Team No. 28

IN THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

CA. No. 20-000123

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 THE DISTRICT OF NEW UNION
No. 66-CV-2019

BRIEF OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Defendant-Appellant

ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICTION

Climate Health and Welfare Now ("CHAWN"), an environmental group, petitioned the Environmental Protection Agency ("EPA") to list greenhouse gases ("GHSs") as criteria pollutants subject to National Ambient Air Quality Standards ("NAAQS") regulation pursuant to the Clean Air Act ("CAA"). CAA § 101; 42 U.S.C. § 7401. The District Court for the District of New Union had—and this Court has—jurisdiction to adjudicate the claims raised in certified issues two, three, and five for two separate and independent reasons. First, federal courts have jurisdiction to adjudicate claims brought by any person or group to enforce emission standards outlined in Title III of the CAA. CAA § 304; 42 U.S.C. § 7604. Second, federal courts have jurisdiction to hear claims arising under the Constitution, laws, or treaties of the United States—otherwise known as federal-question jurisdiction. 28 U.S.C. § 1331.

In response to certified issue one—notwithstanding the Court's jurisdiction to hear the claims raised in certified issues two, three, and five, this Court does not have jurisdiction to adjudicate certified issue four. CAA Section 307(b) mandates that a petition for review of any claim under that title "be filed only in the [U.S.] Court of Appeals for the District of Columbia if such action is based on a determination of nationwide scope or effect[.]" CAA § 307(b); 42 U.S.C. § 7607(b). Although Section 304 grants jurisdiction for unreasonable-delay claims to federal district courts, it mandates that those claims "may *only* be filed" in the U.S. District Court in which such action would be reviewable under Section 307(b). CAA § 304(a); 42 U.S.C. § 7604(a). Accordingly, and as discussed further below, the district court did not, and this Court does not, have jurisdiction to review CHAWN's petition for unreasonable delay that, if successful, will trigger nationwide regulation only reviewable in D.C.'s federal court of appeals.

STANDARD OF REVIEW

On review of an order granting or denying summary judgment, the appellate court owes no deference to the lower court's findings of fact or law as the record is reviewed *de novo*. *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 465 n.10 (1992). Further, each court has a responsibility to ensure its own subject matter jurisdiction since, without such jurisdiction, the judgment would be a legal nullity. *See generally Rhode Island v. Massachusetts* 37 U.S. 657, 697 (1868).

STATEMENT OF ISSUES

I. Did the District Court of New Union have jurisdiction to review an unreasonable-delay claim against the EPA under Section 304(a) of the Clean Air Act where CHAWN is seeking a rule of nationwide applicability subject to review exclusively in the D.C. Circuit under Section 307(b) of the same Act?

II. Is the EPA's 2009 Endangerment Finding valid in concluding that greenhouse gases endanger public welfare?

III. Is the EPA's 2009 Endangerment Finding contrary to law in concluding that greenhouse gases endanger public health?

IV. Does the EPA's ongoing decision not to list greenhouse gases as criteria pollutants under Section 108(a) of the Clean Air Act, which would trigger mandatory state regulation, constitute a reasonable delay?

V. Notwithstanding the 2009 Endangerment Finding, does the EPA have discretion to determine whether to designate greenhouse gases as a criteria pollutant under Section 108 of the Clean Air Act?

STATEMENT OF CASE

I. Statement of Facts[1]

In 1999, a coalition of environmental groups, including CHAWN, petitioned the EPA to find that GHG emissions from automobiles were a danger to human health and the environment under Section 202 of the CAA. R. at 5. A finding under that Section would require EPA regulation of GHG emissions from mobile sources, primarily automobiles. *Id.* at 6. Notably, the petition did not seek any regulation under the NAAQS programs of Title I of the CAA. *Id.*

On September 8, 2003, the EPA denied that petition, explaining that GHGs did not fit the concept of "air pollutants" subject to regulation under the CAA because of their pervasive nature. *Id.* The EPA made that determination based on policy considerations, stating that any regulation addressing global climate change would be more effectively addressed under specific legislation than under the catch-all air pollution provisions of the Clean Air Act. *Id.* A group of environmental organizations disagreed, and litigation ensued. *Id.*

That litigation culminated in the United States Supreme Court's decision in *Massachusetts v. E.P.A.*, 549 U.S. 497 (2007), which held that GHGs *did* fall within the definition of "air pollutants" subject to regulation under the CAA. R. at 6. The Court directed the EPA to respond to the petition with a finding as to whether GHGs endanger public health or welfare. *Id.*

In response to the Court's order, on December 15, 2009 the EPA made a formal Endangerment Finding under CAA Section 202 in which it concluded that GHGs endanger public health and welfare. *Id.* Six greenhouse gases, including carbon dioxide, nitrous oxide, and methane, were defined as a single air pollutant under this Endangerment Finding. *Id.* at 6 n.1.

[1] All facts are referenced by "R. at __." and are taken from the record of C.A. No. 20-000123.

Additionally, the EPA found that GHGs were produced by numerous mobile sources and that such emissions endanger public health and welfare through the risks they posed to the climate. *Id.* at 6-7. Climate change was determined to endanger public health based on a perceived increase in ozone pollution due to warmer temperatures, an increase in heat-related deaths, insect-borne diseases, and other large-scale impacts. *Id.* at 7. Climate change was further determined to endanger public welfare by reducing agricultural productivity, reducing water supplies, and increasing damage on property and the economy as a result of storms and rising sea levels. *Id.*

In the following years, the EPA undertook a number of regulatory actions aimed at limiting GHG emissions. *Id.* First, it established GHG emissions limits for new passenger vehicles and light trucks. *Id.* Although they were challenged, these limits and the Endangerment Finding on which they were based were initially upheld by the courts. *Id.* Recognizing the widespread effects of these actions, the EPA then also adopted New Source Performance Standards and Best Available Control Technology guidance under Title I of the CAA, aimed primarily at power plants. *Id.* The EPA then adopted the so-called Tailoring Rule, intending to limit the scope of permitting review requirements enforced on GHG sources. *Id.* Finally, the EPA then issued so-called Clean Power Plan regulations, which required states to adjust their CAA implementation plans to achieve reductions in GHG emissions consistent with EPA's guidance. *Id.* Each of these regulatory actions were aimed specifically at combatting the impacts of GHGs on the environment.

Despite the EPA's best efforts, none of these regulatory initiatives survived intact. *Id.* The Supreme Court partially struck down the Tailoring Rule and the scope of application of new source GHG limits in *Utility Air Regulatory Group v. E.P.A.*, 573 U.S. 302 (2014). R. at 7. Then, in 2017, the new EPA administration began a series of regulatory rollbacks pursuant to an Executive Order. *Id.* The 2009 Endangerment Finding, however, has thus far remained untouched. *Id.*

In light of significant regulatory consequences, the EPA has thus far declined to invoke its authority to designate GHGs as criteria pollutants under Section 108. CAA § 108(a)(1); 42 U.S.C. § 7408(a)(1). Under that Section, the listing of a pollutant triggers a requirement that the EPA propose both primary and secondary NAAQS, officially known as National Ambient Air Quality Standards, for that pollutant within twelve months of its listing. CAA §§ 108(b), 109(a)(2); 42 U.S.C. §§ 7408(b), 7409(b)(2). Final NAAQS must then be issued within ninety days. *Id.*

NAAQS are designated concentrations of a pollutant in the ambient air. R. at 8. Primary NAAQS are set at a level deemed necessary to protect public health, while secondary NAAQS are set at a level necessary to protect public welfare. CAA § 109; 42 U.S.C. § 7409. Promulgation of primary NAAQS by the EPA for any given pollutant triggers an obligation from each state to submit a plan to achieve compliance with mandatory primary NAAQS concentrations. CAA § 172(a)(2)(A); 42 U.S.C. § 7502(a)(2)(A). Compliance must be achieved within no more than ten years, or states will be subject to the EPA's direct regulation of their emissions and loss of federal highway funding. CAA §§ 110(c)(1), 179(a)-(b)(1); 42 U.S.C. §§ 7410(c)(1), 7509(a)-(b)(1).

