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MOOT COURT COMPETITION

C.A. No. 20-000123
UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

CLIMATE HEALTH AND WELFARE NOW,
Plaintiff-Appellee- Cross Appellant,
v.
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Defendant-Appellant,
and
COAL, OIL, AND GAS ASSOCIATION,
Intervenor-Defendant-Appellant-Cross Appellee.

ON APPEAL FROM
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW UNION

Brief of UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Defendant-Appellee

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STATEMENT OF JURISDICTION

This case concerns questions of administrative action under the Clean Air Act of 1970 ("CAA" or "Act"), 42 U.S.C. § 7401 et seq. This Court has proper jurisdiction over this appeal from the U.S. District Court for the District of New Union's final decision pursuant to 28 U.S.C. § 1291, but the district court did not have original jurisdiction to hear this action under the Citizen Suits provision of the CAA, 42 U.S.C. § 7604(a). Accordingly, this case should either be dismissed or transferred to the U.S. Court of Appeals for the D.C. Circuit under 28 U.S.C. § 1406(a), pursuant to the venue requirement of the Judicial Review provision of the CAA, 42 U.S.C. § 7607(b).

STATEMENT OF THE ISSUES

I. Whether the District Court for the District of New Union had jurisdiction over CHAWN's claim under CAA § 304(a) where the rule sought would be a rule of nationwide applicability subject to review exclusively in the D.C. Circuit under CAA § 307(b).

II. Whether the 2009 Endangerment Finding was valid with respect to an endangerment of public welfare.

III. Whether the 2009 Endangerment Finding was valid with respect to an endangerment of public health.

IV. Whether the EPA's ten-year consideration of action related to listing GHGs as criteria pollutants under CAA § 108(a) constitutes a reasonable amount of time.

V. Whether the EPA has a discretionary duty to designate GHGs as a criteria pollutant under CAA § 108 based on the 2009 Endangerment Finding.

STATEMENT OF THE CASE

I. Facts

The Environmental Protection Agency ("EPA") is the primary executor regulating air pollutants under the Clean Air Act. *See* R. at 5. In 1999, environmental groups, including Plaintiff here, petitioned the EPA to undertake a finding to determine whether Greenhouse Gases ("GHG" or "GHGs") could endanger public health or welfare under § 202 of the CAA. R. at 5–6. This petition did not ask the EPA to make findings under any other section of the CAA. R. at 6. Findings under § 202 would trigger regulations for GHG emissions from mobile sources, such as automobiles. *Id.* At that time, believing GHGs did not fit within the CAA's definition of "air pollutant," the EPA denied the petition. *Id.* Disagreeing with the EPA's choice to deny the petition, those groups then filed a lawsuit against the EPA. *Id.* In that case, the U.S. Supreme Court found that GHGs may qualify as an "air pollutant" under the CAA and therefore could be subject to regulation under § 202 if found by the EPA to be an endangerment to public health or welfare. *Id.*

Following the Court's decision, the EPA undertook a formal endangerment finding on whether GHGs could endanger public health or public welfare. *Id.* The EPA conducted extensive scientific research and issued a formal finding of endangerment in December 2009. *Id.* In addition to finding that GHGs are emitted by several mobile sources, the EPA defined a group of six GHGs as an air pollutant under the CAA, and that such pollutants may be an endangerment to public health and public welfare. R. at 7.

Basing its conclusions and subsequent actions on scientific data regarding climate-change impacts, the 2009 Endangerment Finding explained that there is a rational connection between GHG emissions and the effect on public welfare. R. at 7. GHG emissions were found to

contribute to a warming climate globally, which could lead to a reduction in agricultural productivity, reduced water supplies, and an increase in property and economic damage. *Id.* The Endangerment Finding also contended that climate changes could indirectly lead to effects such as an increase in ozone pollution, hotter temperatures, and more insect-borne diseases, which the Endangerment Finding categorized as effects on public health. *Id.* Knowing that GHGs now needed to be regulated under § 202 of the Act., the EPA implemented a series of regulations to reduce GHG emissions in line with the requirements of § 202. *Id.*

The EPA first set out to limit GHG emissions for new passenger vehicles and light trucks. *Id.* Then the EPA took additional measures to regulate GHGs. For example, the EPA set New Source Performance Standards and Best Available Control Technology guidance that applies to major new sources, including power plants. *Id.* Then, the EPA adopted the "Tailoring Rule" which limited the number and size of emitting sources that are subject to permits, to better align their regulation efforts with Congress's intent. *Id.* Later, the EPA created the "Clean Power Plan" regulations which directed individual states to achieve GHG reductions consistent with EPA guidance by modifying their Clean Air Act Implementation Plans. *Id.*

While the emissions for new passenger vehicles and light trucks were ultimately upheld by the Supreme Court, the other regulations created under § 202 in response to the 2009 Endangerment Finding did not have that same fate. *Id.* These EPA-created regulatory measures were struck-down or limited by the courts and by intra-agency policy changes. *Id.* The Tailoring Rule was challenged in *Utility Air Regulatory Group v. EPA* and was partially struck down. *Id.* Then with the change in administration in 2017, the EPA's efforts to regulate GHGs were subject to rollbacks in line with policy changes within the EPA. *Id.* In particular, the administration relaxed GHG emissions standards for new vehicles and new or existing power plants. *Id.*

Throughout these challenges and changes, the EPA's Endangerment Finding remained in place. *Id.* However, the EPA has chosen not to designate GHGs as criteria pollutants under CAA § 108. *Id.* Based on the agency's Endangerment Finding under § 202, the EPA chose to regulate GHGs by setting emission standards for new motor vehicles and not under § 108, which would require that the EPA set primary and secondary National Ambient Air Quality Standards ("NAAQS"). R. at 6.

II. Procedural History

This appeal follows a final decision by the U.S. District Court for New Union. R. at 1. Following the EPA's issuance of the Endangerment Finding in 2009, a coalition of environmental organizations, including Climate Health and Welfare Now ("CHAWN") filed a petition with the EPA urging that the agency list GHGs as criteria pollutants. R. at 5. Over the ten years following the petition, the EPA regulated GHG emissions under CAA § 202, but the EPA did not act on the petition, nor did it choose to list GHGs as criteria pollutants under § 108 of the Act. *Id.* In April 2019, CHAWN properly served notice to the EPA that the group intended to sue, and after the EPA did not respond, CHAWN brought suit against the EPA in the District Court of New Union, alleging that the EPA failed to carry out its duty to designate GHGs as criteria pollutants and subsequent inaction to regulate GHGs as such under § 108 of the CAA. *Id.* CHAWN is now seeking an order from this Court to force the EPA to publish a new list of criteria pollutants that includes GHGs. *Id.*

