**Team # 27**

**Brief for: United States Environmental Protection Agency**

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*.

Brief for the United States Environmental Protection Agency

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

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## JURISDICTIONAL STATEMENT

The United States District Court for the District of New Union exercised jurisdiction under the Citizen Suit provision of the Clean Air Act ("CAA"), CAA § 304(a), 42 U.S.C. § 7604(a) (discussed *infra* § I), as well as federal question jurisdiction under 28 U.S.C. § 1331. The District Court entered its judgment on August 15, 2020, granting Plaintiff's motion for summary judgment in part, and granting Intervenor's motion in part. Climate Health and Welfare Now (CHAWN), Coal, Oil and Gas Association (COGA) and the United States Environmental Protect Agency (EPA) each 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 THE ISSUES PRESENTED FOR REVIEW

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 EPA's ten-year delay in taking any action on listing 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 THE CASE

This case is an appeal from an order of the District Court for the District of New Union granting Plaintiff's motion for summary judgment in part and Intervenor's motion for summary judgment in part. The district court, EPA, and CHAWN maintain that GHGs which contribute to climate change may present an endangerment to public welfare and should be subject to

secondary NAAQS and regulation under section 202 of the CAA. COGA disagrees, alleging that the 2009 Endangerment Finding ("Endangerment Finding") is itself unsupported by law and the administrative record, and that EPA's understanding of the term "reasonably anticipated to endanger" as embodied in sections 108 and 202 is legally invalid. This case is primarily about the need for agency discretion in order to set standards that are guided by thorough research, and the need for the Titles of the CAA to address distinct sources of pollution as Congress intended. Protecting these needs protects EPA's ability to fulfill its Congressional mandate to protect public health and welfare. In their handling of these questions, the District Court correctly held that the Endangerment Finding was valid only with respect to public welfare. However, the District Court was incorrect to find that EPA has a non-discretionary duty to list GHGs as a criteria pollutant, and that they have unreasonably delayed in listing GHGs as such.

## STATEMENT OF THE FACTS

In 2009, EPA responded to the Supreme Court's decision in *Massachusetts v. EPA* by making a finding regarding whether GHGs may present an endangerment to public health or welfare. Record at 6. EPA makes "two distinct 'findings'" in the Endangerment Finding: (1) the so-called Endangerment Finding that six identified GHGs threaten public health and public welfare, and (2) the so-called "Cause or Contribute Finding," in which EPA finds that combined GHG emissions from new motor vehicles and engines contribute to atmospheric GHG concentrations and the threat of climate change. *See* Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act (Endangerment Finding), 74 Fed. Reg. 66496, 66534 (Dec. 15, 2009) (codified at 40 C.F.R. §1). The Finding itself "does not impose any requirements on industry or other entities," although it did "pave the way" for EPA to finalize proposed GHG emissions standard for light-duty vehicles. *Id*.

Following the publication of the Endangerment Finding, EPA pursued multiple regulatory actions limiting GHG emissions from new motor vehicles and engines. R. at 7. First, EPA established GHG emissions limits for new passenger vehicles and light trucks; these limits were upheld in 2012. *Id*. These regulations included limits beyond what was mandatory under section 202 for motor vehicles and engines: the EPA pursued regulation to limit emissions from new power plants under Title I, adopted the Tailoring Rule under Title V that changed permitting and review requirements for sources, and issued the Clean Power Plan, which instructed states to reassess their implementation plans to achieve GHG emission reduction under section 111. *Id*.

Immediately following the issuance of the Endangerment Finding, CHAWN, along with other environmental organizations, filed a petition with the EPA demanding that EPA list GHGs as criteria pollutants under section 108(a). R. at 5. While EPA did not respond to the petition, they continued to regulate GHGs under section 202(a) and other titles, following their mandate. R. at 7. On April 1, 2019, CHAWN served notice of its intent to sue EPA for failure to carry out its asserted mandatory duty- not to answer the petition, but to designate GHGs as a criteria pollutant. R, at 5. EPA took no action in response, and this lawsuit commenced. *Id.*

CHAWN is an environmental organization with members whose affidavits state they have been harmed by the effects of sea level rise and global warming. *Id*. Coal Oil and Gas Association (COGA) is "a trade association representing the economic interests of fossil fuel companies engaged in the extraction, processing, and marketing of coal, oil, and natural gas." *Id*. COGA intervened as a party with a property or transaction interest under Fed. R. Civ. P. 24(a), answered CHAWN's complaint, and cross-claimed against EPA, seeking a declaration that the Endangerment Finding was unsupported by the record and contract to law. *Id*.

## SUMMARY OF THE ARGUMENT

The District Court of New Union did not have jurisdiction over this case. CHAWN's claim of unreasonable delay pertains to a rulemaking and subsequent regulation with national applicability, and CAA of 1963 at § 304, 307 gives exclusive jurisdiction over such matters to the D.C. Circuit—by extension, it should have been heard first in D.C. District Court.

Jurisdictional issues aside, EPA maintains that its Endangerment Finding as to public welfare is legally valid, due to the "rational basis" of EPA's scientific evidence indicating that GHGs and climate change impacts pose dangers to public welfare, and the explicit link between "welfare" and "climate" in the statutory language of section 302(h). However, the Endangerment Finding as to public health is legally invalid, as the CAA text does not explicitly link public health and climate impacts, and there is little precedent to support expanding "public health" beyond Congress's statutory intent in the CAA. *Id.* EPA also points to judicial deference to agency interpretations, notes that *Chevron* analysis favors EPA as to both the lack of reference to public health in the CAA and agency deference, differentiates the large attenuation between climate change impacts and public health from the tighter link between automotive pollutants and public health, and notes various legal theories which would otherwise exempt EPA from being bound by the public health finding.

Additionally, EPA has not unreasonably delayed in listing GHGs as criteria pollutants. All delay, when no statutory deadline is given, must follow the rule of reason. EPA's ten-year waiting period is justified by the rule of reason because of the scope and technical complexity required to write NAAQS regulating six commingled gases as one pollutant. Further, delay is reasonable because EPA has neither violated a statutory right to timeliness, nor has the waiting period caused *irreparable* harm to petitioners.

Finally, EPA does not have a non-discretionary duty to designate GHGs as a criteria pollutant, as the Endangerment Finding is specifically written under section 202(a), which triggers none of the regulatory requirements found in section 108. Given that the Endangerment Finding gives no clear guidance regarding deadlines for action, the duty to list must be discretionary under the date-certain doctrine. Policy reasons further give the EPA Administrator discretion over the duty to list, and EPA notes instances in which many of the pollutants included in the GHG designation are already regulated—possibly triggering an exception to the requirements of section 108(c).

## STANDARD OF REVIEW

An appellate court reviews a grant of summary judgment de novo. *See, e.g., Clicks Billiards, Inc. v. Sixshooters Inc.*, 251 F.3d 1252, 1257 (9th Cir. 2001); *Schoonejongen v. Curtiss-Wright Corp*., 143 F.3d 120 (3d Cir. 1998) ("Plaintiffs now appeal the district court's grant of summary judgment . . . [o]ur standard of review is plenary."). When the EPA engaged in the informal rulemaking at issue here, its procedures were conducted under section 307(d), Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the CAA, 74 Fed. Reg. 66,946, 66,946 (Dec. 15, 2009), and must be reviewed with the same highly deferential standard of review that the court uses under 5 U.S.C. § 706(2)(A). *See Am. Trucking Ass'ns v. EPA*, 283 F.3d 355, 362 (D.C. Cir. 2002) ("Thus, we presume the validity of agency action as long as a rational basis for it is presented.'") (citing *Lead Indus. Ass'n v. EPA*, 647 F.2d 1130, 1145 (D.C. Cir., 1980)).