A number of environmental organizations, including CHAWN, filed a petition with the EPA quickly after issuance of the 2009 Endangerment Finding. R. at 5. Unmoved by the harsh consequences of listing GHGs as general air pollutants and impatient for immediate solutions to a global issue, Petitioners demanded that the EPA go a step beyond the Endangerment Finding and list GHGs as criteria pollutants under Section 108. *Id.* CHAWN reasoned that the EPA, having made the finding of endangerment, has a nondiscretionary duty to list GHGs as criteria pollutants. *Id.* Currently, the EPA has not ruled on the petition, as this move would trigger the aforementioned process of NAAQS establishment and burdensome state compliance requirements. *Id.*

II. Procedural History

On April 1, 2019, CHAWN notified the EPA of its intention to sue for failure to carry out the alleged mandatory duty to regulate GHGs as criteria pollutants and for "unreasonable delay in carrying out its nondiscretionary duty to designate GHGs as a criteria pollutant as demanded in the December 15, 2009 petition for rulemaking." *Id.* The EPA took no action, and CHAWN commenced suit pursuant to the Citizen Suit Provision of CAA Section 304(a)(2) ten months later on October 15, 2019. *Id.* CHAWN's suit sought an order directing the EPA to publish a new list of criteria pollutants that includes GHGs. *Id.*

The 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 Federal Rule of Civil Procedure 24(a). *Id.* COGA asserted that granting CHAWN's requested relief would result in regulatory limits that would destroy the market for its products. *Id.* The court granted this motion on November 30, 2019, and COGA and the EPA both answered CHAWN's complaint. *Id.* COGA then asserted a cross claim against the EPA seeking a declaration that the 2009 Endangerment Finding was both unsupported by the record and contrary to law. *Id.*

On cross motions for summary judgement, CHAWN asserted that, once the EPA made the Endangerment Finding, it became bound by a nondiscretionary duty to list GHGs as criteria pollutants and that the EPA's ten-year delay in doing so was per se unreasonable. *Id.* The EPA denied the existence of any nondiscretionary duty and argued that its delay was more than justified given the regulatory complexities that would follow such listing. *Id.* Intervenor COGA argued that the factual basis underlying the 2009 Endangerment Finding was insufficient to support a finding of endangerment to public health capable of supporting a primary NAAQS. *Id.* The EPA defended its 2009 Endangerment Finding with respect to public welfare. *Id.* After careful consideration,

however, the EPA concluded that the portion of the 2009 Endangerment Finding which determined that GHG emissions may reasonably be expected to endanger public health is contrary to law. *Id.* The EPA, therefore, sided with COGA in asserting that the public health portion of the Endangerment Finding is not legally valid. *Id.*

In resolving the motions for summary judgment, the District Court for the District of New Union made several determinations. First, the court determined the Endangerment Finding is valid with respect to public welfare. R. at 13. Second, the court determined that the EPA unreasonably delayed in responding to CHAWN's petition and has unreasonably delayed in designating GHGs as a criteria pollutant. R. at 12. Third, the court determined that the EPA has a nondiscretionary duty to list GHGs as a criteria pollutant. *Id.* Lastly, the court determined the Endangerment Finding is contrary to law with respect to public health. R. at 14. Further, the district court ordered the EPA to publish notice of a proposed rule designating GHGs as a criteria pollutant within ninety days of the entry of order and a final rule within 180 days. *Id.*

The district court issued these judgments on August 15, 2020. R. at 2. Each party filed a timely appeal regarding all four issues. *Id.* Additionally, this Court raised, *sua sponte*, the issue of whether the district court had jurisdiction over CHAWN's unreasonable-delay claim. *Id.* This Court ordered that the parties brief all five issues. *Id.* This brief follows.

SUMMARY OF ARGUMENT[2]

The EPA has express discretion to determine when air pollutants are a danger to public welfare or public health pursuant to CAA Section 108. CAA § 108(a)(1)(A); 42 U.S.C. § 7408(a)(1)(A). The EPA's decisions under this Section are entitled to agency deference as

[2] The issues were certified in the order listed in the Statement of Issues, but the EPA will address the issues in the order presented in the Summary of the Argument for the convenience of the Court.

established in *Chevron, U.S.A., Inc. v. Nat. Resources Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). Even without *Chevron*, case law defining when air pollutants pose a risk to public welfare or public health is clear. Dangers to public welfare under the CAA simply require foreseeable risks or cumulative effects of alleged pollutants. *Coalition for Responsible Reg., Inc. v. E.P.A.*, 684 F.3d 102, 116 (D.C. Cir. 2012); *Ethyl Corp. v. E.P.A.*, 541 F.2d 1, 12-14 (D.C. Cir. 1976). Dangers to public health, on the other hand, require a threshold determination of actual harm. *Ethyl Corp.*, 541 F.2d at 14. The harm alleged in this action is climate change and the results thereof. R. at 5. EPA agrees that the very real dangers of climate change could present a danger to public welfare. But, the EPA disagrees that the 2009 Endangerment Finding as to public health is valid—determining the finding is contrary to law since no actual harm, as required, has been alleged. The district court agreed on both of these issues and this Court should follow suit.

CAA Section 304(a) grants district courts subject matter jurisdiction over unreasonable-delay claims with express instructions that those claims may *only* be filed in the circuit in which they would be subject to appellate review. CAA § 304(a); 42 U.S.C. § 7604(a). Section 307(b) makes it clear that claims of nationwide scope and applicability may *only* be filed in the U.S. Court of Appeals for the District of Columbia. CAA § 307(b); 42 U.S.C. § 7607(b). This is more than a mere venue requirement and courts must follow this express statutory instruction. *S. Illinois Power Coop. v. E.P.A.*, 863 F.3d 666, 669 n.2 (7th Cir. 2017). CHAWN filed an unreasonable-delay claim against the EPA in the U.S. District Court for the District of New Union in an attempt to compel the EPA to list GHGs as criteria pollutants and effectively trigger mandatory nationwide regulation. R. at 5. Such action clearly would have only been proper in the D.C. Circuit and should be dismissed for lack of subject matter jurisdiction.

CAA Section 108(a)(1)(C) grants the EPA a discretionary duty to determine if and when an air pollutant should be classified as a criteria pollutant. CAA § 108(a)(1)(C); 42 U.S.C. § 7408(a)(1)(C). *Chevron* requires this Court to give the EPA's interpretation of that duty deference and. Moreover, the lack of a date-certain deadline clearly characterizes the duty as discretionary. *Sierra Club v. Thomas*, 828 F.2d 783, 792 (D.C. Cir. 1987), *superseded by statute on other grounds.*[3] Further, listing GHGs as a criteria pollutant would trigger absurd, burdensome regulation against public interest and should steer the court away from characterizing the EPA's duty as nondiscretionary. *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982). Therefore, this Court should reverse the district court's holding and find that Section 108(a)(1)(C) creates a discretionary duty.

Establishing a valid claim for unreasonable delay requires either an implicit statutory right or risk of an irreparably harmed interest. *See generally Mexichem Specialty Resins, Inc. v. E.P.A.*, 787 F.3d 544, 554-556 (D.C. Cir. 2015). CHAWN's concerns about the long-term impact of climate change does not satisfy either requirement. Moreover, the factors used to determine unreasonable delay weigh in favor of the EPA since they allow a federal agency to rely on rules of reasons and other agency priorities. Even if this Court does have jurisdiction and Section 108(a)(1)(C)'s duty is nondiscretionary, the EPA's delay in listing GHGs as a criteria pollutant is reasonable. Accordingly, this Court should reverse the district court's holding and find the EPA's delay was not unreasonable.