When the lawsuit against the EPA commenced, the Coal, Oil, and Gas Association ("COGA") filed a motion to intervene. *Id.* As a trade association that represents the interests of fossil fuel companies, COGA argued that requiring the EPA to list GHGs as criteria pollutants would be detrimental to the market for its products, including coal, oil, and natural gas. *Id.* The court granted COGA's motion to intervene in November 2019, and COGA then filed a

crossclaim against EPA, with the desire that the court declare the Endangerment Finding as unsupported by the record and unlawful. *Id.* The district court found that the Endangerment Finding is valid with respect to the endangerment to public welfare, that the EPA unreasonably delayed action on responding to CHAWN's petition and listing GHGs as criteria pollutants, and that EPA has a non-discretionary duty to designate GHGs as criteria pollutants. R. at 2. The District Court vacated the public health findings of the Endangerment Finding. *Id.* The EPA, CHAWN, and COGA all appealed the District Court's findings. *Id.*

SUMMARY OF THE ARGUMENT

The U.S. District Court for the District of New Union erred in hearing this case. The court did not have jurisdiction under § 304(a) of the CAA because the remedy sought is reversal of a final action by the EPA Administrator. Proper jurisdiction for this case lies in the U.S. Court of Appeals for the D.C. Circuit under § 307(b) of the CAA. This action arises under a dispute over the EPA Administrator's decision not to list GHGs as criteria pollutants under CAA § 108(a). Congress created a judicial review provision in the CAA that channels this type of action to a special venue. The Judicial Review provision of CAA § 307(b) designates the D.C. Circuit as the proper venue for review of all final actions of the EPA Administrator that are nationally applicable and related to setting NAAQS. Therefore, the district court did not have the authority to hear this case and the case must be dismissed or transferred to the D.C. Circuit.

The district court properly held that the 2009 Endangerment Finding is valid with respect to the endangerment of public welfare. The CAA does not directly define "public welfare," however, Congress made its intentions clear by stating that air pollutants' harm to the climate fall within the "effects on public welfare." The EPA Administrator is given great deference in

making determinations of endangerment, due both to the statutory language of the Clean Air Act; as well as the D.C. Circuit case precedent that will uphold an agency action so long as it is rationally based. After finding that GHGs are an endangerment to public welfare based on the scientific evidence and not policy, the EPA's actions and attempts to regulate were based on the rational determination that the direct link between GHGs from car emissions have a negative impact on public welfare. The EPA then regulated GHG emissions under § 202 of the CAA.

The district court was also correct to invalidate the 2009 Endangerment Finding with respect to the endangerment of public health. The CAA does not define health or public health, but it does include impacts on climate change within its definition of "effects on welfare." The Endangerment Finding incorrectly found GHGs may pose a danger to public health based only on indirect health effects that stem from climate change. Because impacts of climate change are specifically included within the definition of "effects on welfare," those same effects cannot be considered effects on public health. Thus, the Endangerment Finding is invalid as to the effects on public health.

The district court erred in finding that the EPA unreasonably delayed action on responding to Plaintiff's petition for designation of GHGs as a criteria pollutant and designating GHGs as a criteria pollutant under CAA § 108(a). The EPA administrator's inaction reflected a final decision not to list GHGs as criteria air pollutants at this time, and his decision was reasonable because of the complex nature of climate change. Atmospheric science is changing rapidly and difficult to study, and the implications of listing GHGs as a criteria pollutant would be far reaching, requiring action and regulation by each state and tribal nation, as well as the federal government. Combatting climate change is a challenge of global scale that will require international cooperation and negotiation to combat. Because of the complex nature of both the

problems associated with GHGs as well as their regulation, a decision by the EPA administrator not to list GHGs as criteria pollutants at this time was not delayed but was entirely reasonable.

The district court also erred when finding CAA § 108(a) imposed a non-discretionary duty upon the EPA because the court did not even consider the principal case regarding federal agencies' statutory interpretations: *National Resources Defense Council v. Chevron*. Instead, the court relied on a pre-*Chevron* case's analysis of § 108 and did not perform any additional analysis or even conduct a *Chevron* analysis to determine whether the EPA's interpretation of § 108(a) was permissible. Had the district court undergone a *Chevron* analysis, it would have likely concluded the EPA's interpretation of § 108 was permissible because the interpretation reasonably permits the EPA to use its technical and scientific expertise to determine the most efficient and effective route to regulate GHGs. A non-discretionary duty under § 108 would remove the EPA Administrator's judgment by preempting the use of other CAA regulatory schemes and force the EPA into a corner on regulating this air pollutant. This goes against the redefinition of "agency deference" under *Chevron* and should not be permitted.

ARGUMENT

I. THE EPA ADMINISTRATOR'S DECISION NOT TO LIST GHGS AS CRITERIA POLLUTANTS WAS A FINAL ACTION REVIEWABLE ONLY UNDER CAA § 307(b) BECAUSE THE ACT CREATES A SPECIAL VENUE IN THE D.C. CIRCUIT FOR THESE TYPES OF ACTIONS.

The CAA contains two sections that lay out the process and appropriate forum for challenging a variety of agency delays and actions. 42 U.S.C. § 7604(a); 42 U.S.C. § 7607(b). Both sections contain a certain venue for the specific type of delay or action under review. *Id.* CAA § 304(a), the "Citizen Suits" provision, designates the district courts within the locally or regionally applicable circuit as the proper venue for challenging unreasonably delayed EPA enforcement of emission standards or limitations. 42 U.S.C. § 7604(a). The EPA Administrator's

decision not to list GHGs as criteria pollutants, which if listed would create a new nationally applicable regulation, is not covered by the citizen suits provision because the Administrator's decision constitutes a final action reviewable only under CAA § 307(b). 42 U.S.C. § 7607(b). Titled "Administrative Proceedings and Judicial Review," § 307(b) designates the U.S. Court of Appeals for the District of Columbia as the proper venue for review of "nationally applicable regulations promulgated, or final action taken, by the Administrator." *Id.* The U.S. District Court for the District of New Union did not have jurisdiction over either CHAWN or COGA's claims because the CAA specifically designates a proper venue for review of nationally applicable regulation decisions made by the EPA Administrator in CAA § 307(b). *Id.* This Court should vacate the district court's ruling and transfer the case under 28 U.S.C. § 1406(a) to the appropriate venue which is the U.S. Court of Appeals for the District of Columbia. 42 U.S.C. § 7604(a); 42 U.S.C. § 7607(b).

A. Subject matter jurisdiction for this case lies only in the U.S. Court of Appeals for the District of Columbia because listing GHGs as criteria pollutants triggers setting nationally applicable emissions standards.

Plaintiffs have two courses of action when challenging decisions by administrative agencies. The first, which is not applicable in this case is through the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701–706, which creates a cause of action for plaintiffs and waives sovereign immunity for the U.S. Government in a variety of administrative matters. *Am. Rd. & Transp. Builders Ass'n v. EPA*, 865 F.Supp.2d 72, 80–81 (D.D.C. 2012). Alternatively, the U.S. Supreme Court has found that Congress can waive sovereign immunity by expressly granting jurisdiction, as they have in this case under the CAA, § 307(b), to decisions over the reasonableness of EPA's explanation for why it had not made an endangerment determination related to GHGs. *Massachusetts v. EPA*, 549 U.S. 497, 528 (2007).

