EPA relied on studies that showed that fine particulate matter and adverse health effects in making their determination. *Id.* The *American Trucking* court held that EPA's reasoning was sufficient due to the consistent evidence that indicated that particulate matter leads to health effects. *Id.*

In *Center for Biological Diversity v. EPA* the court reviewed EPA's decision to not to establish a NAAQS due to a lack of evidence. 749 F.3d at 1089. The D.C. Circuit concluded that due to the high degree of uncertainty involving the effects of aquatic acidification, EPA's decision to not set a NAAQS in response was a reasoned judgment and must be upheld. *Id.*

In the present case, the Endangerment Finding in regards to the "public health" standard includes only correlations and not direct impacts from GHGs themselves. The prior Endangerment Finding relied on evidence that these GHGs *could* lead to more heat related deaths and more insect borne illnesses, however, no evidence was provided that indicates that

GHGs directly lead to these, or other, negative health effects. The mere possibility that GHGs could lead to these effects is not enough, and mere correlations between the increase of a pollutant and of a health effect are not enough to contend that GHGs support a finding of an endangerment to public health.

Unlike in *Mississippi v. EPA*, in the present case, epidemiological studies, human exposure studies, nor health risk assessments were relied upon when EPA determined that GHGs endanger public health. Furthermore, unlike in *American Trucking* there is no consistent evidence that indicates that GHGs lead to an increase in disease or any other health effect. EPA relied on evidence in this case that indicated that increasing temperatures will "likely" lead to increases in morbidity and mortality, however EPA did not rely on any further evidence to back up this claim. EPA also relied on the likelihood that GHGs will lead to an increase in food borne illnesses, but once again lacked evidence to support this contention.

Although EPA's newfound position is not entitled to deference, it is not necessary that we must undermine every aspect of the prior reasoning to support a new finding. Similar to *Center for Biological Diversity*, EPA has recognized that there is not sufficient evidence to support a primary NAAQS in this case. There is a high degree of uncertainty that GHGs will lead to an increase in heat related deaths or food borne diseases due to the lack of evidence indicating such. EPA must be granted significant deference in this case, and a revision of the prior NAAQS finding will be supported so long as it is reasonable and can be explained. Here, EPA lacked evidence for its contention that GHGs directly impact public health, and therefore the lower court did not err in rejecting EPA's revised finding of GHGs endangerment to public health.

IV. EPA'S TEN-YEAR DELAY IN TAKING ACTION TO LIST GHGS AS CRITERIA POLLUTANTS DOES NOT CONSTITUTE AN UNREASONABLE DELAY

EPA delay in taking action to list GHGs as criteria pollutants under CAA section 108(a) does not constitute an unreasonable delay. The court in *Mexichem Specialty Resins* provides a two phase analysis to determine whether EPA's activities constitute an unreasonable delay under CAA. There the court states that there are "two avenues to establishing an unreasonable delay claim: (1) showing that an agency violated a statutory right to timely decisionmaking implicit in the agency's regulatory scheme, or (2) showing that some other interest—financial, aesthetic, or related to human health and welfare, for example—will be irreparably harmed through delay." *Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 554 (D.C. Cir. 2015) (quotation omitted). In the case at hand, neither avenue is satisfied.

A. EPA Has Not Validated a Statutory Right to Timely Decisionmaking

Relying on the three-factors analysis in *Mexichem*, it is evident that EPA has not violated Plaintiff's statutory right to timely decisionmaking. To establish a deprivation of a statutory right to timely decisionmaking, the court must:

> (a) determine whether Congress has imposed any applicable deadlines, exhorted swift deliberation concerning the matter, or other implicitly contemplated timely final action; (b) determine whether interests other than that of timely decisionmaking will be prejudiced by delay; and (c) determine whether an order expediting the proceedings will adversely affect the agency in addressing matters of a competing or higher priority.