## ARGUMENT

### I. THE DISTRICT COURT OF NEW UNION DID NOT HAVE JURISDICTION OVER CHAWN'S UNREASONABLE DELAY CLAIM UNDER CAA § 304(A).

The district court did not have jurisdiction over the unreasonable delay claim. The CAA's Citizen Suit provision typically allows the district courts to adjudicate claims by individuals and corporate persons against the EPA Administrator for alleged failure to perform non-discretionary duties; but there is an exception where the unreasonably delayed action would compel action referred to in section 307(b), which provides that matters concerning various nationwide rulemaking should be subject to judicial review in the D.C. Circuit. Clean Air Act at § 304. Therefore, such rulemakings must be litigated in the D.C. district court in the first instance. *Id*. The establishment of greenhouse gases ("GHGs") as criteria pollutants would both itself require a rulemaking of nationwide applicability and require further nationwide regulation, clearly establishing the relevance of section 307(b) for review.

Prior to the CAA Amendments of 1990, there may have been a stronger claim of jurisdiction outside the D.C. Circuit court. In *Sierra Club v. Thomas*, the Supreme Court interpreted unreasonable delays as falling outside the bounds of the non-discretionary duties subject to section 304(a)(2). 828 F.2d 783, 792 (D.C. Cir. 1987) ("Where Congress has established no date-certain deadline — explicitly or implicitly — but EPA must nevertheless avoid unreasonable delay, it does not follow that EPA is, for the purposes of section 304(a)(2), under a non-discretionary duty to avoid unreasonable delay. Instead, this type of duty is discretionary and . . . [the D.C. Circuit Court] reviews claims alleging unreasonable delays of this type in order that we may protect our eventual jurisdiction under section 307 to review the final EPA action."). The CAA amendments of 1990 substantially changed the Citizen Suit provision. *Compare* CAA § 304 (1988) (lacking reference to 307(b)) *with* CAA § 304 (1994)

(containing language granting the district courts authority to adjudicate unreasonable delay claims, except for "an action to compel agency action referred to in section 307(b) which is unreasonably delayed may only be filed in a United States District Court within the circuit in which such action would be reviewable under section 307(b)."); *see Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, n. 6 (D.C. Cir. 2015) ("Congress has partly abrogated *Sierra Club v. Thomas*, but its analytical framework for determining whether EPA's delay was unreasonable remains applicable to whether Petitioners may be excused for their failure to exhaust their administrative remedies."). Despite the changes, courts have continued to apply its position that "a non-discretionary duty of timeliness may arise even if a deadline is not explicitly set forth in the statute, if it is readily-ascertainable by reference to some other fixed date or event." *Wheeler*, 2020 LEXIS 133161, at *34 (S.D.N.Y. July 28, 2020) *citing Sierra Club*, 828 F.2d at 791 (stating that though *Mexichem* acknowledged the abrogation of *Sierra Club*, and expanded access to the court, it did not abrogate the decision as it pertains to non-discretionary duty).

Courts may consider ordering EPA to respond to petitions under 304(a) but should not go beyond that to address the content of the petition itself. In *Humane Society of the United States v. McCarthy*, the court assessed whether the CAA provided a remedy for the plaintiff's claim where the plaintiff sought a response to a rulemaking petition regulating concentrated animal feeding operations. 209 F. Supp. 3d 280, 281 (D.D.C. 2016). Although the court dismissed the claim for insufficient notice, it determined that, "[t]he legislative history of the 1990 amendments to the CAA therefore make clear that Congress intended that district courts be given jurisdiction over unreasonable delay claims alleging a failure to respond to a petition for rulemaking under the CAA." *Id.* at 287. The court assessed a similar set of circumstances in *Env't Integrity Project v. EPA*, and similarly dismissed for lack of sufficient notice. F. Supp. 3d

50, 51-52, 57-58 (D.D.C. 2015) (finding that the Citizen Suit provision must be construed more broadly than it was in *Sierra Club v. Thomas*, and that there was a non-discretionary duty to respond but failing to find a non-discretionary duty to grant the petition, when Plaintiff sued for a response to a petition to designate ammonia as a criteria pollutant).

Non-discretionary duty and unreasonable delay are assessed differently in jurisdiction analyses; while claims for failure to fulfill a non-discretionary duty may be brought in any district court that would otherwise have jurisdiction, unreasonable delay claims must be brought in the D.C. District Court. *Wheeler*, 2020 LEXIS 133161, at *22. In *Wheeler*, the court assessed states' claims that EPA had failed to promulgate federal implementation plans (FIPs) for upwind states, as required by the CAA's "Good Neighbor Provision." *Id*. at *2. The court found that there was a non-discretionary duty that allowed the Southern District of New York to hear the case because the "Good Neighbor Provision" had a statutory attainment deadline, creating a non-discretionary duty to act and giving the court jurisdiction. *Id*. at *6, 22-23.

The instant case can be differentiated from both circumstances though in significant ways. Although CHAWN previously submitted a rulemaking petition like those at issue in *Humane Society* and *Environmental Integrity Project*, it does not sue for a response to such petitions, which would still give EPA discretion to grant or reject the petition. Instead, CHAWN asks the court to grant the petition itself, a remedy beyond what has been granted in similar cases under the Citizen Suit provision. Although the court has ordered EPA to make specific decisions, as was the case in *Wheeler*, it has generally done so when a statute created a non-discretionary duty with specific deadlines. EPA is unaware of any case that would give a district court in the Twelfth Circuit jurisdiction to hear a case as is before it, where under the Citizen Suit provision, in absence of a clear duty to act, and without a statutory or implied timeframe in which to

complete it, the court would order EPA to make a specific rule. Therefore, the court must dismiss any claims stemming from an alleged non-discretionary duty.

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

In upholding its endangerment finding as to public welfare, EPA points to A.) its congressionally delegated authority to determine which pollutants are "reasonably anticipated to endanger" welfare, and B.) the CAA's statutory definition of public welfare, which explicitly links "welfare" with "climate" and climate-related factors. CAA § 302(h).

### A. EPA's scientific determinations that GHGs are reasonably anticipated to endanger public welfare are rationally-based and legally valid.

COGA claims that EPA misunderstands, and wrongly applies, the term "reasonably anticipated to endanger" as embodied in CAA sections 108 and 202. R. at 8. Under section 108, the EPA Administrator has the authority to list GHGs as criteria pollutants if, "in his judgment," they are found to "cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare." CAA § 108(a)(1). Section 202(a)(1) requires EPA to prescribe emissions standards for pollutants from new motor vehicles which, in its judgment, cause or contribute to air pollution "reasonably anticipated to endanger public health or welfare."

While the Congresses that drafted section 202(a)(1) may have not known that burning fossil fuels could produce GHGs, cause climate change, and endanger public welfare, they understood that "without regulatory flexibility, changing circumstances and scientific developments would soon render the Clean Air Act obsolete." *Massachusetts v. EPA*, 549 U.S. 497, 532 (2007). The "broad language" of section 202(a)(a) has been read as an "intentional effort" to give EPA enough flexibility to judge whether pollutants may endanger welfare. *See id*. (citing *Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206, 212 (1998)). The CAA's use of the word "judgment" directs EPA to exercise discretion in terms of evaluating whether GHGs

pose a threat—and judgments do not have to rely on definite knowledge. *Massachusetts v. EPA*, 549 U.S. at 533. "Requiring that EPA find 'certain' endangerment" of public welfare before regulating GHGs "would effectively prevent EPA from doing the job Congress gave it in § 202(a)—utilizing emission standards to prevent reasonably anticipated endangerment from maturing into concrete harm." *Coal. for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102, 122 (D.C. Cir. 2012). Ultimately, the EPA Administrator is directed to make endangerment findings "in part on 'factual issues,' but largely 'on choices of policy, on an assessment of risks, [and] on predictions dealing with matters on the frontiers of scientific knowledge.'" *Ethyl Corp. v. EPA*, 541 F.2d 1 (D.C. Cir. 1976) (quoting *Amoco Oil Co. v. EPA*, 501 F.2d 722, 741 (D.C. Cir. 1974)) ("A standard of danger – fear of uncertain or unknown harm – contemplates no more.").