The U.S. Court of Appeals for the D.C. Circuit also held that it had exclusive jurisdiction over this type of matter. *Massachusetts v. EPA*, 415 F.3d 50, 53 (D.C. Cir. 2005), *rev'd on other grounds by Massachusetts v. EPA*, 549 U.S. 497 (2007). In that case, Massachusetts and other state and local governments petitioned for review of an EPA decision to deny a petition for rulemaking to regulate GHG emissions from motor vehicles. *Id.* While the instant case is distinguishable because the EPA has not yet affirmatively acted to deny a petition for rulemaking, the current action is fundamentally the same request for judicial review of a decision by the EPA Administrator not to pass nationally applicable regulations as would be governed by the special venue requirements of CAA § 307(b). The U.S. District Court for the D.C. Circuit has ruled that CAA § 307(b) jurisdiction extends to review of all final EPA actions and proceedings "regardless of how the grounds for review are framed." *Am. Rd. & Transp. Builders Ass'n*, 865 F.Supp.2d at 80 (quoting *Virginia v. United States*, 74 F.3d 517, 523 (4th Cir. 1996)). Further, the U.S. District Court for the D.C. Circuit has also ruled that if a statute channels review to appellate courts for a given remedy, the statute terminates a district court's federal question jurisdiction under 28 U.S.C. § 1331. *Friends of the Earth v. EPA*, 934 F.Supp.2d 40, 46 (D.D.C. 2013) (citing *Am. Rd. & Transp. Builders Ass'n*, 865 F.Supp.2d at 80–81).

B. The EPA Administrator's decision not to list GHGs as a new criteria pollutant has not been unreasonably delayed, because a final action has been taken and therefore the decision cannot be subject to challenge under the citizen suits provision of CAA § 304(a).

The EPA Administrator's listing of new criteria pollutants is a discretionary action, and because it is discretionary, it cannot be unreasonably delayed. In *Massachusetts v. EPA* and *Friends of the Earth,* both the Supreme Court and the U.S. District Court for the District of Columbia, respectively, have addressed issues related to the instant case regarding what type of

action or inaction by the EPA Administrator constitutes a final action reviewable under § 307(b). *See generally Massachusetts v. EPA*, 549 U.S. 497; *Friends of the Earth*, 934 F.Supp.2d 40.

In *Massachusetts v. EPA*, the issue of whether the EPA administrator had an affirmative duty to list GHGs as criteria pollutants was not yet ripe. 549 U.S. at 533. In that case, the Court addressed the issue of whether the EPA Administrator had an affirmative duty to investigate whether GHGs endangered public health and welfare by making an endangerment finding. *Id*. Whereas this case is distinct from *Massachusetts v. EPA*, since the EPA has already made an endangerment finding, and instead revolves around the EPA's latitude in deciding how to regulate GHGs. Accordingly, this Court should address this matter *de novo*, as the circumstances are materially different from those in *Massachusetts v. EPA.* The Supreme Court held that the EPA should have discretion in listing GHGs as criteria pollutants so long as the agency "provides some reasonable explanation as to why it cannot or will not exercise its discretion." *Id.*

In *Friends of the Earth*, an environmental group brought suit in the U.S. District Court for the District of Columbia seeking to compel the EPA to make an endangerment finding regarding the risk posed by aircraft fuel to public health and welfare. 934 F.Supp.2d at 41 (D.D.C. 2013). The court found that they lacked jurisdiction to compel EPA action directly linked to final rule making in this way under CAA § 304(a). *Id.* at 55. As discussed further in Section IV and V of this brief, the EPA Administrator has reasons for deciding not to list GHGs as criteria pollutants at this time, however, his decision is still a final action. Since it is a final action, it is only judicially reviewable under § 307(b) based on well-established precedent.

C. Statutory construction demonstrates that the Administrator's decision not to list GHGs as criteria pollutants constitutes a final action judicially reviewable only under § 307(b) because that interpretation aligns with the plain meaning of the text and is in keeping with the congressional purpose of adding a judicial review provision.

In order to determine the intent of Congress, a court will first look at the plain language of a statute. If the statute contains ambiguous terms as it does in § 307(b), the court should evaluate how best to defer to the agency of enforcement, while considering methods of statutory construction and canons of legal interpretation. Courts grant deference to the interpretation of the agency responsible for promulgating regulations, conducting research, and publishing guidance related to the underlying text, so long as the agency's interpretation is reasonable. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984). Following the legal scholarship trend, the Supreme Court has recently applied a more textualist, as opposed to purposivist, approach in its interpretation of the CAA. David M. Driesen et. al., Half A Century of Supreme Court Clean Air Act Interpretation: Purposivism, Textualism, Dynamism, and Activism, 75 Wash. & Lee L. Rev. 1781, 1784–85 (2018).

Certain a-political canons of legal interpretation are also widely accepted. Ejudem Generis, for example, is the statutory canon dealing with instances where general words appear in a clause next to specific words in a statutory enumeration, and, therefore, the general words are construed to embrace only objects similar to those enumerated by the adjacent specific items. *See generally* Jay Wexler, Fun with Reverse Ejusdem Generis, No. 19-29 Boston University School of Law, Public Law Research Paper (2019).

The CAA provision entitled "Administrative Proceedings and Judicial Review," reads as follows:

Judicial Review

> (1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard or requirement under section 7412 of this title, any standard of performance or requirement under section 7411 of this title, any standard under section 7521 of this title (other than a standard required to be prescribed under section 7521(b)(1) of this title), any determination under section 7521(b)(5) of this title, any control or prohibition under section 7545 of this title, any standard under section 7571 of this title, any rule issued under section 7413, 7419, or under section 7420 of this title, or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia.

42 U.S.C. § 7607(b).

In interpreting what constitutes an "action of the Administrator in promulgating any national primary or secondary ambient air quality standard" a court must consider the plain meaning of those words, statutory interpretation precedent, and the actions specifically enumerated after this introductory clause by Congress. *Chevron*, 467 U.S. at 844; Driesen, *supra*, at 1784–85; Wexler, *supra*.

The Administrator's decision to list GHGs as criteria pollutants would directly trigger a duty to promulgate NAAQS. While the Administrator has chosen not to list GHGs as a criteria pollutant at this time, this decision not to regulate resembles others specifically included in § 307(b). The section 42 U.S.C. § 7412 deals with revising a list of hazardous air pollutants for promulgation of emission standards, § 7411 (or CAA § 111) addresses standards of performance for new stationary sources, § 7521 covers emission standards for new motor vehicles or new motor vehicle engines, § 7545 discusses regulation of fuels, § 7571 discusses setting standards for emissions from aircraft, and §§ 7413, 7419, and 7420 deal with enforcement of state implementation plans, standards for metals manufacturers, and penalties for noncompliance. These sections encompass a wide variety of standards related to regulation of air quality and pollutants associated with domestic industries.

The EPA Administrator's decision not to list GHGs as criteria pollutants under CAA § 108 has far reaching effects on all these industries addressed in the judicial review provision, CAA § 307(b)**,** and should therefore be reviewed under the venue assigned therein. Though a textual analysis of the statute is ambiguous as to whether an inaction by the EPA Administrator is considered a final action, the provision can be read to include this type of final inaction because of the types of related actions reviewable. Further, this interpretation of the D.C. Circuit special venue requirement of CAA § 307(b) is in keeping with the purpose of creating a specific provision in the original CAA for review of final air quality related standards that are nationally applicable.