[3] Congress partially abrogated *Sierra Club v. Thomas* when amending CAA Section 304(a) to extend jurisdiction to federal district courts for specific claims; however, the analytical framework still stands. *Mexichem*, 787 F. 3d at 553 fn. 6.

ARGUMENT

I. THE 2009 ENDANGERMENT FINDING IS VALID WITH RESPECT TO ITS DETERMINATION THAT GHGs MAY BE REASONABLY ANTICIPATED TO ENDANGER PUBLIC WELFARE.

The identification of air pollutants and emissions that threaten public welfare falls within the express discretion of the EPA. This Court should, therefore, grant significant deference to the EPA's determinations regarding threats to public welfare. The EPA is required by law to publish a list of pollutants which, "in [their] judgment, cause or contribute to air pollution which may reasonably be expected to endanger the public . . . welfare." CAA § 108(a)(1)(A); 42 U.S.C. § 7408(a)(1)(A). The CAA reiterates this judgment in Section 202, which defines the EPA's role in identifying motor-vehicle emissions that endanger public welfare. CAA § 202(a)(1); 42 U.S.C. § 7521(a)(1). When the decision relates to such clearly delegated authority, a federal agency's decision-making power is afforded controlling deference and courts must recognize that deference to "give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 843-45.

The district court properly determined that the 2009 Endangerment Finding is valid with respect to public welfare. Further, *Chevron* deference should settle the matter of whether the 2009 Endangerment Finding issued by the EPA is valid with respect to public welfare regardless of GOGA's protests. Even absent *Chevron* deference, the fact remains that climate change impacts, such as those upon which the 2009 Endangerment Finding is based, are expressly included in the definition of public welfare and justify the EPA's endangerment finding. *Ethyl Corp.*, 541 F.2d at 14. Accordingly, whether treated with agency deference or examined on its merits, this Court should affirm the district court's holding that GHGs may be reasonably anticipated to endanger public welfare and that portion of the Endangerment Finding should remain undisturbed.

A. Decisions Regarding Whether Pollutants May Be Reasonably Anticipated to Endanger Public Welfare are Entitled to *Chevron* Deference and Should Not Be Disturbed Absent a Finding of Unreasonableness.

Where Congress authorizes the EPA to perform a statutory duty and the Agency's determination is challenged by a party finding that decision unsatisfactory, the Court should adhere to *Chevron* guidance by deferring to the EPA's determination. It is well-settled that, when examining the validity of agency interpretations and implementations of statutory law, courts should defer to the legislature's allocation of agency governance. *Chevron*, 467 U.S. at 845-46. This principle has become a recognized maxim that agency decisions "ought not be substituted [by] the opinions of judges who, unlike agency administrators, have no duty or expertise in the treatment of particular statutes." *Id.* at 846. In instances where the validity of EPA decisions has been challenged, courts have shown a marked willingness to leave the Agency's decisions undisturbed, finding that they have an "obligation to defer to [the] EPA's interpretation of the [CAA]." *Ctr. for Biological Diversity v. E.P.A.*, 749 F.3d 1079, 1087 (2014) (citing *Chevron*, 467 U.S. at 842-43).

The CAA explicitly delegates the EPA sole authority to identify emissions which, "in [the EPA's] judgement, can be expected to contribute to the endangerment of public welfare." CAA §§ 108(a)(1)(A), 202(a)(1); 42 U.S.C. §§ 7408(a)(1)(A), 7521(a)(1). GHGs have been found by the court to be a proper subject for regulation under the CAA as an endangerment to public welfare. *Coal. for Responsible Reg.*, 684 F.3d at 118. The EPA has, in accordance with that evidence, determined that GHGs do endanger public welfare, and that finding is entitled to great deference. *Train v. Nat. Resources Def. Council, Inc.*, 421 U.S. 60, 75 (1975).

As the acknowledged experts in the field of emissions regulation and control, the EPA receives *Chevron* deference with regard to such decisions. *See*, *e.g.*, *Nat'l Wildlife Red'f v. E.P.A.*,

286 F.3d 554, 560 (D.C. Cir. 2002). Accordingly, the decision of the EPA to set aside the Endangerment Finding should be afforded extreme deference and should be affirmed absent a showing of arbitrariness. Recognizing that the EPA, acting through its Administrator to determine the validity of potential findings of endangerment, "is evaluating scientific data within its technical expertise," courts have generally seen no need to interject their own opinions for that of the EPA and have exercised an "extreme degree of deference." *Hüls Am., Inc. v. Browner*, 83 F.3d 445, 452 (D.C. Cir. 1996) (internal citations omitted).

Sections 108 and 202 of the CAA expressly task the EPA with identifying emissions that can reasonably be expected to endanger public welfare. Therefore, any decision the Administrator makes in that regard should be afforded agency deference under *Chevron*. Because the EPA was acting well within their statutory authority when they elected to designate GHGs as a public welfare endangerment, their opinion should remain undisturbed.

As the district court notes, COGA is attempting to "unravel" this settled issue of climate policy. R. at 8. COGA's appeal, however, is untimely as it is being raised well after the "sixty days from promulgation" requirement for challenges. *Id.* In intervening in this case, COGA is simply attempting to take another bite at the apple and dispute well-founded environmental and legal principles. This self-interested argument should not overrule the deference of the agency to which Congress has delegated the specific authority to protect public welfare.

B. *Chevron* Deference Notwithstanding, the 2009 Endangerment Finding as to Public Welfare Accords with the Statutory Definition and Should Remain Intact.

The impacts of climate change clearly fall within the scope of well-established definitions of endangering public welfare. Public welfare, as defined under the CAA, includes "effects on . . . weather . . . and climate." CAA § 302(h); 42 U.S.C. § 7602(h). Challengers to the EPA's endangerment determinations have historically sought to invalidate "foreseeable risks" or

"cumulative effects" of pollutants on climate change as a basis for a finding of public endangerment. *See Ethyl Corp.*, 541 F.2d at 12-14; *see also Coal. for Responsible Reg.*, 684 F.3d at 116. Instead, opponents have argued that harm must be specific to the alleged pollutant. *Id.*

Courts have consistently disagreed, holding specific harm cannot be the case with respect to public welfare. *Id.* In fact, courts have recognized that, when assessing the impact of emission pollutants on human welfare, "[t]he effects of one source [are often] meaningful only in cumulative terms[.]" *Ethyl Corp.*, 541 F.2d at 9. These same courts have found that contribution to climate change is absolutely a justification for a finding of endangerment to public welfare. *Id.*

The U.S. Court of Appeals for the D.C. Circuit has specifically considered whether the effects of climate change can justify a finding of endangerment to public welfare. *See Coal. for Responsible Reg.*, 684 F.3d at 116. In *Coalition*, the petitioners' challenge to the validity of the 2009 Endangerment Finding was based on the EPA's reliance on the broad effects of climate change. *Id.* at 125-26. The court held that the finding was not arbitrary and capricious because the Agency had "relied on [a] substantial record of empirical data and scientific evidence . . . regarding impacts of GHGs on climate change and the effects of climate change on . . . [public] welfare." *Id.* at 123. The clear consensus of the law and the EPA is that "global climate change will cause a host of deleterious consequences, including drought, increasingly severe weather events, and rising sea levels." *Id.* at 114.

Coalition is inherently on point here since it involved the very Endangerment Finding this Court is considering. As the *Coalition* court specifically acknowledged, in making the 2009 Endangerment Finding the EPA properly relied on scientific data indicating that an increase in GHGs likely contributes to climate change. This reliance was proper and provides ample statutory justification, under Section 302(h), for a finding that GHGs endanger public welfare. Furthermore,

the EPA compiled additional evidence during the notice-and-comment period for rulemaking which consisted of "published findings of several international and national scientific review bodies and . . . peer reviewed scientific literature"—all concluding that a "rational basis" existed to substantiate the EPA's finding that GHGs pose a danger to public welfare. R. at 8.