When EPA receives a judicial order to determine whether a pollutant is dangerous, it must do so if "sufficient information exists to make an endangerment finding." *Massachusetts v. EPA*, 549 U.S. at 533-34. As noted by the district court in this case, judicial review of EPA's resolution of scientific issues is "highly deferential"—courts assume that an agency decision is valid, as long as "a rational basis" is presented. R. at 8; *Coal. for Responsible Regulation, Inc.*, 684 F.3d at 120; *see also Am. Farm Bureau Fed'n v. EPA*, 559 F.3d 512, 533 (D.C. Cir. 2009) (quoting *City of Waukesha v. EPA*, 320 F.3d 228, 248 (D.C. Cir. 2003)) (stating that courts give an "extreme degree of deference to the agency when it is evaluating scientific data within its technical expertise," and only review an agency decision to "ensure that the EPA has examined the relevant data and has articulated an adequate explanation for its action"). Policy issues, such as a finding's economic or political impacts, are not barred from consideration, but they cannot be "justification for declining to form a scientific judgment." *Massachusetts v. EPA*, 549 U.S. at 533-34.

The scientific record referenced by EPA in the Endangerment Finding, as detailed below, makes it entirely rational for the agency to conclude that public welfare is directly threatened by GHGs, because the description of "welfare" in the CAA encompasses the effects of rising levels of atmospheric GHGs on weather systems, sea level, and other issues of concern. COGA protests that the NAAQS which flow from an endangerment finding "would severely limit, or completely destroy, the market for its products." R. at 5.[1] As clarified above, and by the district court, EPA is not required to weigh such policy arguments heavily at the science-focused Endangerment Finding phase. R. at 5. *See also Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 465 (2001) ("the most important forum for consideration of claims of economic and technological infeasibility is before the state agency" implementing CAA rulemaking, not EPA factfinding).

### B. The statutory construction of the Clean Air Act by Congress supports the Endangerment Finding as to public welfare.

Congress intends for air pollutants' effects on "climate" to be considered as a matter of public welfare. Indeed, the district court notes that "Congress specifically included impacts of 'climate' in the definition of 'welfare.'" R. at 9. CAA's statutory definition of "welfare" is broad, encompassing most of the climate change impacts listed in the Endangerment Finding as threats to public welfare. *See* CAA § 302(h), 42 U.S.C. § 7602(h) ("All language" throughout the CAA "referring to effects on welfare includes, but is not limited to, effects on . . . weather, visibility, and **climate**, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and well-being") (emphasis added). The Endangerment Finding states that the "clearest and strongest" evidence that GHGs threaten public welfare is the ongoing and projected impact of climate change on sea level rise, coastal

[1] COGA expresses concern that granting CHAWN's request for relief and promulgating GHG NAAQS for public health would destroy its business, but this applies to public welfare as well as the NAAQS are hypothetical.

flooding, and threats to water resources; other strong support includes impacts on "infrastructure and settlements, as well ecosystems and wildlife." Endangerment Finding, 74 Fed. Reg. 66,496, 66,534 (Dec. 15, 2009). While the attenuation between climate change and direct impacts on health may provide a "reasonable basis" for not setting primary NAAQS, the direct connection between the text of the CAA, evidence of the negative impact of climate on overall public welfare is more difficult to rebut due the CAA's bundling of these issues under "welfare."

## III. THE ENDANGERMENT FINDING IS NOT VALID WITH RESPECT TO PUBLIC HEALTH.

Scientific evidence in the Endangerment Finding suggests that climate change threatens public health through impacts such as higher temperatures, a rise in insect-borne diseases, and the adverse effects of increasingly severe coastal storms and sea level rise; on this basis, CHAWN argues EPA must uphold the finding and issue NAAQS. R. at 4, 6; Endangerment Finding, 74 Fed. Reg. 66496, 66534 (Dec. 15, 2009). The district court and COGA agree with EPA that the public health endangerment finding is contrary to law, as it relies on indirect health harms resulting from a changing climate, rather

than direct harms that may follow from GHGs' impacts on the human body. R. at 9. EPA's stance is supported by A.) the distant link between climate change impacts and public health in the CAA text; B.) the lack of precedent to support expanding "public health" beyond congressional intent; C.) judicial deference to agency interpretations, and D.) *Chevron* analysis; E.) the attenuation between climate change impacts and public health, as compared to automotive pollutants and public health; and F.) various judicial doctrines which may exempt EPA from putting this finding into effect.

### A. The Clean Air Act's legislative history does not support construing indirect climate change impacts as endangerments to public health.

In contrast to "welfare," there is no definition provided for "public health" in the CAA's statutory language. *See* CAA § 302(h). The CAA simply charges the EPA Administrator with setting NAAQS at a level "requisite to protect the public health" with "an adequate margin of safety." CAA § 302(h). The D.C. Circuit has recognized that Congress's reading of "public health" in the CAA is typically related to individuals' respiratory sensitivity to pollutants, requiring NAAQS to protect both healthy people and those with "asthma, emphysema, or other conditions causing sensitivity to air pollution." *See Nat'l Env't Dev. Association's Clean Air Project v. EPA*, 686 F.3d 803, 810 (D.C. Cir. 2012) (quoting *Am. Lung Ass'n v. EPA*, 134 F.3d 388, 389 (D.C. Cir. 1998)). This follows the "origins of the Clean Air Act," which are "closely tied to fatal fogs" and "Killer Smog" with ambient air concentrations of pollutants in ambient air high enough to cause health effects such as "impaired breathing, heart disease, lung damage and lung disease." *See Coal. for Responsible Regulation, Inc. v. EPA*, No. 09-1322, 2012 U.S. App. LEXIS 25997, at *32-33 (D.C. Cir. Dec. 20, 2012) (Brown, J., dissenting).

Although the CAA Amendments of 1990 expanded the CAA's regulatory coverage, and *Massachusetts v. EPA* held that EPA should regulate GHGs under the CAA, no CAA-related cases have parsed "public health" to mean anything beyond direct health effects to the human body. 549 U.S. at 534; Clean Air Act Amendments of 1990 § 707(f), Pub.L. No. 101-549, 104 Stat. 2574, 26883 (expanding CAA coverage from urban air pollutants to also include acid rain and ozone depletion, which increases human exposure to solar radiation). Even the language of the Endangerment Finding itself delineates "adverse air quality impacts" as "strong and clear" evidence as to the effects of climate change on public health, while more indirect effects of

climate change on health—such as an increased likelihood of heat waves—are described by EPA as subject to "many uncertainties." Endangerment Finding, 74 Fed. Reg. at 66497.

### B. Precedent does not support expanding the definition of the public health endangerment beyond the bounds of congressional intent placed in the CAA.