II. THE DISTRICT COURT PROPERLY HELD THE ENDANGERMENT FINDING AS VALID WITH RESPECT TO AN ENDANGERMENT OF PUBLIC WELFARE BECAUSE THE ADVERSE EFFECTS OF CLIMATE CHANGE FALL SQUARELY IN THE STATUTORY LANGUAGE OF "WELFARE."

The district court correctly held that the 2009 Endangerment Finding regarding GHGs as an endangerment to public welfare is valid. The CAA lacks a specific definition for "public welfare," however, the Act states that the "effects on welfare" include effects of air pollutants on soil, water, crops, vegetation, wildlife, weather and climate, property damage, aesthetic concerns, and considers economic values and personal comfort and well-being. 42 U.S.C. § 7602(h). As the district court properly recognized in its decision, Congress's intentions are clear by stating the effects on climate fall within the "public welfare" section of the Act. Under the Act, the EPA is required to regulate an air pollutant that the Administrator may reasonably anticipate to endanger public health or welfare. 42 U.S.C. § 7521. Courts defer to the agency to conduct findings to determine if there is an endangerment. *Coal. for Responsible Regul., Inc. v. EPA*, 684 F.3d 102, 120 (D.C. Cir. 2012). After making a rational determination that GHGs contribute to

climate change—and therefore fall within the realm of having an "effect on welfare"—the EPA began to regulate GHG emissions under § 202(a) of the Clean Air Act. *See* Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,495, 66,497 (Dec. 15, 2009).

A. The EPA Administrator is given authority under the CAA to use his or her judgment in determining if GHGs may reasonably be anticipated to endanger public welfare, as was done in the Endangerment Finding.

Based on the statutory language, "which in his [or her] judgment," the CAA gives the EPA control to determine if an air pollutant may endanger public welfare. 42 U.S.C. § 7521(a)(1). The D.C. Circuit court has held that the EPA has significant deference when it comes to areas in which the agency has expertise, saying that the court must "give an extreme degree of deference to the agency when its evaluating scientific data within its technical expertise." *City of Waukesha v. EPA*, 320 F.3d 228, 247 (D.C. Cir. 2003) (quoted in *Cmtys. for a Better Env't v. EPA*, 748 F.3d 333, 335 (D.C. Cir. 2014)). The Administrator has the sole judgment to determine if air pollutants may endanger public welfare and how to regulate the pollutants; the Court, on the other hand, is not responsible for second guessing the scientific evidence, but instead is tasked with determining if the EPA has made a rational judgment. *Am. Pet. Inst. v. Costle*, 665 F.2d 1176, 1185 (D.C. Cir. 1981). Courts, therefore, do not reweigh the evidence used by the EPA, but instead analyze whether the Administrator has a reasoned explanation for how the EPA used the evidence; if there is a rational connection between the evidence and choices made in response, the agency's action will be upheld. *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962); *Nat'l Ass'n of Clean Air Agencies v. EPA*, 489 F.3d 1221, 1232 (D.C. Cir. 2007).

In its 2009 Endangerment Finding, the EPA made a rational judgment in finding that motor-vehicle related emissions of GHGs influence climate change. 74 Fed. Reg. 66,497–98. Not only do these adverse effects match the statutory definition for "effects on welfare," but there is a clear link between the scientific data and the EPA's decision to regulate GHGs under § 202(a). The district court correctly ruled that the EPA made a rational judgment in determining that GHGs affect public welfare, and this Court should also uphold the Endangerment Finding regarding public welfare.

B. The EPA's findings and subsequent actions were based on scientific evidence and expertise and should be upheld as rationally based.

The EPA based its decisions on scientific evidence and not policy, therefore the Court should uphold the findings and actions because they are rationally based. *Am. Farm Bureau Fed'n v. EPA*, 559 F.3d 512, 533 (D.C. Cir. 2009); *Chem. Mfrs. Ass'n v. EPA*, 28 F.3d 1259, 1263 (D.C. Cir. 1994). The D.C. Circuit has held that the EPA has great deference in making its scientific judgments because of its technical expertise in the area. *Ctr. for Biological Diversity v. EPA*, 749 F.3d 1079, 1089 (D.C. Cir. 2014). As stated in the Endangerment Finding, the agency determined that public welfare is endangered by way of compelling scientific evidence, including assessments from the U.S. Global Climate Research Program, the Intergovernmental Panel on Climate Change, and the National Research Council. 74 Fed. Reg. 66,497. After establishing that there is an endangerment to public welfare, the EPA sought to regulate GHG emissions under § 202 of the CAA, which states that the agency shall regulate emissions of any air pollutant from new motor vehicles. 42 U.S.C. § 7521.

While regulation under § 202 is not discretionary, the EPA does have discretion regarding the manner, timing, and content of the actions and regulations. *Massachusetts v. EPA*, 549 U.S. at 533. The EPA began setting regulations, including the establishment of GHG emissions limits

for new passenger vehicles and light trucks; and limiting the scope of permitting and review requirements that would apply to GHG sources; as well as setting the Clean Power Plan regulations which directed states to make efforts to reduce GHG emissions. In addition to having made rational decisions based on the scientific evidence, the EPA's findings should be upheld because the EPA did not rely on policy matters in making its decisions. The Supreme Court held that policy matters, including economic costs, should not be considered by an agency in making determinations of endangerment. *Id*. In the 2009 Endangerment Finding, the EPA spoke directly to this issue and set forth the reasons why it would not consider policy in making its determinations. 74 Fed. Reg. 66,500–01. Instead, the EPA based its actions on the scientific data, therefore the EPA correctly regulated based on its findings that GHGs are a direct endangerment to public welfare.

III. THE DISTRICT COURT WAS CORRECT TO INVALIDATE THE 2009 ENDANGERMENT FINDING REGARDING PUBLIC HEALTH BECAUSE THE IMPLICATED EFFECTS ARE SPECIFICALLY DEFINED BY CONGRESS AS EFFECTS ON WELFARE.

Since the 2009 Endangerment Finding, the EPA has reevaluated the GHG effects on climate and weather and concluded they fit within the Act's definition of "effects on welfare"; thus, these effects are not effects on public health under the CAA. This conclusion is permissible. *See Massachusetts v. EPA*, 549 U.S. at 524 (accepting that agencies "whittle away at [problems] over time, refining their preferred approach as circumstances change and as they develop a more nuanced understanding of how best to proceed"). Here, the EPA does not argue the science underlying the 2009 Endangerment Finding is inadequate, nor does the EPA argue any additional scientific determinations need to be made. Rather, the EPA argues the scientific record, when considered "in a rational manner," from the Endangerment Finding found only effects on public

welfare and not effects on public health. *Coal. for Responsible Regul., Inc.*, 684 F.3d at 122 (quoting *Costle*, 665 F.2d at 1187).