Mexichem Specialty Resins, 787 F.3d at 554–55 (quotations omitted). Here, these factors are not satisfied.

i. Congress Has Not Imposed a Date Certain Deadline for Listing Criteria Pollutants

CAA does not specify a timetable for listing pollutants as criteria pollutants, therefore the first factor in establishing a statutory right to decisionmaking is not satisfied. "[A]bsent a precise statutory timetable or other factors counseling expeditious action, an agency's control over the timetable of its proceedings is entitled to considerable deference." *Mexichem Specialty Resins*, 787 F.3d at 555 (citations omitted). "In order to impose a clear-cut nondiscretionary duty, . . . a duty of timeliness must 'categorially mandate' that *all* specified action be taken by a date-certain deadline." *Sierra Club v. Thomas*, 828 F.2d 783, 791 (D.C. Cir. 1987).

In *Mexichem Specialty Resins*, the court held that petitioners failed to show that EPA's delay in rulemaking, to set a limit on polyvinyl chloride ("PVC") as a hazardous air pollutant, "violate[d] a statutory right to timely decision making." *Mexichem Specialty Resins*, 787 F.3d at 557. The court stated that in consideration of the three factors to establish a statutory decisionmaking the court should be mindful that "absent a precise statutory timetable or other factors counseling expeditious action, an agency's control over the timetable of its proceedings is entitled to considerable deference, and that even where a statutory timetable exists, noncompliance with it has sometimes been excused as long as the agency has acted rationally and in good faith." *Id.* at 555 (quotations omitted). The court held that because "EPA's forecasted duration of the reconsideration of the wastewater limit and the PVC-combined process vent limit is reasonably proportionate to the gravity and complexity of the rulemaking." *Id*. Further, the court stated that "[t]he scope of EPA's reconsideration in this case is proportional to the scope of the alleged shortcomings in the 2012 rulemaking, and EPA estimates that its current reconsideration proceeding will take about four years, a duration commensurate with that of EPA's prior efforts to set emissions limits for PVC production." *Id*.

In the case at hand, as was the case in *Mexichem*, CAA provides no timetable for which EPA must comply. EPA has no legislative directive, timeabletable, or date certain deadline by which it must list criteria pollutants. Listing GHGs as criteria pollutants and developing regulations for their emission is a complex process. Given this complexity, and the lack of a statuory timetable, EPA is entitled to considerable deference in determining the time necessary to list criteria pollutants.

ii. Plaintiff's Interests Will Not Be Prejudiced by EPA's Delay

Plaintiff's interests have not been prejudiced by EPA's delay in taking action to list GHGs at criteria pollutants. The D.C. Circuit provided that prejudice arises when "administrative delay amounts to a refusal to act, with sufficiently finality and ripeness." *Pub. Citizen Health Rsch. Group v. Food & Drug Admin.*, 740 F.2d 21, 32 (D.C. Cir. 1984). Here, EPA's delay does not equate to a finality of inaction. Instead, EPA has competing executive mandates, and a lack of Congressional directive, which have led to reasonable delays in the listing process. Such conflict does not arise to finality, and therefore, no interests of Plaintiff have been prejudiced.

iii. Expediting EPA Action Will Adversely Affect EPA Matters of Higher Priority

Executive Order 13771 directed agencies to prioritize deregulate and fiscal responsibility. Reducing Regulation and Controlling Regulatory Cost, Exec. Order 13771, 82 Fed. Reg. 9,339, 9,339 (Feb. 3, 2017). The order made it "the policy of the executive branch to be prudent and financially responsible in the expenditure of funds." *Id.* The order further directed that "whenever an [agency] publicly proposes for notice and comment or otherwise promulgates a new regulation, it shall identify at least two existing regulations to be repealed." *Id.* Specifically, in subsequent Presidential Memorandum, EPA is directed to carry out its core mission in accordance with statutory requirements, "while reducing unnecessary impediments to new

manufacturing and business expansion essential for a growing economy." Promoting Domestic Manufacturing and Job Creation—Policies and Procedures Relating to Implementation of Air Quality Standards, 83 Fed. Reg. 16,761, 16,762 (Apr. 16, 2018). Further Executive Orders specify that it the policy of the United States to "take appropriate actions to promote clean air and clean water for the American people, while also respecting the proper roles of the *Congress* and the States concerning these matters." Promoting Energy Independence and Economic Growth, Exec. Order 13,783, 82 Fed. Reg. 16,093, 16,093 (Mar. 28, 2017) (emphasis added).