In other cases assessing EPA's duty to regulate GHGs in a climate change context, the court has consistently looked first to congressional language and intent. In *Massachusetts v. EPA*, the court sought to identify "any congressional action that conflicts in any way with the regulation of greenhouse gases from new motor vehicles" before directing EPA to reexamine GHG regulation. 549 U.S. at 531. Even a prior endangerment finding as to public health "is not a roving license to ignore the statutory text" of the CAA, in which Congress defines public welfare as connected to climate change but remains silent on health. *Massachusetts v. EPA*, 549 U.S. at 533. EPA "must ground its reasons for action or inaction in the [CAA]" itself, separate from the question of an endangerment finding. *Massachusetts v. EPA*, 549 U.S. at 534-535. Although EPA is duty-bound to make an endangerment finding "by congressional design," it may be able to refrain from doing so if it "provides some other reasonable explanation as to why it cannot or will not exercise its discretion." *Massachusetts v. EPA*, 548 U.S. at 532.

Congress has been free to "circumvent" the "close cause-health effect nexus" between climate change and public health by amending the CAA and clarifying or expanding the meaning of public health; notably, it has abstained from doing so. *Coal. for Responsible Regulation*, Inc., 2012 LEXIS 25997, at *38-39 (Brown, J. dissenting). Until Congress alters course, the dangers that EPA can regulate as to public health are limited. EPA points to Congress's intent in the CAA to target direct health effects as a reasonable explanation for holding its former finding invalid. R. at 9. As noted by the district court, EPA's health endangerment finding "relies entirely on the consequential health harms resulting from changing climate," and fails to rely on

specific health impacts "resulting from breathing air with ambient concentrations of carbon dioxide or other GHGs." R. at 9. Therefore, EPA will not—and, arguably, cannot—adopt CHAWN's interpretation of public health in relation to the CAA.

### C. EPA's interpretation of public health should be given weight, as an agency is best suited to resolve ambiguities in its own rules.

Although courts are not bound by EPA's reading of "public health" as excluding indirect climate change impacts, an agency interpretation should be given "considerable weight" and should "influence" judicial reasoning. *U.S. v. Mead Corp*., 533 U.S. 218, 227-228 (2001); *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837 (1984). It is firmly established that "agencies charged with applying a statute necessarily make all sorts of interpretive choices" outside of formal rulemaking; and even when those interpretations are not binding, "they certainly may influence courts facing questions the agencies have already answered." *Mead Corp*., 533 U.S. at 227-28; *see also Skidmore v. Swift & Co*., 323 U.S., 134, 139–140 (1944) (finding that "well-reasoned views of the agencies implementing a statute 'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance'") *and Chevron*, 467 U.S. at 844 (noting courts have "long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer"). Following *Chevron*, the Supreme Court has adopted the view that "when an agency-administered statute is ambiguous with respect to what it prescribes, Congress has empowered the agency to resolve the ambiguity." *Util. Air Regulatory Group v. EPA*, 573 U.S. 302, 315 (2014).

Congress's delegation to agencies to resolve ambiguities is very broad, as recognized by the Supreme Court: "[W]e have 'almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the

law.'" *Whitman*, 531 U.S. at 474-475. The reviewing court is only tasked with deciding whether an agency, in resolving an ambiguity, "acted reasonably" and "stayed within the bounds of its statutory authority." *Arlington v. FCC*, 569 U.S. 290, 297 (2013). In all of U.S. history, the Supreme Court has found a delegation excessive only twice. *See Gundy v. U.S.*, 139 S. Ct. 2116, 2129 (2019) (citing two cases in which "Congress failed to articulate any policy or standard" to confine discretion). In the CAA context, the Supreme Court has "affirmed a delegation" to EPA "to issue whatever air quality standards are 'requisite to protect the public health.'" *Whitman*, 531 U.S. at 472; *see also Friends of the Earth v. EPA*, 934 F. Supp. 2d 40, 49 (D.D.C. 2013) ("Congress sought to assign [EPA] the responsibility to judge or determine which pollutants belong to the category the agency is required to regulate. . . ."). Even more to the point, courts have construed the CAA as "explicitly leav[ing] the endangerment determination up to EPA's sole judgment." *Zook v. McCarthy*, 52 F. Supp. 3d 69, 74 (D.C. Cir. 2014).

In this case, the general weight of deference toward EPA's interpretations should be considered. Although EPA's clarification of the public health finding has not been subject to notice and comment rulemaking (R. at 10), EPA does not seek to avoid *any* consideration as to how GHGs may impact public health, but rather narrows the applicability of indirect health impacts on future GHG NAAQS standards. The Endangerment Finding admittedly was ambiguous as to how heavily various climate change impacts were weighed into the public health endangerment finding, and EPA's reinterpretation still leaves room for regulation of many of these impacts under welfare NAAQS. For example, the "adverse air quality impacts" cited as strong support for a public health endangerment finding will likely be regulated under welfare, but holding the public health finding legally will invalid will free EPA from the impossible task of "fixing" rising temperatures with NAAQS. Endangerment Finding, 74 Fed. Reg. at 66497.

### D. *Chevron* analysis supports EPA's judgment that the public health endangerment finding is not legally valid.

CHAWN argues that EPA's interpretation of public health in the Endangerment Finding, encompassing indirect effects of climate change, deserves controlling deference under *Chevron, U.S.A. v. Natural Resources Defense Council*, despite the agency's change in position. 467 U.S. 837 (1984); R. at 10. But *Chevron* analysis does not support this position, either because Congress has already "unambiguously" cabined climate change impacts as endangerments to "welfare" under CAA § 302(h), or because the EPA's narrowed interpretation of its "public health" findings is "a permissible construction" of the CAA. *Chevron*, 467 U.S. 837, 842-43.

Questions of statutory interpretation are governed by a two-step analysis under *Chevron*: "First . . . if the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." 467 U.S. 837, 842-43 (1984). If a statute is "silent or ambiguous with respect to the specific issue," the court asks "whether the agency's answer is based on a permissible construction of the statute." *Id*. at 843. In considering shifting interpretations of the CAA term "source," the Supreme Court held that "an initial interpretation is not instantly carved in stone . . . the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis." *Chevron*, 467 U.S. at 863-864. The fact that an agency often adopts different interpretations of a single term "adds force to the argument that the definition itself is flexible," and "Congress has never indicated any disapproval of a flexible reading of the statute." *Id*. The CAA checks this broad deference to agency interpretation by empowering courts "to reverse [EPA's] action in rulemaking if it is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.'" *Med. Waste Inst. & Energy Recovery Council v. EPA*, 645 F.3d 420, 424 (D.C. Cir. 2011) (quoting CAA§ 30742 U.S.C. § 7607(d)(9)(A)).

EPA still maintains that as to public health, Congress intended for the CAA to regulate pollutants with direct effects, rather than indirect climate change impacts. However, even if a court believes the CAA is ambiguous as to whether public health covers indirect impacts, EPA's rejection of this connection is permissible. EPA understands CAA requires "precautionary, forward-looking" judgments as to whether GHGs endanger health, and certainty as to what level of GHGs would endanger health are not required. *Coal. for Responsible Regulation, Inc.*, 684 F.3d at 122. But precautions taken for health cannot be boundless, and courts have been reluctant to impose "extreme interpretation[s] absent support in the legislative history." *Env't Defense Fund, Inc. v. EPA*, 636 F.2d 1267, 1281 (D.C. Cir. 1980). For example, in *Ethyl Corp. v. EPA*, the court upheld EPA's "qualitative" endangerment finding as to leaded gasoline because EPA gave sufficient evidence that lead inhalation directly endangers health, despite the difficulty of identifying a precise quantitative safety threshold. 541 F.2d 1, 56 (D.C. Cir. 1976).