A. Congress specifically defined "effects on welfare" for the CAA, therefore the EPA cannot use impacts contained within that definition to find effects on public health.

The Act does not define "public health," nor does it define "health." However, the Act's definition of "effects on welfare," includes effects on "animals, . . . weather, . . . and climate." 42 U.S.C. § 7602(h). When a statute "includes an explicit definition," courts are bound to follow that definition. *Stenberg v. Carhart*, 530 U.S. 914, 942 (2000). The district court correctly understood this condition and correctly invalidated the 2009 Endangerment Finding regarding public health.

The Endangerment Finding found the public health effects from GHGs were temperature effects, air quality effects, effects on weather, and effects on food and water borne pathogens. 74 Fed. Reg. 66,524–25. Regardless of how the Endangerment Finding attempted to craft these indirect health effects from climate change as effects on health, these scientific findings fall within the definition of "effects on welfare" as defined by Congress and should not additionally be construed as effects on public health. *See id.* 66,526–29.

Congress specifically defined impacts on the climate as effects on welfare. 42 U.S.C. § 7602(h). As explained above, the Endangerment Finding included only effects that fall squarely into the congressionally defined "effects on welfare" as effects on public health. The public health effects listed in the Endangerment Finding are "entirely . . . indirect health impacts flowing solely from climate change." R. at 10. If the climate impacts found to impact public health in the Endangerment Finding were upheld as valid, then there would be no need for a differentiation between public health and public welfare in § 108 or § 202. However, Congress directly and intentionally separated the two categories of impacts, which leads to the conclusion

that these two categories are separate and distinct from one another. Because agencies are bound to follow Congress's explicit intent, the district court correctly concluded that the Endangerment Finding on public health is invalid and should be upheld.

IV. EPA'S DECISION NOT TO LIST GHGS AS CRITERIA POLLUTANTS DURING THE LAST TEN YEARS IS REASONABLE BECAUSE OF THE COMPLEX AND CHANGING SCIENCE OF CLIMATE CHANGE, THE INTRICATE REGULATORY FRAMEWORK THAT WOULD BE TRIGGERED, AND THE INTERNATIONAL COLLABORATION REQUIRED TO ADDRESS GHG LEVELS.

CAA § 108 grants the EPA Administrator the discretion to decide whether to list new criteria pollutants without time-frame limitations, and imposing any "date-certain" deadline would contradict public policy. Imposition of time-frame restrictions frustrates the CAA's purpose by undermining the EPA Administrator's ability to regulate most effectively by using his or her statutorily recognized judgment. 42 U.S.C. § 7408. This section on listing air pollutants guides the establishment of NAAQS: threshold levels of pollutant concentrations that trigger state, local, and tribal agencies to develop emission reduction strategies, plans and programs to assure attainment. It further directs that the Administrator

> shall from time to time thereafter revise, a list which includes each air pollutant—(A) emissions of which, in his [or her] judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare.

Id.

For a statutory duty to be non-discretionary there must be a statutory deadline for performance, and absent a deadline it is difficult to differentiate "unreasonable delay" from "unacknowledged final action." *Sierra Club v. Thomas*, 828 F.2d 783, 794 (D.C. Cir. 1987). In the instant case, the Administrator has taken unacknowledged final action by deciding not to list GHGs as criteria air pollutants at this time.

Six substances are listed as criteria air pollutants which the EPA is responsible for regulating through NAAQS, and GHGs do not fall into this category. Criteria Air Pollutants, EPA, https://www.epa.gov/criteria-air-pollutants (last visited Nov. 15, 2020). The criteria pollutants are carbon monoxide, lead, nitrogen dioxide, ozone, particulate matter, and sulfur dioxide—functionally, five of these six have been listed since 1971. EPA, Air Quality Criteria for Ozone and Related Photochemical Oxidants (Final Report, 2006) (explaining that regulation of ozone replaced regulation of photochemical oxidants in 1979 as the related science developed); National Primary and Secondary Ambient Air Standards, 36 Fed. Reg. 8186 (Apr. 30, 1971). The only criteria pollutant listed now, that was not listed in 1971 is lead. *Id.* Furthermore, even though listing even one new criteria air pollutant would be a major undertaking for the EPA with major regulatory ramifications that are seldom reassessed, GHGs are not the equivalent of just one criteria pollutant because the category as researched in the Endangerment Finding includes six *gases* as a single "air pollutant." 74 Fed. Reg. 66496–01. Therefore, the science of regulation is more complex than it would be for other singular gaseous air pollutants or combinations of solid and liquid pollutants such as particulate matter.

A. Implementation of a new NAAQS program for GHGs would be complex and would requires significant scientific and administrative resources, therefore a ten-year time frame is reasonable.

The EPA Administrator is in the best position to understand the imminent dangers related to air pollution, to evaluate the current priorities and capabilities of the EPA, and to best allocate the agency's limited resources. If GHGs were listed under CAA § 108, adequate warning would need to be given to states for them to formulate State Implementation Plans ("SIPs")—rules, technical documentation, and agreements formulated by states in order to comply with CAA regulations—otherwise the EPA would be responsible for implementing an overwhelming

amount of Federal Implementation Plans ("FIPs") if the SIPs were found to be insufficient. Grace Weatherall, *Immediate Executive Action: Unexplored Options for Addressing Climate Change Under the Existing Clean Air Act*, Environmental & Energy Law Program, 28 (2020). Because of the complexity of listing new criteria pollutants, the EPA Administrator has not unreasonably delayed acting. Additionally, the scale and recency of the global problem related to GHGs and climate change is complex, and the international cooperation required to address the problem is different from other criteria pollutants. Accordingly, ten years is not too long to research and formulate a plan for addressing this historic, and politically charged scientific phenomenon of increased GHGs and associated global temperature rises.

B. Because listing a criteria pollutant is discretionary, the EPA could still list GHGs as criteria pollutants as science and circumstances develop, however, the Agency's decision not to list GHGs has been made in a reasonable period of time even though *TRAC* factors would not apply to a discretionary duty.

EPA's decision not to list GHGs as criteria pollutants is a final action that cannot be unreasonably delayed. Nonetheless, the district court's consideration of the factors described in *Telecommuncations Research & Action Center v. FCC* governing unreasonable delay incorrectly categorized EPA's rationale in choosing not to list GHGs at this time. *Telecomms. Research & Action Ctr. v. FCC* (*TRAC*), 750 F.2d 70 (D.C. Cir. 1984). The D.C. Circuit described two of the *TRAC* factors for considering unreasonable delay of agency action:

> (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, ...

Id. at 80 (quoting *Public Citizen Health Research Grp. v. FDA*, 740 F.2d 21, 34 (D.C. Cir. 1984)).

While the district court found the third *TRAC* factor to have weighed heavily in the EPA's decision, and the court rejected this reasoning because of a judgment that economic considerations related to limiting GHGs should not be prioritized above the aims of having air clean enough to protect public welfare, an economic rationale was not the reason for the EPA's decision. Scientific and strategic considerations associated with the fourth *TRAC* factor influenced the EPA Administrator's decision not to list GHGs to a greater extent than economic factors. R. at 12–13.