The issue in this case is nothing more than a vain attempt to relitigate the same issue settled in *Coalition*. This Court should follow the D.C. Circuit in rejecting the challenge to the Endangerment Finding with respect to public welfare and affirm the district court. Accordingly, the end result of this challenge to the Endangerment Finding with respect to public welfare is a foregone conclusion—it fails, and the finding should remain intact.

II. THE 2009 ENDANGERMENT FINDING IS NOT VALID INSOFAR AS IT DETERMINES THAT GHGs MAY BE REASONABLY ANTICIPATED TO ENDANGER PUBLIC HEALTH.

The district court also properly determined that the Endangerment Finding was contrary to public health given the lack of actual harm. As discussed, Sections 108 and 202 of the CAA put the identification of emissions that endanger public welfare strictly within the purview of the EPA. CAA §§ 108(a)(1)(A), 202(a)(1); 42 U.S.C. §§ 7408(a)(1)(A), 7521(a)(1). The CAA similarly grants the EPA the authority to publish a list of pollutants which, "in [their] judgment, cause or contribute to air pollution which may reasonably be expected to endanger the public health." CAA § 108(a)(1)(A); 42 U.S.C. § 7408(a)(1)(A).

The difference between the two grants of authority—of great consequence to this case—lies in the regulatory consequences they trigger. While a finding of endangerment to public *welfare* triggers the issuance of secondary NAAQS, which have a low regulatory impact on the states, a finding of endangerment to public *health* results in the issuance of primary NAAQS, which result in mandatory state compliance deadlines and "draconian sanctions." R. at 9.

Accordingly, the bar to prove a danger to public health is much higher. A finding of endangerment to public health requires more than the speculative broad climate effects relied upon for the initial 2009 Endangerment Finding and seen in *Coalition* to justify a finding of danger to public *welfare*. *Ethyl Corp.*, 541 F.2d at 8. Instead, it must be substantiated by findings of direct adverse effects on human health. *Id.*

Primarily, the 2009 Endangerment Finding is contrary to law with respect to public health because the evidence underlying the original decision does not rely on any direct health impact resulting from ambient concentrations of GHGs. R. at 10. Additionally, although the district court came to the correct conclusion despite determining *Chevron* deference did not apply, the EPA respectfully disagrees with that determination. The district court specifically stated that *Chevron* deference did not apply since the determination was being raised for the first time in litigation and was never subject to comment-and-rulemaking. *Id.* However, the record is absent of any new arguments that would have necessitated a new comment-and-rulemaking period. Whether by way of clearly established law or agency deference, it is clear this Court should affirm the district court's finding that the 2009 Endangerment Finding as to public health is contrary to law.

A. GHGs Cannot Establish a Danger to Public Health Absent Proven Direct Health Impacts Resulting from Breathing Air Containing Ambient Concentrations.

With regard to public health, Congress tailored the original CAA to address the direct effects of local air pollutants rather than substances, like GHGs, that are fairly consistent in their concentration throughout the world's atmosphere. Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52922-02 (Sept. 8, 2003). Courts have affirmed that the EPA's ability to propose regulation—based on the issuance of primary NAAQS accompanied by a finding of public health endangerment—requires more than tangential effects on climate change. *See Ethyl Corp.*, 541 F.2d at 8 (holding that substantial levels of lead entering the human body through

ambient gasoline fumes justify a finding of endangerment to public health); *see also State of N.Y. v. Thomas,* 613 F. Supp. 1472, 1489 (D.D.C. 1985) (holding that acid deposition endangered public health only after leaching into groundwater and being poisonously consumed).

In *Ethyl Corp.*, the D.C. Court of Appeals specifically opined that "regulation may not be premised on a threshold determination of *likely* danger; rather, regulation must be premised on a determination of danger." *Ethyl Corp.*, 541 F.2d at 15-16 (emphasis added). The court there upheld the EPA's decision to classify lead as an endangerment to public health only *after* being presented with the significant bodily impact of airborne lead emissions. *Id.* at 8. Such direct impacts included "anemia, severe intestinal cramps, paralysis of nerves, fatigue, and even death." *Id.* Thus, the *Ethyl Corp.* court specifically established a "threshold determination that the pollutant causes actual harm." *Id.* at 14. This threshold was satisfied in both *Thomas* and *Ethyl Corp* as the harms were localized and direct, causing documented bodily harm such as poisoning or even death.

COGA's position is directly contrary to that of Federal Regulation 52922-02 since the record clearly recognizes that GHG emissions are relatively consistent around the globe. R. at 9. Further, the circumstances presented in *Thomas* and *Ethyl Corp.* are entirely distinguishable from the facts in the record before this Court. Here, the EPA's original finding that GHGs endanger public health fails to meet the threshold determination of actual harm. The only justifications for a finding of public health endangerment were, as stated in the record, based upon the "climate impacts of air pollution." *Id.* These justifications, although sufficient to establish a risk to public welfare, do not justify a finding of endangerment to public health. *Id.* This Court should, therefore, affirm the lower court in certifying the EPA's newfound position that GHGs are not reasonably anticipated to endanger the public health.

B. The EPA's Decision to Rescind the Determination that GHGs May Endanger Public Health Should be Afforded Controlling Agency Deference Under *Chevron.*

Despite the district court's holding, *Chevron* deference applies to the EPA's newfound interpretation of whether endangerments to public health should include GHGs. As discussed, *Chevron* deference vests this Court with an "obligation to defer to [the] EPA's interpretation of the [CAA]." *Ctr. for Biological Diversity*, 749 F.3d at 1087 (citing *Chevron*, 467 U.S. at 842-43). The court below held that the EPA's newfound position that GHGs do not endanger public health should not be entitled to *Chevron* deference as it was not preceded by notice-and-comment rulemaking. R. at 10. The court based its opinion upon the notion that, in order for an amendment to a formal rule to receive *Chevron* deference, an agency is required to conduct rulemaking procedures designed to allow other government agencies and private parties the opportunity to submit issues for its consideration. R. at 8.

The CAA provides that "the [EPA] shall convene a proceeding for reconsideration" of notice-and-comment rulemaking only in an instance where "an objection to a rule or procedure" is made that would have been impracticable at the time of the original proceeding. CAA § 307(d)(7)(B); 42 U.S.C. § 7607(d)(7)(B). Put simply, if a party disputes the validity of a finding with evidence that was not available at the time of the rule's original rulemaking process, only then must the EPA convene additional notice-and-comment procedures in order to account for such new information.

This interpretation of the CAA's rulemaking requirement was affirmed by *California Communities Against Toxics v. Envtl. Prot. Agency*, 928 F.3d 1041, 1048 (D.C. Cir. 2019). In *California*, industry manufacturers challenged the EPA's promulgation of a regulatory exclusion aimed at reducing non-recyclable waste, contending that the EPA's failure to commence notice-and-comment rulemaking invalidated a court-ordered revision of existing agency rules. *Id.* In

rejecting this argument, the court held that, because the revisions were not the result of any new information which required further agency investigation, additional notice-and-comment rulemaking was unnecessary to vest that decision with full rulemaking authority. *Id.* at 1049. Since the EPA had already had an opportunity to address the concerns brought by petitioners, the EPA was not required to take further steps to address problems. *Id.*

This Court is similarly under no obligation to require notice-and-comment rulemaking because the record is void of any considerations which were not presented to the EPA during its initial rulemaking procedures. The EPA was well aware of COGA's objections to its proposed Endangerment Finding and took care to note them in its original notice of proposed rulemaking, registering its concern that such a finding would, "with respect to GHG emissions controls, likely . . . place a significant burden on . . . manufacturing and industrial facilities, businesses, power plants, and potentially thousands of other sources throughout the United States." *Regulating Greenhouse Gas Emissions Under the Clean Air Act*, 73 FR 44354-01 (July 30, 2008). Since COGA's primary objection and cause to intervene in this case is to defend its market interest, the EPA's prior awareness and investigation into this issue abrogates any need to commence an additional round of notice and comment rulemaking. Accordingly, the EPA's determination that the 2009 Endangerment Finding is contrary to law with respect to public health is entitled to *Chevron* deference and should not be disturbed.