EPA "act[ed] reasonably" and "stayed within the bounds of its statutory authority" in arguing that the term "public health" cannot be read to include indirect health impacts flowing from climate change. *Arlington*, 569 U.S. 290 at 297; R. at 9. The CAA requires EPA to identify pollutants which "may reasonably be anticipated to endanger public health or welfare," and to "develop and issue air quality criteria" that "accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health" by the pollutant's presence in the air. CAA § 7408(a)(1)-(2), 42 U.S.C. § 7401-7671(2000). Although the CAA "permits the EPA Administrator to err on the side of caution" in regulating health dangers, EPA cannot be forced regulate climate impacts of air pollution as dangers to public health when it is clear that Congress views them "solely as a matter of public welfare." *Am. Farm Bureau Fed'n*, 559 F.3d at 533; R. at 9. Here, the reviewing court could side with

CHAWN if EPA had established a more direct connection between pollutants and health, as in *Ethyl Corp*., but only an "extreme interpretation" of public health endangerment would encompass almost any climate change impact, as listed in the Endangerment Finding.

**E. Delineating between endangerment findings as to motor vehicles versus broader endangerment findings as to climate impacts on public health.**

Much of the case law binding EPA to regulate air pollutants due to their endangerment of public health has involved new motor vehicles and gasoline, which EPA is explicitly bound to regulate. In *Massachusetts v. EPA*, the court determined that EPA had a "statutory mandate" to regulate any vehicle emissions of GHGs reasonably anticipated to endanger public health, because the text of the CAA requires EPA to prescribe emissions standard to any class of "new motor vehicles or new motor vehicle engines" which, in the Administrator's judgment, "cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health." 549 U.S. at 251; CAA § 202(a)(1); *see also Ethyl Corp v. EPA*, 541 F.2d 1, 7 (D.C. Cir. 1976) (finding that the CAA authorizes EPA to regulate gasoline additives that will likely endanger public health, pursuant to a determination that auto emissions will present a "significant risk of harm"). In the vehicle emissions context, the link between leaded gasoline additives, polluted air emissions by automobiles, and negative health effects on urban dwellers is described as a "somewhat attenuated chain of causation." *Ethyl Corp*., 541 F.2d at 16.

However, the connection between GHGs, their climate change impacts, and endangerment to public health is far more attenuated than the link between vehicle emissions and respiratory issues. In addition, EPA has taken pains to differentiate its duty to regulate vehicle emissions' impact on health versus the impacts of climate change on health. EPA has repeatedly asserted that the Endangerment Finding itself "does not impose any requirements" as to broad regulation of GHGs on the basis of climate change, while noting that vehicle GHG emissions are

already bound by explicit CAA requirements. ENVIRONMENTAL PROTECTION AGENCY, EPA'S ENDANGERMENT FINDING: FREQUENTLY ASKED QUESTIONS (2016). Further, the CAA does not contain "a command to regulate" *any* GHGs for *any* reason, but merely provides "a description of the universe of substances EPA may consider regulating under the Act's operative provisions." *Util. Air Regulatory Group*, 573 U.S. at 302. EPA has "routinely given it a narrower, context-appropriate meaning" to air pollutants; the CAA's directive to regulate automobile emissions which endanger public health does not mean any scientific link between GHGs, climate change, and public health must force EPA to make, and never reinterpret, a related endangerment finding. *Util. Air Regulatory Group*, 573 U.S at 316.

**F. CHAWN's reading of the public health endangerment finding would lead to absurd outcomes, must be rejected due to administrative necessity, and would cause de minimis improvement beyond public welfare NAAQS.**

Any application of CHAWN's reading of the public health endangerment finding would veer into absurdity: "If there can be this much logical daylight between the pollutant and the anticipated harm, there is nothing EPA is not authorized to do. If this finding is valid . . . the right endangerment finding would allow EPA to rule the world." *Coal. for Responsible Regulation, Inc. v. EPA*, No. 09-1322, 2012 U.S. App. LEXIS 25997, *44 (D.C. Cir. Dec. 20, 2012) (Brown, J., dissenting). Although these policy judgments and absurdity arguments are irrelevant to the endangerment finding's scientific connection between GHGs, climate change, and public health, they may still constrain any attempt by EPA to translate this finding into an actual statutory rulemaking. *See Coal. for Responsible Regulation, Inc.,* 684 F.3d at 119 (citing Massachusetts v. EPA, 549 U.S. at 501) ("[W]here a literal reading of a statutory term would lead to absurd results, the term simply has no meaning . . . and is the proper subject of construction by EPA and the courts."). EPA has already used the "absurd results" doctrine to

narrow the overbroad applicability of the Endangerment Findings to GHG emission permitting requirements in the Tailoring Rule. *See* Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514, 31,554 (June 3, 2010).

In addition, the "administrative necessity" and the "de minimis" exceptions may also justify EPA's refusal to read the statutory term "public health" to include indirect health impacts of climate change. *See Env't Defense Fund, Inc.*, 636 F.2d at 1283 (citing *Alabama Power Co v. Costle*, 636 F.2d 323 (D.C. Cir. 1979)); R. at 10. The D.C. Circuit has held that EPA is bound to carry out responsibilities imposed by statutory language, unless EPA can make a showing that it could not carry out the statutory command. See *Env't Defense Fund, Inc.*, 636 F.2d at 1283 (denying administrative necessity exemption because EPA failed to show a lack of enforcement resources, or indicate how much of a pollutant was left unregulated by a statutory cutoff). The de minimis exemption gives an agency power "to overlook" statutory commands "when the burdens of regulation yield a gain of trivial or no value." *Alabama Power Co.*, 636 F.2d at 360 (D.C. Cir. 1979). In *Env't Defense Fund, Inc.*, the court denied EPA a de minimis exemption from regulating concentrations of a pollutant below the statutory cutoff, due to a strong record that the regulated pollutant was directly toxic to wildlife and tended to bioaccumulate; furthermore, EPA had found that any direct exposure of humans to the pollutant "could cause adverse effects." *Env't Defense Fund, Inc.*, 636 F.2d at 1283-1284.

Here, EPA argues that the administrative necessity exemption should apply because it is impossible for EPA to regulate GHGs until all indirect impacts of climate change on public health are addressed. In promulgating the Tailoring Rule and vehicle emissions standards following the Endangerment Findings, EPA it has arguably fulfilled its statutory command to regulate a certain level of GHGs "reasonably anticipated" to endanger public health, and

demanding more regulation reaches into administrative impossibility. 74 Fed. Reg. at 66,525. By complying with the district court's order, designating GHGs as criteria pollutants as to public welfare, and publishing a notice of proposed rulemaking, EPA will sufficiently fulfill its statutory command. R. at 3.

As for the de minimis exemption, a court could agree with EPA that the "benefits of regulating" GHGs with primary NAAQS under a public health endangerment finding "are of no value" beyond that already achieved with secondary NAAQS. *Env't Defense Fund, Inc*., 636 F.2d at 1283-1284. Especially because the absurdity argument limits to what degree GHGs can be regulated under a public health finding, any advantage of regulating GHGs under two standards may be minimally effective in addressing the harmful effects of climate change.

Finally, CHAWN characterizes EPA's newfound position on the health endangerment finding as noncontrolling, as it was asserted for the first time during this litigation and not through rulemaking—but courts can rely on an agency's post hoc position if "no [additional] special agency expertise" is required for that position. *Ashland Oil, Inc. v. Federal Trade Com*., 548 F.2dd 977, 981 & n.6 (D.C. Cir. 1976); R. at 10. Courts have only refused to award deference to agencies' post-rulemaking interpretations when an agency did not properly exercise its expertise in its original rulemaking, or failed to explain its decision to exercise interpretative authority, and when the agency's counsel relied on those errors to "justify the agency's action." *Ashland Oil, Inc*., 548 F.2d at 985; see *Burlington Truck Lines v. U.S.*, 371 U.S. 156, 169 (1962); see *Am. Farm Bureau Fed'n*, 559 F.3d at 512 (rejecting EPA's argument that short-term studies justified less stringent regulations on particulate matter, since the idea was advanced for the first time in a brief); *SEC v. Chenery Corp*., 332 U.S. 194, 196 (1947) (rejecting an agency's attempt to justify its approval of a plan based on grounds it had previously disavowed).