While courts have found certain types of EPA final actions to be unreasonably delayed when in the realm of eight to ten years—as was the case in *Community Voice v. EPA*—the hazards in cases associated with this general rule are usually characterized by widely accepted scientific data, uninfluenced by major political division, and linked to dangers that can be entirely controlled domestically. *Cmty Voice v. EPA*, 878 F.3d 779, 787 (9th Cir. 2017) (holding that an eight-year delay was unreasonable for updating lead-based paint and dust-lead hazard standards). The GHG listing-decision, on the other hand, is dependent on rapidly changing global atmospheric conditions and requires foreign cooperation to address. Even though the EPA has taken unacknowledged final action by not listing GHGs as criteria pollutants at this time, which is a discretionary decision, any delay in listing GHGs as criteria pollutants is reasonable and appropriate given the complicated nature of the dangers posed by GHGs and their regulation.

C. Stripping the EPA Administrator of his ability to use judgment when listing new criteria pollutants is bad public policy and makes it harder for the United States to negotiate with foreign nations to address climate change.

The language of the CAA reflects the intention of Congress to allow the EPA Administrator to consider all the relevant scientific evidence, and then decide, based on the Administrator's judgment, whether updating the list of criteria pollutants is appropriate.

42 U.S.C. § 7408. Congress granted the authority to add criteria pollutants to an executive branch official which allows for greater political and democratic accountability in decision making. By delegating the power to the executive branch, Congress has enabled the U.S. President to negotiate with other nations to reduce emissions in a way that addresses the problem posed by GHGs to the public welfare. Weatherall, *supra*, 42 (discussing the role of the executive in negotiating international climate agreements). The language of the CAA gives the EPA administrator discretion regarding when to list new criteria air pollutants—imposing judicial time constraints on this decision subverts national interests and makes it harder to reach climate goals.

V. THE DISTRICT COURT ERRED WHEN IT RELIED ONLY ON *TRAIN* TO ESTABLISH A NON-DISCRETIONARY DUTY BECAUSE IT FAILED TO ANALYZE § 108 UNDER *CHEVRON*.

The determination of whether there is a discretionary duty to list an air pollutant as a criteria pollutant under § 108(a)(1) is not guided by *National Resources Defense Council, Inc. v. Train* but is instead guided by *Chevron*. *Train* was decided by the Second Circuit eight years before the U.S. Supreme Court decided *Chevron*. *NRDC, Inc. v. Train*, 545 F.2d 320 (2d Cir. 1976). The district court here relied only on *Train* in its holding that § 108(a) imposes a non-discretionary duty upon the EPA to list GHGs as a criteria pollutant; the court did not perform any additional analysis itself nor did it even consider *Chevron*. *See* R. at 13. Because the district court did not undertake a *Chevron* analysis, the court erred and created an irrational result.

A. *Train* is not appropriate precedent because it was decided before *Chevron*, therefore the U.S. Supreme Court's holding in *Chevron* granting agency deference is binding precedent and should be followed.

On its surface, the Second Circuit's holding in *Train* appears to guide the case here. *Train* analyzed whether § 108 creates a non-discretionary duty to list an air pollutant as a criteria

pollutant after an endangerment finding; the court dismissed the EPA's argument that § 108 creates a discretionary duty to list an air pollutant as a criteria pollutant and found § 108 creates a non-discretionary duty. *Train*, 545 F.2d at 328. However, after *Train* was decided, the Supreme Court decided *Chevron* which redefined agency deference and changed the analysis of agency interpretations. *See generally*, *Chevron*, 467 U.S. 837. *Chevron* created a two-part test to determine whether an agency's interpretation of a statute is permissible. *Id.* at 843. Further, this Court has not interpreted § 108 and thus *Chevron* deference applies. *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982–83 (2005) (holding that unless a previous decision by the reviewing court "unambiguously forecloses the agency's interpretation," the agency's interpretation is subject to *Chevron* deference).

Train is no longer appropriate precedent because it was neither decided by the Supreme Court nor by the D.C. Circuit Court of Appeals. *See* R. at 9 (explaining the important "role Congress assigned to the D.C. Circuit in resolving challenges to regulations of national import"). Because of the deference afforded to reasonable, permissible agency interpretations under *Chevron*, regardless of the holding in *Train*, this Court should find that the district court erred when it did not consider *Chevron* in its decision. Using a proper *Chevron* analysis, it is permissible for the EPA to interpret the duty to list GHGs as a criteria pollutant under CAA § 108 as discretionary.

Like *Train*¸ *Chevron* involved a provision of the CAA—the Court in *Chevron* was asked to determine the proper interpretation of CAA § 172. The EPA argued that its decision to define a "stationary source" as a single, industrial "bubble" was reasonable under the CAA, while the plaintiff argued this interpretation violated the CAA. *Chevron*, 467 U.S. at 840–42; *id.* at 842 n.7. The Court held the EPA's interpretation of § 172 was "a permissible construction of the

statute" and upheld the EPA's rule. *Id.* at 843. To reach its holding, the Court outlined a two-step test to determine whether an agency's interpretation of a statute is permissible. *See id.* at 842–43. An initial threshold question must first be addressed to reach the *Chevron* deference analysis: whether the agency has the authority to interpret the statute at issue. *See Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990) ("A precondition to deference under *Chevron* is a congressional delegation of administrative authority."). An agency is only provided deference under *Chevron* if Congress delegated the power to the agency to administer the statute at issue. *Id.* If Congress did not delegate this authority, or the agency does not have the power to interpret the statute at issue, *Chevron* does not apply. *See id.*

Once this threshold question is satisfied, the court must determine whether the statute at issue is ambiguous; if Congress has made the statute clear, the analysis is over. *Chevron*, 467 U.S. at 842. If the agency followed the clear requirements, then the court will uphold the agency's action. *Id.* at 842–43. However, if the agency acted contrary to the statute or outside the power granted to it under the statute, a court should strike it down. *Id.* If the statute is silent or ambiguous, the second step of the *Chevron* test is implicated. *Id.* at 843. Under this step, the court examines whether the agency's action is "based on a permissible construction of the statute," instead of imposing its own construction on the statute, it determines whether the agency's interpretation is "permissible." *Id.*

Both courts in *Train*, the Southern District of New York and the Second Circuit, imposed their own interpretations of the statute rather than determining whether the agency's interpretation was permissible. In its holding, the Southern District of New York explained that it "think[s] the reasonable reading of the disputed language in § 108 is" that a non-discretionary duty exists under the section. *NRDC, Inc. v. Train*, 411 F.Supp. 864, 868 (S.D.N.Y. 1976).

Further, the Second Circuit did not take the entire section at issue into account when analyzing § 108(a)(1)'s language; the court, ignoring the subsection as a whole, noted § 108(a)(1) creates a duty through the language: "the Administrator *shall* . . . publish . . . a list." *Train*, 545 F.2d at 324–25. This ignores the language "from time to time," which creates ambiguity in the statute.