III. JURISDICTION TO REVIEW CHAWN'S UNREASONABLE-DELAY CLAIM LIES ONLY WITH THE D.C. APPELLATE COURT AND, THEREFORE, COULD ONLY HAVE BEEN PROPERLY FILED IN THE D.C. DISTRICT COURT.

This Court must dismiss CHAWN's unreasonable-delay claim for lack of subject matter jurisdiction pursuant to the jurisdictional and venue requirements of the CAA. "The plaintiff bears the burden of establishing jurisdiction by a preponderance of the evidence." *Envtl. Integrity Project*

v. EPA, 160 F. Supp. 3d 50, 53 (D.D.C. 2015) (internal citations omitted). "[B]ecause subject-matter jurisdiction is 'an Art[icle] III as well as a statutory requirement . . . no action of the parties can confer subject-matter jurisdiction upon a federal court.'" *Id.* (quoting *Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982) (internal citations omitted)). "Federal courts are courts of limited jurisdiction and the law presumes that 'a cause lies outside this limited jurisdiction.'" *Envtl. Integrity Project*, 160 F. Supp. 3d at 53 (quoting *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).

The CAA divides jurisdiction to review the EPA's actions between the district courts and the appellate courts. *See generally Oljato Chapter of the Navajo Tribe v. Train*, 515 F.2d 654, 657-58 (D.D.C. 1975), *superseded by statute on other grounds*. As to the district courts, the CAA's Citizen Suit Provision authorizes any person to commence a civil action against the EPA "where there is alleged a failure of the [EPA] to perform any act or duty under this chapter *which is not discretionary* with the [EPA]." CAA § 304(a)(2); 42 U.S.C. § 7604(a)(2) (emphasis added). Section 304 also provides that "district courts of the United States shall have jurisdiction to compel (consistent with paragraph (2) of this subsection) agency action unreasonably delayed[.]" CAA § 304(a); 42 U.S.C. § 7604(a).

But, Section 304 also limits that jurisdiction, stating "an action to compel agency action . . . which is unreasonably delayed may *only* be filed in a [U.S. District Court within the circuit in which such action would be reviewable under [Section 307(b).]" CAA § 304(a); 42 U.S.C. § 7604(a) (emphasis added). Section 307(b), in turn, provides that petitions for review "may be filed in the [U.S.] Court of Appeals for the appropriate circuit." CAA § 307(b); 42 U.S.C. § 7607(b) The statute goes on to categorize "appropriate circuits" into two categories. *See generally Id.*

First, actions which would be only locally or regionally applicable may be filed only in the court for the corresponding circuit. *Id.* Second, and of great importance to this case, actions of "nationwide scope or effect" "may be filed *only* in the United States Court of Appeals for the District of Columbia." *Id.* (emphasis added). The D.C. Circuit has pointed out it "reviews claims alleging unreasonable delays of this type in order [to] protect [their] eventual jurisdiction under [Section] 307 to review the final EPA action." *Sierra Club*, 828 F.2d at 792. Section 307(b)(1) makes it clear that the U.S. Court of Appeals for D.C. has *exclusive jurisdiction* to review an EPA action in promulgating certain national standards and rules, as well as "any other nationally applicable regulations promulgated, or final action taken, by the [EPA]." CAA § 307(b)(1); 42 U.S.C. § 7607(b)(1).

The EPA recognizes that some courts have characterized this jurisdictional provision as a venue requirement which can be waived. *See generally Tex. Mun. Power Agency v. EPA,* 89 F.3d 858, 867 (D.C. Cir. 1996); *see also State of N.Y. v. E.P.A.*, 133 F.3d 987, 990 (7th Cir. 1998). More recent caselaw, however, has made it clear that "[while the CAA's] venue and filing provisions for judicial review of the [EPA's] actions are not jurisdictional; nonetheless, the venue provision is a binding rule to be treated as mandatory." *S. Illinois Power Coop.*, 863 F.3d at 669 n.2.

This ongoing circuit split represents the pitfall of failing to give the EPA's interpretation of Section 307(b)(1) proper deference. Judge Silberman of the D.C. Circuit addressed this pervasive issue in his concurring opinion to *Clean Air Project*, pointing out that Section 307(b)(1) is "more than the ordinary venue issue—which typically involves such questions as the convenience of parties." *Natl. Envtl. Dev. Assoc.'s Clean Air Project v. E.P.A.*, 891 F.3d 1041, 1053 (D.C. Cir. 2018). Rather, Judge Silberman addressed the importance of deferring to the

EPA's interpretation of the statute to ensure national uniformity in implementing nationally applicable environmental regulations. *Id.*

Notwithstanding the EPA's forthcoming argument that CHAWN's unreasonable-delay claim lacks jurisdiction for failure to allege violation of a nondiscretionary duty, CHAWN has failed to establish even basic subject matter jurisdiction over the claim as a matter of statutory interpretation. The dispute between the EPA's interpretation and that of varying circuits speaks exactly to Judge Silberman's concurrence. These differences of opinion highlight the reality that failing to give the EPA's interpretation proper deference under *Chevron* will result in different outcomes concerning rules with nationwide applicability.

As the district court noted, designating a criteria pollutant would be a regulation of nationwide scope and applicability. R. at 12. Even GOGA concedes that "GHG concentrations are relatively constant around the globe." R. at 9. Further, the EPA has enacted a series of regulatory actions in an attempt to regulate GHG emissions since the Endangerment Finding.[4] R. at 7. Yet, not one of those regulatory initiatives survived completely intact.[5] *Id.* Given the unique and international nature of climate change and GHG emissions, it is clear this matter belongs, as Congress intended, in the D.C. Circuit. This Court should defer to the EPA's interpretation of Section 307(b)(1) and find CHAWN lacks subject matter jurisdiction.

[4] Examples of regulatory initiatives include: GHG emission limits for new passenger vehicles and trucks; New Source Performance Standards and Best Available Control Technology guidance under Title I of CAA; the Tailoring Rule to limit the scope of permitting requirements for GHG sources; and Clean Power Plant Regulations to require states to modify their implementation plans to achieve reduced GHG emissions. R. at 7.

[5] The Tailoring Rule was struck down by the Supreme Court; the 2017 EPA administration rolled back emission standards for vehicles and power plants; and the Clean Power Plan was repealed. R. at 7.

IV. CAA SECTION 108 GRANTS THE EPA A DISCRETIONARY DUTY TO DETERMINE WHETHER LISTING GHGs AS CRITERIA POLLUTANTS IS THE MOST EFFECTIVE METHOD OF REGULATING GHG EMISSIONS.

Assuming this Court does have subject matter jurisdiction, which the EPA does not concede, there would still be an additional jurisdictional barrier since the CAA only grants jurisdiction to review unreasonable-delay claims regarding *nondiscretionary* duties. This Court lacks that jurisdiction since CHAWN is challenging the EPA's discretionary duty to determine whether GHGs should be listed as criteria pollutants. A citizen suit is only proper "where there is alleged a failure of the [EPA] to perform any act or duty under [the Act] which is not discretionary with the [EPA]." CAA § 304(a)(2); 42 U.S.C.A. § 7604(a)(2). Therefore, *any* court would *only* have jurisdiction over CHAWN's claim "if the act or duty that plaintiff seeks to compel is one that is not discretionary with [the EPA]." *Friends of the Earth v. U.S. E.P.A.*, 934 F. Supp. 2d 40, 47 (D.D.C. 2013). Put simply, a court would only have jurisdiction to hear an unreasonable-delay claim if making an endangerment finding *required* the EPA to list GHGs as a criteria pollutant. The CAA, as a matter of statutory interpretation, requires no such action.