Although the Endangerment Finding itself consists of special agency expertise, the primary justifications for EPA's position change—the silence of the CAA as to public health, and the great deference owed to agency interpretations under *Chevron*—are largely "legal in nature." *Texas v. U.S.*, 829 F.3d 405, 422 (5th Cir. 2005) (discussing EPA arguments that are "legal in nature and do not rely on EPA's factual conclusions or expertise"). Unlike *Chenery*, EPA's reinterpretation of public health endangerment does not lead to it "disavowing" its former scientific findings, GHG emissions regulations, or its future GHG regulations; it merely narrows the application of broad, scientific research linking public health to indirect effects of climate change into a future rule, which would be subject to the issues noted in the next sections.

## IV. EPA HAS NOT UNREASONABLY DELAYED LISTING GHGS AS CRITERIA POLLUTANTS.

If, as we argue, the endangerment finding is legitimate with respect to public welfare, the court must, as the district court notes, "disentangle" the law regarding whether this imposes upon the EPA a duty to designate GHGs as a criteria pollutant, and when the EPA must do so. R at 11. While both claims of unreasonable delay and failure to perform a non-discretionary duty require that section 108 of the CAA impose on the EPA a non-discretionary duty to act, the claims are distinct. *Zook v. McCarthy*, 52 F. Supp. 3d 69, 73 (D.D.C. 2014). The difference between the claims is one of *timing*: unreasonableness can only be a meaningful standard by which to measure delay when agency action is required at indefinite intervals, *see Am. Lung Ass'n v. Reilly*, 962 F.2d 258, 263 (2d Cir. 1992), while failure to perform claims require a deadline to have been missed, *see Sierra Club*, 828 F.2d at 790-91.

If section 108 does not impose a non-discretionary duty, then this court cannot grant relief on either a claim of unreasonably delay or failure to perform. *Zook*, 52 F. Supp. 3d at 73. Section 108 requires that the Administrator, "from time to time," revise the list of pollutants that

A.) cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare; B.) 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. CAA § 108(a)(1)(A)-(C). While we maintain that section 108 does not impose a per se non-discretionary duty to list, because it requires rulemaking only for those pollutants "from numerous or diverse sources," we will discuss the claims of unreasonable delay. CAA § 108(a)(1)(B); s*ee infra* § V-A.

While listing is not required under section 108 and thus cannot be delayed, we argue further that EPA's decision not to list was justified by the rule of reason as articulated under *Mexichem*, and because the promulgation of rules regulating GHGs under alternate sections of the CAA suffice to address the vehicular emission problem.

**A. The rule of reason justifies the EPA's delay.**

When agency action is required from "time to time," any delay must be reasonable. *Am. Lung Ass'n*, 962 F.2d at 263. Only delay that is "so egregious as to warrant mandamus" is unreasonable. *TRAC v. FCC*, 750 F.2d 70, 79 (DC Cir. 1984). While there is no test articulated, six factors seem to emerge from the case law: the time taken should be governed by a "rule of reason," whether the statute supplies content for the rule of reason, if the reasonableness from an economic perspective is less tolerable when human health and welfare are at stake, if expediting the delayed action would compete with higher priorities, the nature and extend of the interests prejudiced by delay, and finally, an understand that impropriety is not a prerequisite to a finding of unreasonable delay. *Id*. at 80 (internal citations omitted). The most important of these factors is the first factor, the 'rule of reason.' *In re Core Commc'ns, Inc.*, 531 F.3d 849, 855 (D.C. Cir.

2008). Here, EPA maintains that the ten-year delay satisfies the rule of reason: regulation of GHGs would require resolution of both policy and scientific issues.

Judgments about permissible duration for action under the CAA are fact bound and case specific. *Mexichem*, 787 F.3d at 555. The CAA's provisions generally grant the agency broad discretion to correct its own mistakes before subjecting it to judicial review. *See, e.g.,* CAA42 U.S.C. § 307(d)(7)(B), (d)(8). Section 108 imposes no deadlines and only instructs that designations be made from "time to time." CAA § 108(a)(1).

Here, the district court found that EPA's delay was unreasonable, basing its decision in part on case law finding delays of less than ten years unreasonable. R. at 13. We disagree. As these determinations are fact bound and case specific, we argue that here, the court should recognize that agency discretion to establish thorough, data-driven regulations, supplemented with evidence of engagement with the pollutant through the current actions named above, explains the years that have passed since the Endangerment Finding. *Chevron*, 467 U.S. at 843 (1984); *see also Sierra Club v. Gorsuch*, 715 F.2d. 653, 658 (D.C. Cir. 1983) (holding that a flexible approach to determining unreasonableness of delay is required when agency expertise and discretion must guide a decision). While the district court notes that "[d]elays of over eight to ten years have uniformly been held to be unreasonable," the EPA has never before had to, in one rule, develop NAAQS standards for pollutants that would *double* the number of criteria pollutants. R. at 6, 13. If it is the case that GHGs must be regulated together because their impact on human health and welfare is such because of their simultaneous emission, the amount of information needed to determine relatively responsibility, and to regulate accordingly, will require materially more time and agency discretion. *Sierra Club v. Gorsuch*, 715 F.2d. at 658; *c.f. Util. Air Regulatory Group v. EPA*, 573 U.S. 302, 310 (2014) (opining that the regulation of

GHGs has resulted in "the single largest expansion in the scope of [the Clean Air] Act in its history"). As such, courts should find the ten-year waiting period here warranted.

**B. EPA has not violated CHAWN's statutory right to timely decision-making.**

Additionally, the TRAC factors illuminate "two avenues to establishing an unreasonable delay claim: 1) showing that an agency violated a statutory 'right to timely decision-making' implicit in the agency's regulatory scheme, or 2) showing that some other interest- financial, aesthetic, or related to human and welfare, for example- 'will be irreparably harmed through delay.'" *Mexichem*, 787 F.3d at 554. A plaintiff can establish a claim for unreasonable delay by demonstrating that the EPA has deprived them of a statutory right to timely decision-making by considering deadlines imposed by Congress, whether other interests will be prejudiced by delay, and whether expedited proceedings will conflict with the agency's competing priorities. *Id.* at 556-57. Courts should assess these factors with "considerable deference" to agency control over the timetable in the absence of a precise statutory timetable and agency discretion in setting priorities. *Sierra Club v. Gorsuch*, 715 F.2d., at 658.

This court must consider the effect expedited proceedings would have on the EPA's competing priorities. *Telecomm. Research & Action Ctr. v. F.C.C.*, 750 F.2d 70, 80 (D.C. Cir. 1984); *Mexichem*, 787 F.3d at 554. Here, the EPA is also beholden to Executive Order 13,771, which requires agencies to limit "the governmental imposition of private expenditures required to comply with Federal regulations." Reducing Regulation and Controlling Regulatory Costs, 82 Fed. Reg. 9,339, 9,339 (ordered Jan. 30, 2017). While this is not dispositive, it is an important consideration. Here, that consideration weighs in favor of not finding unreasonable delay.