Looking at the plain language of the statute rather than looking to the permissibility of the EPA's interpretation, the court in *Train*, and thus the district court here, decided its own interpretation based on how it read parts of the Act's legislative history was more reasonable and invalidated the EPA's action. *Id.* at 327 (explaining that the "literal language of § 108(a)(1)(C) is somewhat ambiguous"); *see also Train*, 411 F.Supp. at 868. Because the court used its own interpretation of the statute rather than looking to the permissibility of the EPA's interpretation, *Train* is contrary to the Supreme Court's holding in *Chevron* and, thus, should not guide the analysis here. This Court should use *Chevron* to analyze and determine whether a discretionary duty exists in § 108(a)(1).

B. At this time, the EPA does not plan to list GHGs as a criteria pollutant, therefore, under a proper *Chevron* analysis, the EPA is not required to list GHG regardless of the 2009 Endangerment Finding.

The plain meaning of CAA § 108(a)(1) requires three elements to be met before listing an air pollutant as a criteria pollutant. These elements are (1) air pollutants which "may reasonably be anticipated to endanger public health **or** welfare;" (2) are emitted by "numerous **or** diverse mobile **or** stationary sources; **and**" (3) for which the EPA Administrator "plans to issue air quality criteria under this section." 42 U.S.C. § 7408(a)(1)(A)–(C) (emphasis added). An ordinary person looking at the use of *and* in the statute would understand the three elements listed in § 108(a)(1) as conjunctive rather than disjunctive—thus the statute should be read as

requiring all three elements.[2] The conjunctive nature of the statute shows that *Train* was incorrect and the EPA's current interpretation of § 108(a)(1) is permissible.

1. Chevron *applies because the EPA has authority under the EPA to issue legally binding rules under § 108(a)(1).*

Chevron does not automatically apply to an agency's action. Only an agency action made under "the force of law" is given *Chevron* deference on the agency's interpretation of a statute. *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001). The Court held *Chevron* deference applies only if "Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *Id.* If the interpretation was not promulgated under the authority to issue rules carrying the force of law, then the agency is not necessarily entitled to Chevron deference, but instead is entitled to a lesser standard of deference. *Id.* at 227. The 2009 Endangerment Finding was made under notice and comment. *See* Proposed Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 18,885 (proposed Apr. 24, 2009). This method is specifically mentioned in Mead as an indication of congressionally delegated authority that is subject to Chevron deference. *Mead*, 533 U.S. at 227. Thus, the *Chevron* threshold question is satisfied, and the *Chevron*-deference analysis applies in this case.

2. Chevron *Step One is satisfied because the word choice within the subsection § 108(a)(1) is ambiguous.*

The first question of the *Chevron* analysis is simple: Has Congress unambiguously and "directly spoken to the precise question at issue" or is the statute "silent or ambiguous with respect to the specific issue"? *Chevron*, 467 U.S. at 842–43. Plainly, the analysis looks to whether the statute at issue is unclear. The Court in *Chevron* explained, "If a court, employing

traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect. *Id.* at 843 n.9. If the meaning of the statute at issue is not clear, then the analysis will look to whether the agency's interpretation of that unclear statute is permissible. *Id.* at 843.

In addition to traditional statutory construction, courts may look to legislative history. In fact, the court in *Train* relied on legislative history to resolve ambiguity it found in § 108(a)(1)(C). *Train*, 545 F.2d at 327. However, the Court has since held that "normally, neither the legislative history nor the reasonableness of the . . . method would be determinative if the plain language of the statute unambiguously indicated that Congress sought to foreclose the . . . interpretation." *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81, 93 (2007).

If an air pollutant meets all three of the elements outlined in § 108(a)(1), the CAA instructs that the administrator "shall from time to time . . . revise" the criteria air pollutants. "[S]hall . . . is the language of command." *Escoe v. Zerbst*, 295 U.S. 490, 493 (1935). If the statute only included *shall*, that would a strong indication as to the meaning of § 108(a)(1). However, the statute also uses *from time to time* and *and* within § 108(a)(1); these words alongside *shall* create ambiguity, which permits the EPA's interpretation of § 108(a)(1) to move to the second and final step of the Chevron analysis. *Train* relied on legislative history in an attempt to explain away the ambiguity the court found in the statute. *Train*, 545 F.2d at 326–27.

The same Senate Report the *Train* court relied on supports a non-discretionary duty to list GHGs as a criteria pollutant: "If the Secretary subsequently should find that there are other pollution agents for which the **ambient air quality standards procedure is appropriate**, he **could** list those agents in the Federal Register, and repeat the criteria process." Legislative History, Clean Air Amendments, Vol. 1 at 409–10 (1974) (emphasis added). The difference

between the language in the Senate Report and the Act itself show there is ambiguity permitting deference under *Chevron*.

3. Chevron *Step Two is satisfied because the EPA should have discretion to choose how to regulate air pollutants and a non-discretionary duty to list GHGs as a criteria pollutant would prevent the EPA from using other parts of the CAA to regulate GHGs.*

The final part of the *Chevron* analysis looks to whether an agency's interpretation is permissible. Regardless of how the court would interpret the statute, an agency's interpretation "must" be upheld by a court if it is a permissible interpretation of the statute. *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 158 (2013). Unless the agency's interpretation is "arbitrary, capricious, or manifestly contrary to the statute," a court does not have the authority to invalidate an agency's interpretation. *Chevron*, 467 U.S. at 844; *see also Sebelius*, 568 U.S. at 157.

Massachusetts v. EPA did not require that the EPA regulate GHGs each time the term "air pollutant" appears in the CAA; the Court only required that the EPA must "ground its reasons for action or inaction in the statute." *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 318 (2014) (quoting *Massachusetts v. EPA*, 549 U.S. at 535). Because the EPA did not explain how inaction under Title II conflicted with the CAA as a whole, the *Massachusetts v. EPA* Court found the EPA's inaction "was not sufficiently grounded in the statute." *Id.* The Court further explained that the Act "would compel EPA to regulate in any way that would be 'extreme,' 'counterintuitive,' or 'contrary to common sense.'" *Id.* (quoting *Massachusetts v. EPA*, 549 U.S. at 531).

While *Train* held that the EPA's interpretation of the CAA is "contrary to the structure of the Act as a whole," that is an incorrect conclusion. *Train*, 545 F.2d at 324. If the EPA chooses not to exercise its discretionary duty to list an air pollutant under § 108, the EPA can use other sections of the CAA to regulate that same air pollutant. In fact, listing an air pollutant under §

108 prohibits the EPA from using § 111(d) to regulate GHG. Section 111(d) may be better suited to an air pollutant such as GHG so it does not make sense that Congress would create a non-discretionary duty in § 108(a)(1) if that non-discretionary duty would preempt other parts of the CAA. A discretionary duty under § 108(a)(1) makes more sense because it permits the Administrator to exercise his or her judgment, coupled with the EPA's expertise, on how to best regulate an air pollutant under the CAA.

C. Because the EPA's interpretation of § 108(a)(1) is permissible under a proper *Chevron* analysis, the interpretation should be permitted to stand.