The discretionary duty to list criteria pollutants is only triggered when all elements of Section 108(a)(1)(A) are met. *See generally* CAA § 108(a)(1)(A)-(C); 42 U.S.C. § 7408(a)(1)(A)-(C). Subsection 108(a)(1)(C), the third element, requires intent to regulate those emissions by establishing air quality standards for GHG emissions. *Id.*

The EPA has no intent to act on their discretion to regulate GHG emissions by establishing NAAQS. Additionally, the EPA asserts that establishing NAAQS is an impractical method of regulating the complex nature of GHG emissions. This Court should, accordingly, find that the EPA is acting within their statutorily granted discretion, and in the public's best interest, in declining to establish NAAQS to regulate GHG emissions.

A. EPA is Statutorily Authorized to Use Discretion in Determining Whether to List an Air Pollutant as a Criteria Pollutant for the Purpose of Establishing NAAQS.

"To resolve a question of statutory interpretation, the Court begins with the language of the statute itself." *Friends of the Earth*, 934 F. Supp. 2d at 48 (quoting *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002)). Even if that statue does not expressly qualify a duty, "the absence of a clear statement that a duty is discretionary does not suffice to make it mandatory." *Friends of the Earth*, 934 F. Supp. 2d at 50.

Section 108 creates the EPA 's discretionary duty of listing criteria pollutants, providing:

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

CAA § 108; 42 U.S.C. § 7408 (emphasis added). The listing of criteria pollutants is, therefore, contingent on three factors: whether emissions endanger public health or welfare, whether there are multiple sources of emissions present, and whether the EPA has intent to regulate those emissions by establishing air quality criteria. *Id.*

In *Train*, the National Resources Defense Council brought suit against the EPA for declining to list lead as a criteria pollutant. *Nat. Resources Def. Council v. Train*, 545 F.2d 320, 322 (2d Cir. 1976). The Second Circuit specifically considered whether Section 108(a)(1)(C) granted the EPA discretion in determining whether to regulate an air pollutant by promulgating NAAQS standards or by an alternative measure of the CAA. *Id.* at 324. The court relied on the

Act's legislative history and judicial gloss in interpreting that if subsections (A) and (B) are met, subsection (C) should be mandatory. *Id* at 324-28.

The procedural aspects of *Train*'s holding, however, are no longer good law. Although the arguments presented by the EPA here are substantially similar to those in *Train*, the *Train* court's reasoning is no longer viable. Even New Union's own district court was rightfully hesitant "to rely on precedent from nearly one-half century ago." R. at 13. Indeed, *Train* was decided before the Supreme Court's decision in *Chevron* in 1984. Further, the Second Circuit failed to apply the date-certain doctrine in *Train* as the decision was ten years before *Sierra Club v. Thomas*. This Court should, therefore, reject the outdated and unrealistic persuasive authority offered by *Train*.

i. Courts Should Defer to the EPA's Interpretation of Section 108(a)(1)(C) Because *Train's* Holding is Inconsistent with the Supreme Court's Holding in *Chevron*.

The EPA is tasked with the responsibility of protecting human health and the environment. *See generally Michigan v. E.P.A.*, 576 U.S. 743, 748 (2015). Under the CAA, this responsibility involves regulating pollution sources *warranting regulation*. *Id.* (emphasis added). Under many circumstances, this involves the agency using its discretion to consider the realistic implications of that regulation in deciding to act. *Id.* (holding that the EPA could consider the cost of regulation in coming to decisions pursuant to the CAA).

The Supreme Court decided *Chevon* for circumstances exactly like these, where the EPA should have authority to reasonably interpret statutes implicating its area of expertise. The Court created a two-prong analysis for courts to apply when reviewing an agency's construction of the statute it administers. *Chevron*, 467 U.S. at 842. "First, whether Congress has directly spoken to the precise question at issue." *Id.* at 843. If not, *Chevron* mandates "the court does not simply impose its own construction on the statute . . . Rather, if the statute is *silent or ambiguous* with

respect to the specific issue, the question for the court is *whether the agency's answer is based on a permissible construction of the statute*." *Id.* (emphasis added). The Court made it clear that "the power of an administrative agency to administer a congressionally created program necessarily requires the formulation of policy and making of rules to fill any gap left, *implicitly or explicitly*, by Congress. *Id.* (emphasis added) (internal citations omitted).

These well-established principles demonstrate that when an agency acts within clearly expressed statutory authority, the agency's actions are entitled to uttermost deference. *Id.* at 842. In issues regarding interpretations of the CAA, courts have been extraordinarily hesitant to disturb a decision made by the EPA, holding that the court has an "obligation to defer to [the] EPA's interpretation of the [CAA]." *Ctr. for Biological Diversity*, 749 F.3d at 1087.

Since courts have continually struggled with whether Section 108(a)(1)(C) creates a discretionary duty, it is clear that Congress has not spoken directly to this issue. Indeed, even the court in *Train* admits the language of Section 108(a)(1)(C) is "ambiguous." *Train*, 545 F.2d at 327. In line with *Chevron*, the analysis, therefore, turns to whether the agency's interpretation is based on a permissible construction of the statute.

The EPA's interpretation is, and has been since 1976, that Section 108(a)(1)(C) creates a discretionary duty. *Id.* at 324. Without this discretion, the EPA would be required to list every air pollutant as a criteria pollutant subject to NAAQS. While perhaps an admirable pursuit to end climate change, the diverse nature of air pollutants makes such regulation impossible. Climate change, especially, is a global and unique problem, with GHG concentrations essentially the same around the world. R. at 9. GHGs are also different from other criteria pollutants, which cause direct health impacts, in that the only resulting harm is the indirect impact of climate change. R. at 10. Listing GHGs as criteria pollutants would, therefore, have no meaningful result other than

potentially depriving states of federal highway funding when they, understandably, cannot control the global emissions of GHGs. R. at 8-9. This Court should, accordingly, find that the decision to list GHGs as a criteria pollutant is a discretionary duty subject to *Chevron* deference.

ii. *Train's* Reasoning is Not Viable in Light of the Date-Certain Doctrine.

Train's interpretation of Section 108(a)(1)(C) relies heavily on the presence of extensive deadlines throughout the CAA. *Train*, 545 F.2d at 325-26. But, statutory interpretation based on deadlines has been clarified since *Train* to require a "date-certain" deadline. *See generally Sierra Club*, 828 F.2d at 792. In fact, the district court even noted that *Train's* holding was prior to *Sierra Club v. Thomas*. R. at 11. *Sierra Club* considered the mandatory nature of Section 108(a)(1)(C) and determined the deadlines relied on in *Train* are not triggered until *after* an endangerment finding or listing of a criteria pollutant. *See generally Friends of the Earth*, 934 F. Supp. 2d at 51.

In *Sierra Club v. Thomas*, the Court held that, "[w]here Congress has established no date-certain deadline—explicitly or implicitly—but [the] EPA must nevertheless avoid unreasonable delay, it does not follow that [the] EPA is . . . under a nondiscretionary duty to avoid unreasonable delay. Instead, this type of duty is discretionary[.]" *Sierra Club*, 828 F.2d at 792. The CAA does provide timetables to promulgate air quality standards; however, that duty is not triggered until after the judgment that the pollutant should be regulated. *See generally Friends of the Earth*, 934 F. Supp. 2d at 51. In addition to upholding this so-called "date-certain doctrine," *Friends* specifically held that undergoing an endangerment determination is not a nondiscretionary act or duty. *Id.* at 54. Even the Supreme Court in *Massachusetts* recognized that the EPA has "discretion to determine whether they [will regulate GHGs.]" *Massachusetts*, 549 U.S. at 502.