An assessment of deprivation of timely decision-making should consider the gravity and complexity of the rulemaking at issue. *Mexichem*, 787 F.3d at 555. In *Mexichem*, the EPA

promulgated rules regulating PVC, about which industry plaintiffs filed petition for reconsideration and sought judicial review, claiming inadequate notice and comment. *Id*. at 551. While the facts are distinct from the case here, the discussion of delay is instructive. In *Mexichem*, the court held that because of the extended engagement the EPA has had with PVC regulation, including multiple rulemaking attempts, plaintiffs could not claim the EPA had deprived them of their right to timely decision-making. *Id.* at 555.

Here, like in *Mexichem*, the EPA has not categorically avoided regulation of GHGs; in fact, quite the opposite. Following the Endangerment Finding, EPA initiated a series of regulatory actions to limit GHGs. *See Coal. for Responsible Regulation*, 684 F.3d at 113 (upholding GHG emission limits for new passenger vehicles and light trucks), Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514, 31,550 (June 3, 2010) (adopting new standards that would apply to major new sources of GHGs like power plants), *and* Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generation Units, 80 Fed. Reg. 64,662 (Oct. 23, 2015) (creating the Clean Power Plan regulations). Like in *Mexichem*, the court here should find that delay can vary with the gravity and complexity of the rulemaking process. First, because the listing of GHG as criteria pollutants "would require resolution of thorny policy and scientific issues," and second, since the EPA has engaged with rulemaking limiting GHGs in other contexts and under other statutory regimes, the EPA has not violated petitioner's statutory right to timely decision-making. R. at 12.

### C. Petitioners here cannot establish unreasonable delay by demonstrating irreparable harm to outside interests.

Alternatively, petitioners can establish a claim of unreasonably delay by demonstrating that "some other interest- financial, aesthetic, or related to human health and welfare, for

example- will be irreparably harmed through delay." *Mexichem*, 787 F.3d at 554. The court has set a high standard for irreparable injury. *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006). The claimed irreparable 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.* (emphasis added).

The possibility of correcting the named harm weighs heavily against a finding of irreparable harm. *Virginia Petroleum Jobbers Ass'n. v. Federal Power Comm.* 259 F.2d 921, 925 (D.C. Cir. 1958). *Virginia Petroleum* decides a dispute among various natural gas companies regarding the ability to connect to the distribution grid. *Id.* at 923. The petitioner sought an injunction to intervene in the proceedings to approve a petition for certificates of public necessity and convenience from a competing gas company, claiming irreparable harm through economic loss. *Id.* at 923-24. The court denied the petitioners request of injunction, holding that the operative word in the term of art is *irreparable*, and that a possibility of relief or compensation in some other forum weighed heavily against a finding of irreparability. *Id*.

Here, while not faced with a request for an injunction, the same question of irreparability is relevant. While the district court here noted that GHG emissions pose an endangerment to public welfare, they did not address the question of whether that threat is beyond remediation. Like in *Virginia Petroleum*, remediation is available in other forums; in fact, the EPA has already undertaken a vast and thorough regulatory approach to limiting GHG emissions. R. at 7.

**D. Other regulation suffices here, making the delay reasonable.**

In addition, courts may find that delay of designation is not unreasonable if regulations promulgated in other sections of the Act suffice to address the emission problem. *Sierra Club v. Jackson*, 2011 U.S. Dist. LEXIS 5316, *9 (Jan. 20, 2011, D.D.C.). In *Sierra Club v. Jackson*,

plaintiffs claimed that the EPA failed to promulgate emissions standards pursuant to its non-discretionary duties following the 1990 amendments to the Act. *Id.* at *1. The specified hazardous air pollutants in the case fell under sections that required several types of pollution control mechanisms: some could be based on generally available control technologies, while others were required to be specifically based on maximum achievable control technologies or health-based standards. *Id.* at *8. The court found that, in part because one source may emit numerous pollutants, the EPA may not need to promulgate regulations directly under a more specific requirement if other regulations can suffice. *Id.* at *9.

EPA may not need to promulgate regulations directly under the more specific auspices of section 108 if it can accomplish at least a portion of section 108's intended effect with regulations promulgated under other sections of the CAA. Like in *Sierra Club v. Jackson*, here, GHGs are emitted from sources that produce other emissions, and GHGs themselves are emitted from various sources. Endangerment Finding, 74 Fed. Reg. at 66,499. The EPA has promulgated regulations in conjunction with the Department of Transportation to set emissions limits for new passenger vehicles and light trucks. *Id*. It has also promulgated rules under Title I of the CAA and section 111(d) of the CAA. Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. at 31,550; Carbon Pollution Emission Guidelines for Existing Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,510 (Oct. 23, 2015). Not only do these rules address GHGs themselves, but they suffice to limit other emissions which will in turn limit GHGs. As the court found this sufficient in *Sierra Club v. Jackson*, they should do so here.

## V. EPA DOES NOT HAVE A NON-DISCRETIONARY DUTY TO LIST GHGS AS A CRITERIA POLLUTANT.

The EPA has a duty to list criteria pollutants that it has determined to "cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare and

*result from multiple sources*." *Nat. Res. Def. Council, Inc. v. Train*, 545 F.2d 320, 325 (2d Cir. 1976) (emphasis added). Knowledge—or even acknowledgement—of a pollutant's adverse effects does not constitute the endangerment determination necessary to trigger the duty to list; rather, the legal designation in reference to 108(a)(1)(A)-(B) is what triggers the non-discretionary duty. *Env't Def. Fund v. Thomas,* 870 F.2d 892, 899 (2d Cir. 1989). Section 108(a)(1)(A) leaves that endangerment determination up to the EPA Administrator's sole judgment. CAA § 108(a)(1)(A). Section 108 mandates the Administrator "from time to time . . . 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. CAA § 108(a) (emphasis added).

**A. The Endangerment Finding is specifically written to be under CAA section 202(a), does not satisfy section 108(a)(1)(B), and thus triggers no regulatory requirements under section 108.**

The EPA must formally and legally acknowledge, under section 108 of the CAA, a pollutant's adverse effects, as well as its resulting from numerous or diverse sources. *Env't Def. Fund*, 870 F.2d at 899. The Endangerment Finding articulates the danger of GHGs for their impact to public welfare. 74 Fed. Reg. at 66,496. However, because it does so under section 202 of the CAA, it does not, as section 108 requires, identify that they result from "numerous or diverse" mobile sources. CAA § 108(a)(1)(B). Rather, the Endangerment Finding states, "six greenhouse gases taken in combination endanger both the public health and the public welfare. . . the combined emissions of these greenhouse gases *from new motor vehicles and new motor*

*vehicle engines* contribute to the greenhouse gas air pollution that endanger public health and welfare *under CAA section 202(a)*." *Id.* (emphasis added). This finding of contribution aligns directly with section 202(a)(1), which requires a judgment that the air pollutant "from any class or classes of new motor vehicles or new motor vehicle engines" contribute to air pollution. CAA §202(a)(1). The Endangerment Finding speaks only to the contribution to greenhouse gas air pollution of GHGs *that are emitted from new motor vehicles and motor vehicle engines*. *See* 74 Fed. Reg. at 66,496 ("[T]he combined emissions of these greenhouse gases from new motor vehicles and new motor vehicle engines contribute to the greenhouse gas air pollution that endanger public health and welfare under CAA section 202(a)."). Thus, the Endangerment Finding does not meet section 108(a)(1)(B), finding contribution of "numerous or diverse" sources, and does not trigger a non-discretionary duty to list GHGs as a criteria pollutant. The Endangerment Finding here is particularly distinguishable from *Train*, where the EPA had conceded that lead met the requirements in both 108(a)(1)(A) and (B). 545 F.2d at 323.