Given these orders, EPA is required to prioritize deregulation and fiscal responsibility, and not the creation of new regulation for a family of pollutants for which Congress has not mandated such regulation. Noticeably, here, Congress has not acted to require EPA to list GHGs as criteria pollutants. Unlike in 1990, where Congress did order EPA to regulate a new class of pollutants, ozone-depleting substances. *See* 42 U.S.C. § 7671a (a)–(d) (providing a list of ozone depleting substances and requiring EPA to list and develop emissions regulations for such substances, and a timeline which such regulation is to occur). Here, EPA would be acting without direction or metrics set by Congress to create NAAQS for an entire class of pollutants.

B. Plaintiff's Interests Will Not be Irreparably Harmed Through EPA's Delay

Any injury caused to Plaintiff by EPA's ten-year delay in listing GHGs as criteria pollutants is not so substantial as to require equitable relief. Courts "set a high standard for irreparable injury." *Mexichem Specialty Resins*, 787 F.3d at 555. To constitute such, the "injury must be both certain and great, actual and not theoretical, beyond remediation, and of such *imminence* that there is a clear and present need for equitable relief to prevent irreparable harm." *Id.* (quotations omitted).

It is well recognized that the impact of GHGs on the climate is an international issue. Pollutants travel across borders and oceans, regardless of the environmental regulations that exist within certain countries. Promoting Domestic Manufacturing and Job Creation—Policies and Procedures Relating to Implementation of Air Quality Standards, 83 Fed. Reg. at 16,764–63. EPA's regulation of GHGs "may not by itself *reverse* global warming." *Massachusetts v. EPA*, 549 U.S. 497, 525 (2007). EPA regulation may merely "*slow* or *reduce* it." *Id.* However, a delay in taking such action does not create irreparably because the harm cause by global warming will persist notwithstanding EPA regulation. Therefore, it cannot be said that Plaintiffs have been irreparably harmed by EPA's lack of regulation, while other nations continue to produce GHGs at increasing levels. Therefore, inaction by the United States alone to regulate GHGs has not caused such certain, great and actual irreparable harm sufficient to necessitate equitable relief.

V. EPA HAS DISCRETION TO DESIGNATE GHGS AS CRITERIA POLLUTANTS

EPA does not have a non-discretionary duty to designate GHGs as a criteria pollutant under CAA seection 108 based on the 2009 Endangerment Finding. As stated above, "[i]n order to impose a clear-cut nondiscretionary duty, . . . a duty of timeliness must 'categorially mandate' that *all* specified action be taken by a date-certain deadline." *Thomas*, 828 F.2d at 791. "In the absence of a readily-ascertainable deadline, . . . it will be almost impossible to conclude that Congress accords a particular agency action such high priority as to impose upon the agency a 'categorical mandate' that deprives it of all discretion over the timing of its work." *Thomas*, 828 F.2d at 791. Here, as stated above, there is no deadline or timeframe by which EPA must comply. Therefore, EPA has discretion over not only *when* to list criteria pollutants, but also *whether* to list criteria pollutants.

CONCLUSION

Plaintiffs ultimately seek to have the Court construe CAA's statutory provisions in a way that Congress never intended, while EPA is merely asking the Court to interpret CAA's statutory provisions as written. As a result, this Court should reverse the District Court's holding that it had jurisdiction over CHAWN's unreasonable delay in designating GHGs as a criteria pollutant. Likewise, this Court should reverse the District Court's holding that the Endangerment Finding was valid with respect to an endangerment of public welfare. This Court should only affirm the District Court's conclusion that the Endangerment Finding that GHGs endanger public health is contrary to law. However, this Court should reverse the District Court's holding that EPA unreasonably delayed designating GHGs as a criteria pollutant and that EPA has a non-discretionary duty to designate GHGs as a criteria pollutant.