It would be inefficient, and likely impossible, for the EPA to set national standards for GHGs under §§ 108–109 because GHGs are a global pollutant rather than a regional pollutant. This fact removes one of the CAA's regulatory programs from the fight against climate change, however, it is not necessary for ambient standards to be established under § 108(a) for a particular air pollutant to be regulated. In fact, if ambient standards are set under § 108(a), regulation under other parts of the CAA is preempted. *See* 42 U.S.C. § 7411(d)(1). This preemption, coupled with a non-discretionary duty under § 108, implicates the absurd results doctrine because it limits the ability of the EPA to exercise its technical and scientific expertise in regulating air pollutants.

1. Because GHGs are dissimilar to the already listed Criteria Pollutants and countries across the world contribute to GHG levels, the EPA is entitled to decide that NAAQS and SIPs may not be the most appropriate way to regulate this air pollutant.

The EPA has technical and scientific expertise when it comes to environmental matters, but also has expertise in regulating air pollutants under the CAA that Congress does not have. *See Am. Meat Inst. v. EPA*, 526 F.2d 442, 450 n.16 (7th Cir. 1975) (explaining the Supreme Court's "strong policy" that gives "great deference to EPA's interpretation of the statutes it

administers" because of the "complexity and technical nature of the statutes and the subjects they regulate . . . and EPA's unique experience and expertise in dealing with the[se] problems"). Congress recognized this by creating a discretionary duty under § 108(a)(1). If the EPA contends there are no plans to list as criteria pollutant, as the EPA contends here, because there are more appropriate sections of the CAA to regulate GHG under, including § 111 and § 202, then that interpretation is afforded agency deference because it is both permissible and reasonable.

As explained above, the six listed pollutants are carbon monoxide, lead, nitrogen dioxide, ozone, particulate matter, and sulfur dioxide. Looking at lead, as the most recently listed criteria pollutant, it is easy to draw distinctions between lead and GHGs and show why it would be impossible to set regional and national standards for GHGs. Lead concentrations in the ambient air are highest around certain industrial plants.[1] Whereas GHG concentrations in the ambient air are "relatively constant around the globe." R. at 9. This is because, "unlike traditional air pollutants," GHGs disperse throughout the global atmosphere, meaning the concentration of GHGs in a particular place does not depend on the local source of GHG emissions. *Coal. for Responsible Regul.*, 684 F.3d at 137 (quoting Regulating Greenhouse Gas Emissions Under the Clean Air Act ("Greenhouse Gas Advance Notice"), 73 Fed. Reg. 44,354, 44,400–01 (July 30, 2008)). This would make regulating GHGs under CAA § 109 impractical because meeting primary and secondary ambient air quality standards would be impossible without international standards and cooperation.

The court below explained that "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

[1] *See* EPA, Basic Information about Lead Air Pollution, https://www.epa.gov/lead-air-pollution/basic-information-about-lead-air-pollution.

does not threaten climate change." R. at 9. *Train*, the same case the district court relied on to find a non-discretionary duty, explained that "Congress cannot require the impossible. It may be that a pollutant exists which meets the listing requirements of § 108 but for which no criteria or national standard is possible. That issue is not before this court." *Train*, 411 F. Supp. at 870. The *Train* court anticipated that not all air pollutants would be regulatable under § 108; GHG is one of those air pollutants.

Utility Air Regulatory Group recognized the nature of this discretion when the Court explained that *Massachusetts v. EPA* did not create "a command to regulate" GHGs, but rather described what the EPA could consider when regulating under the CAA. *Util. Air Regul. Grp.*, 573 U.S. at 319 (citing an amicus brief that explained *Massachusetts v. EPA* did not hold that GHGs "'*must* be air pollutants for all purposes' regardless of the statutory context"). *Massachusetts v. EPA* gave the EPA permission to regulate GHGs as an air pollutant when GHGs "may sensibly be encompassed within the particular regulatory program." *Id.* The Supreme Court recognized that the 2009 Endangerment Finding did not command the EPA to act in a certain way, this Court should similarly find that, because it is impractical to regulate GHGs under § 108, the CAA does not command the EPA with a non-discretionary duty to list criteria air pollutants.

2. *If a non-discretionary duty to list GHGs under § 108(a)(1) was triggered by the 2009 Endangerment Finding, the absurd results doctrine is implicated because it precludes the EPA from exercising its best judgment for how to regulate GHGs.*

The absurd results doctrine looks to whether an agency's statutory interpretation "defies rationality." *Landstar Express Am., Inc. v. Fed. Mar. Comm'n*, 569 F.3d 493, 498 (D.C. Cir. 2009). A statutory interpretation that "would produce absurd results [is] to be avoided if alternative interpretations consistent with the legislative purpose are available." *Griffin v.*

Oceanic Contractors, 458 U.S. 564, 575 (1982). Analyzing the entirety of the CAA under the absurd results doctrine shows that Congress could not have intended, and this Court should not enforce, a non-discretionary duty regarding listing GHGs as a criteria pollutant. Instead, the Court should recognize that, based on the statutory structure, § 108 imposes a discretionary duty upon the EPA.

First, as discussed above, Congress specifically separated public health and public welfare, which implies that the impacts defined as effects on welfare are distinct from those on public health. Second, it defies rationality that Congress would create a non-discretionary duty under § 108 because that duty would prevent the EPA from exercising its judgment on how to best regulate GHG emissions under the various regulation schemes of the CAA. While the district court rejected the use of the absurd results doctrine, that was in error. It defies rationality that Congress would create a non-discretionary duty if that duty meant the EPA could not regulate an air pollutant under another section of the CAA. A discretionary duty, however, would not defy rationality—a discretionary duty allows the EPA to regulate an air pollutant using the best section(s) of the CAA as determined by its own scientific and technical expertise. *See Am. Meat Inst.*, 526 at 450 n.16 A discretionary duty allows to EPA to choose the most effective method to regulate GHGs, whether that method is under § 108, § 111, or another section altogether.

The EPA is neither acting in bad faith nor shirking its duty to regulate GHG here, unlike in *Massachusetts v. EPA*. *See* 549 U.S. at 533–34. The EPA is simply using its expert know-how to regulate GHG more efficiently than would be possible under § 108(a). If the EPA was simply not acting to regulate GHGs at all, as was the case in *Massachusetts v. EPA*, then there would be an argument for the EPA's interpretation of § 108(a) as unreasonable. *See id.* However, the EPA

is already regulating GHGs under different sections of the CAA and should be allowed to continue choosing which regulatory program to use to regulate this air pollutant.

CONCLUSION

For the reasons discussed above, the EPA respectfully requests that this Court (1) transfer this case to the U.S. Court of Appeals for the D.C. Circuit under 28 U.S.C. § 1406(a), (2) affirm the District Court's finding in regard to declaring that the Endangerment Finding is valid with respect to an endangerment to public welfare and not an endangerment to public health, (3) reject the District Court's findings that EPA has unreasonably delayed action in responding to CHAWN's petition for designation of GHGs as a criteria pollutant, and has unreasonably delayed designating GHGs as a criteria pollutant, and (4) hold that EPA has a discretionary duty to designate GHGs as a criteria pollutant under the CAA.