Given *Sierra Club v. Thomas*, it is clear *Train* was incorrect in concluding that the "deliberate inclusion of a specific timetable for the attainment of ambient air quality standards

incorporated by Congress" makes Section 108(a)(1)(C) a nondiscretionary duty. *Train*, 545 F.2d at 327. The EPA does not dispute that they would be subject to a mandatory duty to promulgate NAAQS once they listed GHGs as criteria pollutants; however, the discretion to make that initial judgment lies with the EPA. Section 108(a)(1) is void of any date-certain, only requiring the EPA "shall from time to time thereafter revise" the list. It is clear, given more recent authority, that *Train* is no longer viable case law and that Section 108(a)(1)(C) should be interpreted as vesting the EPA with a discretionary duty.

B. Regulating GHG Emissions by NAAQS Is Impractical and Against the Public's Best Interest.

Notwithstanding statutory interpretation, listing GHGs as a criteria pollutant would be against public interest since establishing NAAQS is an impractical method of regulating GHG emissions into the atmosphere. The district court here relied on *Massachusetts* to improperly exclude these concerns of the unique regulatory impacts initially raised by COGA from their analysis, characterizing them as "absurdity arguments." R. at 9. However, the trial court misconstrued *Massachusetts's* language, which simply stated that "policy judgments . . . have nothing to do with whether greenhouse gas emissions contribute to climate change." *Massachusetts*, 549 U.S. at 501.

The *Massachusetts* Court's decision was considering s*pecifically* whether to require the EPA to formally recognize that GHGs contribute to climate change. *Id.* Respectfully, that holding has no bearing on the statutory interpretation of whether Section 108(a)(1)(C) creates a discretionary duty. Indeed, in writing for the majority, Justice Stevens included in the closing remarks of his opinion a firm assurance that "we need not and do not reach the question . . . whether policy concerns can inform [the] EPA's actions in the event that it makes such a[n] Endangerment] [F]inding." *Id.* at 534-35.

Moreover, the so-called "absurd results doctrine" actually favors the EPA's position since the doctrine requires "interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purposes are available." *Griffin*, 458 U.S. at 575. In fact, this doctrine has been applied in EPA cases to avoid absurd results even when a statute is unambiguous. *See generally Coal. for Responsible Reg.*, 684 F.3d at 132-49. The spirit of the CAA is to improve and protect the environment and public health. Embracing that spirit must include allowing the EPA discretion to determine that, as here, establishing NAAQS would not be the most effective means of regulating a specific air pollutant.[6] This Court should find that this fact inherently categorizes Section 108(a)(1)(C) as a discretionary duty.

Massachusetts never expressly mentions absurdity arguments, making the district court's interpretation persuasive at best. Moreover, the issue presented in *Massachusetts* is not the issue presented here today. The EPA has already recognized that GHGs contribute to climate change. The issue here is whether promulgating NAAQS is the most effective way of mitigating that contribution. As mentioned, the absurd result doctrine is intended to prevent interpreting statutes in a way that would end in absurd results, which is exactly what would occur if this Court were to interpret Section 108(a)(1)(C) as a nondiscretionary duty.

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[6] Even modern environmentalists recognize that regulating GHG under the CAA would not be practical or effective. *See* Megen E. Miller, *Picking the Right Tools: Why Regulation of Greenhouse Gases under the Clean Air Act's National Ambient Air Quality Standards Is Statutorily Compelled, But Not a Practical Tool in the Combat Against Climate Change*, Michigan State University (2014), https://www.law.msu.edu/king/2013-2014/Miller.pdf (citing Robin Bravender, *Groups Petition EPA to Set Greenhouse Gas Limits under Clean Air Act*, N.Y. TIMES (Dec. 2, 2009), http://www.nytimes.com/gwire/2009/12/02/02greenwire-groups-petition-epa-to-set-greenhouse-gas-limi-40485.html).

In concluding that policy judgments were inapplicable to the EPA's inquiry, the lower court simply misapplied the *Massachusetts* Court's logic. Policy judgments may not be relevant in inquiring whether a particular emission relates to climate change, but once that has been established, there is nothing to exclude policy from a relevant assessment of whether or not to classify that pollutant as a criteria pollutant.

Listing GHGs as a criteria pollutant would trigger the nondiscretionary duty to establish, at the very least, secondary NAAQS. R. at 8. If the Endangerment Finding is found valid with respect to public health, primary NAAQS would be mandatory as well. *Id.* States would then have ten years to meet those levels of emissions, "or face the mandatory loss of federal highway funding." R. at 7, 9. Again, even COGA concedes that "GHG concentrations are relatively constant around the globe." R. at 9. Further it is clear from the record that even the EPA has not been able to promulgate successful regulations in their pursuit to limit GHG emissions. R. at 7. As the record states "it is beyond the power of any one State, or even the United States as a nation, acting alone, to bring global GHG concentrations down to a level that does not threaten climate change." R. at 9. Therefore, it would be against public interest to burden states with an impossible standard that could potentially result in the loss of federal highway funding. These are the realistic results of characterizing GHGs as a criteria pollutant that the district court improperly refused to consider. This Court should act in the public's best interest and reverse the district court's holding that Section 108(a)(1)(C) creates a nondiscretionary duty.

V. THE EPA'S DECISION NOT TO LIST GHGs AS CRITERIA POLLUTANTS DUE TO RULES OF REASON AND IMPRACTICALITY CONSTITUTES A REASONABLE DELAY.

Assuming, *arguendo*, that this Court determines it has both subject matter jurisdiction *and* that listing criteria pollutants is a discretionary function, this Court should still find that the EPA's

delay in listing GHGs as a criteria pollutant is reasonable under the circumstances. To establish a valid claim of unreasonable delay, CHAWN must make a requisite showing that they have "a right the denial of which [the D.C. Court of Appeals] would have jurisdiction to review upon final agency action but the integrity of which might be irreversibly compromised by the time such review would occur." In answering this question, "the first stage of judicial inquiry is to consider whether the agency's delay is so egregious as to warrant a mandamus." *Telecomm. Research & Action Ctr. v. F.C.C. ("TRAC")*, 750 F.2d 70, 79 (D.C. Cir. 1984) (internal citations omitted).

The D.C. Court of Appeals has interpreted *Sierra Club v. Thomas* as establishing two avenues by which an unreasonable-delay claim can be established: "(1) [by] showing that an agency violated a statutory 'right to timely decision-making' implicit in the agency's regulatory scheme, or (2) [by] showing 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 (citing *Sierra Club v. Thomas*, 828 F.2d at 796). *Sierra Club v. Thomas* relied on the *TRAC* factors in establishing this standard for evaluating the viability of unreasonable-delay claims against federal agencies. *See generally Sierra Club v. Thomas*, 828 F.2d at 787.

Under either the recent framework, established by *Thomas* in 1987 and relied on in *Mexichem* in 2015, or the analysis of the traditional *TRAC* factors, the result is the same. The EPA reasonably delayed in listing GHGs as a criteria pollutant since the agency relied on the rule of reason and focused on higher priorities while still addressing the issue of GHGs. This Court should, accordingly, reverse the district court's finding that the EPA's delay was unreasonable.

A. CHAWN Has Failed to Demonstrate Either A Statutory Right or Sufficient Interest that was Unreasonably Delayed by the EPA's Informed Decision Not to List GHGs.

In evaluating the first avenue for a claim of unreasonable delay, a statutory right to timely decision-making, courts evaluate three factors:

> "(a) determine whether Congress has imposed any applicable deadlines, exhorted swift deliberation concerning the matter, or otherwise implicitly contemplated timely final action; (b) determine whether interests other than that of timely decision[-]making 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 property."