The question of ambiguity of "numerosity" or "diversity" can be resolved using *Chevron* deference. First, the CAA is silent on the intended definition of "numerous" or "diverse." *See* CAA § 302 (defining important terms in the CAA, but not defining numerous or diverse). The ordinary meanings of numerous and diverse are "consisting of a large number," and "composed of distinct or unlike elements or qualities," respectively. *Numerous*, Merriam Webster, merriam-webster.com (last visited Nov. 19, 2020); *diverse*, Merriam Webster, merriam-webster.com (last visited Nov. 19, 2020). While it is true that new motor vehicles and new motor vehicle engines certainly could be *numerous* mobile sources of emissions, it is not entirely clear whether diverse is taken to mean different types of new motor vehicles and engines, or whether new motor vehicles and engines would only be *one* of many numerous and diverse sources of emissions to

meet the criteria of 108(a)(1)(B). Further, it is unclear whether many of the *same* source of emission would meet the criteria of 108(a)(1)(B), without being diverse, particularly for a source type which is regulated under another section of the CAA.

Since there is ambiguity, *Chevron* instructs that, so long as EPA's interpretation is "based on a permissible construction of the statute," it should be accepted. 467 U.S. at 843. Here, it is reasonable for EPA to have reached the conclusion that "numerous or diverse" refers not just to the literal number of mobile emission sources, but necessarily to the different *types*, or diversity, of emission sources. So, while there may be many different types of new motor vehicles and engines, they are all a single *type* of emission source, as they are all encompassed in section 202(a). By this reasonable interpretation, the Endangerment Finding does not meet the criteria for section 108 and thus the EPA does not have a non-discretionary duty to list GHGs as a criteria pollutant. CHAWN's interpretation eviscerates the difference between section 108(a) and section 202(a), making 202(a) mere surplusage; if EPA's Endangerment Finding under 202(a) also triggers section 108(a) regulations, the distinct sections are rendered redundant.

### B. The date certain doctrine instructs that the duty to list here *must* be discretionary, as there is no clear guidance regarding deadlines for action.

The date certain doctrine instructs that there must be a statutory deadline for the performance of the duty for such statutory duty to be "non-discretionary." *Sierra Club*, 828 F.2d at 791, *WildEarth Guardians v. Jackson*, 885 F. Supp. 2d 1112, 1116 (D.N.M. 2012), *Nat. Res. Def. Council v. Thomas*, 689 F. Supp. 246, 252 (S.D.N.Y. 1988). Without a statutory deadline, the EPA administrator *must* exercise discretion about an otherwise mandatory duty, and thus, quite literally, the duty cannot be non-discretionary. *Nat. Res. Def. Council v. Thomas*, 689 F. Supp. at 252 *see also Chevron*, 467 U.S. at 865 ("[A]n agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the

incumbent administration's view of wise policy to inform its judgments"). In this case, section 108 of the CAA instructs that the Administrator must update the list of criteria pollutants from "time to time." CAA § 108(a)(1). Without a statutory deadline, we do not believe the court can find a non-discretionary duty to list as a matter of law.

### C. For policy reasons, the duty to list here must be at the discretion of the administrator because the GHG endangerment designation names six separate greenhouse gases as a "single pollutant."

Of the current criteria pollutants, all identify a single gas, compound, or type of material.[2] *NAAQS Table*, EPA, https://www.epa.gov/criteria-air-pollutants/naaqs-table (last visited Nov. 10, 2020). In *Train*, the preeminent case on non-discretionary duty to list and precedent followed by the court below, the pollutant in question was lead. 545 F.2d at 322. The court in *Train* held that, because the Administrator had found that lead met the requirements under 108(a)(1)(A) and (B), that he must list lead as a criteria pollutant. *Id*. The case here is distinguishable from *Train* because here the pollutant encompasses 6 individual gases.

EPA must individually find each chemical to fulfill section 108(a)(1)'s criteria to trigger a non-discretionary duty to list. *Zook*, 52 F. Supp. 3d at 75. In *Zook*, the plaintiffs sought to require the EPA to list and regulate emissions from Animal Feeding Operations (AFO). *Id*. at 71. Plaintiffs were affected by the substances, namely ammonia, hydrogen sulfide, particulate matter, and volatile organic compounds, that are emitted during the largescale feeding of livestock. *Id.* at 72. (noting, importantly, that included among the emissions in AFOs is original criteria pollutant particulate matter.) The court held that since APOs were not identified by which specifically "cause or contribute to air pollution which may reasonably be anticipated to

[2] While there are two diameter classifications for particulate matter, it is the classification of material, rather than materially, chemically different compounds.

endanger public health or welfare," plaintiffs could not be allowed to order EPA to place pollutants from AFOs on the list and to establish criteria and standards for them. *Id.* at 74-75.

The case here is far more analogous to *Zook* than it is to *Train*. Here, like in *Zook*, the Endangerment Finding included six greenhouse gases—carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride—as a *single* "air pollutant." Endangerment Finding, 74 Fed. Reg. at 66,496. This is distinguishable from *Train*, where the criteria pollutant listed lead (Pb), and only lead. 545 F.2d at 322. The Court here should find, like in *Zook*, that granting petitioner's request would "usurp EPA's exclusive authority" to make the judgment as to each individual chemical. 52 F. Supp. 3d. at 75.

Further, as a matter of policy, the Court should find the duty to list here a discretionary duty because of the complex nature required in setting unique standards for each gas included in GHGs. If it is the case that GHGs must be regulated together because their impact on human health and welfare is such because of their simultaneous emission, the amount of information needed to determine relatively responsibility, and to regulate accordingly, will require materially more time and agency discretion. *Sierra Club v. Gorsuch*, 715 F.2d. at 658; *c.f. Util. Air Regulatory Group*, 573 U.S. at 310 (opining that the regulation of GHGs has resulted in "the single largest expansion in the scope of [the Clean Air] Act in its history").

## CONCLUSION

In the ongoing process of regulating GHGs to protect the public welfare, the EPA has followed their Congressional mandate. After publishing an Endangerment Finding pursuant to section 202(a), they promulgated rules regulating the same vehicles and engines the Endangerment Finding names as causes and contributors to air pollution. Because CHAWN's

claim of unreasonable delay pertains to a rulemaking and subsequent regulation with national applicability, the District Court for the District of New Union did not have jurisdiction.

Nevertheless, evidence indicating that GHGs pose dangers to public welfare, and the explicit link between "welfare" and "climate" in the statutory language of the CAA, render the Endangerment Finding with respect to public welfare valid. However, the Endangerment Finding with respect to public health is legally invalid, as the CAA does not explicitly link public health and climate impacts, and there is little precedent to support expanding "public health" beyond Congress's statutory intent in the CAA.

Additionally, EPA has neither unreasonably delayed, nor does EPA have a non-discretionary duty, to list GHGs as criteria pollutants. EPA's waiting period is justified by the rule of reason because of the scope and technical complexity required to write NAAQS regulating six commingled gases as one pollutant, and because EPA has neither violated a statutory right to timeliness, nor has the waiting period caused *irreparable* harm to petitioners. EPA does not have a non-discretionary duty to designate GHGs as a criteria pollutant, as the Endangerment Finding is specifically written under CAA section 202(a), which triggers none of the regulatory requirements found in section 108. Furthermore, the date-certain doctrine, policy implications, and previous sufficient regulation as render the duty to list non-discretionary.

For the above reasons, this Court should vacate the District Court's ruling with respect to unreasonable delay for lack of jurisdiction and remand to the court for the District of D.C., affirm the District Court's rulings on validity of the Endangerment Finding, both with respect to public health and public welfare, reverse the District Court's ruling that EPA has a non-discretionary duty to designate GHGs as a criteria pollutant, and vacate the District Court's order to EPA requiring rulemaking to list GHGs as a criteria pollutant.