Mexichem, 787 F.3d at 554-55. In assessing those factors, a court must be mindful that "[a]bsent a precise statutory timetable or other factors counseling expeditious action, an agency's control over the timetable" of its actions "is entitled to considerable deference." *Sierra Club v. Gorsuch*, 715 F.2d 653, 658 (D.C. Cir. 1983). Further "[e]ven where a statutory timetable exists, noncompliance with it has sometimes been excused as long as the agency has acted rational[ly] and in good faith[.]" *Id.*

In evaluating the second avenue for a claim of delay, asserting an interest that will be *irreparably* harmed by delay, courts have set "a high standard for irreparable injury." *Chaplaincy of Full Gospel Churches v. England,* 454 F.3d 290, 297 (D.C. Cir. 2006). Irreparable injuries 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." *Mexichem*, 787 F.3d at 555 (citing *Full Gospel*, 454 F.3d 297).

In *Mexichem*, petitioners brought action against the EPA for estimating a four-year time frame to respond to the petitioner's request—asserting that such a timeline would constitute an unreasonable delay. *Mexichem*, 787 F.3d at 555. In considering this assertion, pursuant to the first avenue for establishing an unreasonable-delay claim, the court held that the "text and structure" of the CAA suggests reconsideration proceedings are "fact bound and case specific." *Id.* Specifically, the court stated that the CAA does not "specify limits" and that "[the CAA's] provisions generally grant the agency broad discretion to correct its own mistakes before its rules are subjected to judicial review." *Id.* In considering the assertion pursuant to the second avenue for establishing an

unreasonable-delay claim, the court determined the revenues lost in that time would not constitute "irreparable harm." *Id.* at 556-57. Accordingly, the court found the petitioners did not establish an unreasonable delay pursuant to either avenue. *Id.*

CHAWN's claim fares no better than the petitioner's in *Mexichem*. With respect to the first avenue, as discussed above, the CAA does not provide a specific timetable for making the decision to list air pollutants as criteria pollutants. As to factor (a), the Act only provides a general provision that the EPA update the list "from time to time." Even if CHAWN established they have interests prejudiced by delay, pursuant to avenue one's factor (b), Petitioners have still failed to demonstrate those interests should come before the EPA's competing priorities consistent with factor (c). In fact, an express Executive Order requires the EPA to reduce regulatory burdens on business and economic activity, a goal that would assuredly be hindered by infeasible NAAQS for GHGs. R. at 12. Accordingly, CHAWN fails to establish a claim for unreasonable delay by the first avenue.

With respect to the second avenue, CHAWN has also failed to establish any interest that will be irreparably harmed by the EPA's delay in listing GHGs as a criteria pollutant. To meet that high bar, CHAWN's alleged harm would need to be both beyond remediation and imminent. CHAWN's only alleged harm is the broad harm climate change and global warming will cause to public welfare. R. at 5. This danger is neither beyond remediation nor imminent. Further, the EPA again points out that regulating GHG's under the criteria pollutant framework would do little to nothing to actually combat the impact of GHGs. Moreover, if the petitioner's subjective financial losses were not sufficient to establish irreparable harm in *Mexichem*, CHAWN's general assertions of global harm certainly do not establish such harm here. The EPA is continually taking extensive regulatory actions under the CAA to stop and reverse the impact GHGs are having on the

environment. R. at 7. This Court should, accordingly, recognize the practical reasons for the EPA's delay in taking this action and reverse the district court's finding.

B. A *TRAC* Factors Analysis Presents that the EPA Reasonably Delayed in Their Decision to List GHGs as a Criteria Pollutant Based on Permissible Factors.

The *TRAC* court established a six-factor standard to guide courts in evaluating allegations of unreasonably delayed agency action:

> "(1) the time agencies take to make decisions must be governed by a rule of reason; (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority; (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and (6) the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed."

TRAC, 750 F.2d at 79-80 (internal citations and quotations omitted). While these factors are broad, the standard nevertheless "provides useful guidance in assessing claims of agency delay[.]" *Id.*

The EPA's delay in listing GHGs as criteria pollutants satisfies the rule of reason, meaning the first and second *TRAC* factors weigh in the EPA's favor. The *TRAC* court found that this rule, in regard to federal agencies' regulations, requires decisions to be "just and reasonable," not "perfect." *Sierra Club*, 828 F.2d at 795. Clearly, the EPA is just and reasonable in wanting to avoid the extensive burdens NAAQS would place on states and economic activity.

TRAC factors three and four also weigh in favor of the EPA. Even though this is a concern of public welfare, regulating GHGs under NAAQS would simply not be in the public's best interest. Further, factor three simply asserts this danger would make a delay *less* tolerable, not *in*tolerable. Moreover, as discussed, the EPA is currently tasked with an Executive Order that clearly indicates GHG regulation is not the Agency's highest priority. This is an outright

justification for delay pursuant to *TRAC* factor four. The EPA, therefore, is clearly acting within the scope of its authority, despite the danger to public welfare.

Finally, *TRAC* factors five and six also weigh in favor of the EPA. Factor five considers exactly what the second avenue of *Mexichem* did, the extent of the injuries alleged. As discussed there, the potential injury in CHAWN's claim is in no way immediate and, moreover, simply would not be mitigated by listing GHGs as criteria pollutants. As to factor six, as clearly established in the record, the EPA has taken extensive measures to regulate GHGs since the Endangerment Finding in 2009. R. at 7. The EPA is not acting with impropriety or "lurking behind lassitude." The Agency's hesitancy to list GHGs as a criteria pollutant always has been, and continues to be, the unreasonable burdens such a measure would place on states and the ineffectiveness of expecting states to resolve a global issue. R. at 9.

Altogether, it is clear that each *TRAC* factor weighs in favor of the EPA. The district court's only justification, other than *TRAC* factor four, for finding an unreasonable delay was the *per se* unreasonableness of anything longer than eight years. R. at 13. However, neither cases cited by the district court were considering the complexities of climate change. Therefore, there is no binding authority that the EPA's justified delay was unreasonable, and this Court should reverse the district court's decision.

CONCLUSION

In determining that the 2009 Endangerment Finding is valid with respect to public welfare, the EPA relied on scientific data demonstrating that GHGs likely contribute to climate change. In doing so, the EPA acted within their appropriate discretion and should be entitled to deference as the decision falls squarely within the agency deference established in *Chevron*. *Chevron*

notwithstanding, the EPA's finding should not be disturbed given the clearly established case law that climate change absolutely poses an endangerment to public welfare.

Similarly, that deference should also be applied to the EPA's newfound determination that GHG emissions do not pose a danger to public health. Regardless of *Chevron* deference, dangers to public health have only been found where there are direct impacts on individuals' physical health and should not be extended to include broad dangers that may result from climate change.

With respect to jurisdictional inquiries, Section 108(a)(1)(C) is more than a mere venue requirement and, even so, petitions can only be brought against a nondiscretionary action. The district court's determination finding subject matter jurisdiction and a valid discretionary duty were improper as they were matters of statutory interpretation and subject to the EPA's deference.

Finally, jurisdictional inquiries aside, the EPA is tasked with acting in the best interest of public health, welfare, and the environment. The agency was not unreasonable in delaying the action of listing GHGs as a criteria pollutant since that decision was based on the rule of reason, competing priorities, and other means of achieving the goal.

Ultimately, the Endangerment Finding was valid with respect to public welfare but contrary to law with respect to public health and this Court should affirm the district court on those matters. However, the district court lacked, and this Court lacks, subject matter jurisdiction and should dismiss the unreasonable-delay claim. Jurisdiction notwithstanding, the EPA did not have a nondiscretionary duty to list GHGs as a criteria pollutant and, even if they did, their delay is not unreasonable. Accordingly, this Court should reverse the district court's holding on those issues.