TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

RULES

REGULATIONS

JURISDICTIONAL STATEMENT

Climate Health and Welfare Now ("CHAWN") appeals from an Opinion and Order denying Plaintiff's Motion for Summary Judgment in-part, entered September 2020, by the honorable Judge Remus in the U.S. District Court of New Union, No. 66-CV-2019. CHAWN petitioned the district court, under the Citizen Suit provision of the Clean Air Act ("CAA"), 42 U.S.C. § 7604(a), to compel the administrator of the United States Environmental Protection Agency ("EPA") to list greenhouse gases ("GHG") under CAA § 108(a), 42 U.S.C. § 7408, as criteria pollutants subject to the National Ambient Air Quality Standards ("NAAQS") program. The district court determined that CHAWN satisfied all of the necessary elements to establish Article III standing and have their case heard: (1) an injury in fact, (2) which is fairly traceable to the defendant's conduct, and (3) which may be remedied by court intervention.

For the reasons enumerated in Section I of this Brief, the district court had subject matter jurisdiction under the Citizen Suit provision of the Clean Air Act, 42 U.S.C. § 7604(a). CHAWN filed a timely Notice of Appeal pursuant to Fed. R. App. P. 4 (2016). The U.S. Court of Appeals for the Twelfth Circuit has valid jurisdiction over the appeal based on 29 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Did the district court have jurisdiction over CHAWN's citizen suit?

II. Is the EPA's 2009 Endangerment Finding valid regarding an endangerment to public welfare?

III. Is the EPA's 2009 Endangerment Finding valid regarding an endangerment to public health?

IV. Is EPA's duty to list GHGs as CAA § 108(a) criteria pollutants non-discretionary?

V. Is EPA's inaction regarding the listing of GHGs as criteria pollutants an unreasonable delay?

STATEMENT OF THE CASE

This case is an appeal of an order from the United States District Court for the District of New Union denying Plaintiff's motion for summary judgment in part. Plaintiff brought this action to compel Defendant EPA to list GHGs as criteria pollutants under CAA § 108(a), which would subject them to the NAAQS program. 42 U.S.C. § 7408. This suit was brought ten years after Defendant EPA issued the 2009 Endangerment Finding confirming that GHGs endanger public health and welfare, which Plaintiff CHAWN alleges triggered a non-discretionary duty for EPA to list GHGs. Plaintiff also argues that EPA has unreasonably delayed action on the matter. Defendant Coal, Oil, and Gas Association ("COGA") intervened to represent the interests of the fossil fuel industry, and Defendants allege that the 2009 Endangerment Finding is not valid with respect to public health. Defendants also claim EPA is not subject to a non-discretionary duty to list GHG as criteria pollutants, and there was no unreasonable delay. The district court erred in finding that the 2009 Endangerment Finding was not valid with respect to public health. However, the district court was correct in holding that EPA does have a non-discretionary duty to list criteria pollutants following the issuance of an Endangerment Finding and that EPA unreasonably delayed in fulfilling this duty.

STATEMENT OF THE FACTS

I. Factual Background

Global warming and climate change pose a significant risk to the welfare of our nation and preservation of our democracy. "Projected effects of climate change include wildfires, adverse effects on air quality, flooding, drought, increased magnitude of storms, agricultural harms, and detrimental effects on wildlife and ecosystems." Colt Hagmaier & Rachel Mack, Comment, 1 Wash. & Lee J. Energy, Climate & Env't. 210 (2010). In 2015, the Executive Office of the President stated:

> Climate change is an urgent and growing threat to our national security, contributing to increased natural disasters, refugee flows, and conflicts over basic resources like food and water. The present-day effects of climate change are being felt from the Arctic to the Midwest. Increased sea levels and storm surges threaten coastal regions, infrastructure, and property. In turn, the global economy suffers, compounding the growing costs of preparing and restoring infrastructure.

Exec. Office of the President, The Nat'l Security Implications of a Changing Climate (2015).

By 2100, global sea levels could rise by as much as 6.3 feet above 2012 sea level averages. Global Sea Level Rise Scenarios for the U.S. Nat'l Climate Assessment, NOAA Tech. Rep. OAR CPO-1, 37 (2012). This is a major threat to United States citizens because "many of the nation's assets related to military readiness, energy, commerce, and ecosystems that support resource-dependent economies are already located at or near the ocean, thus making them exposed to [rising sea level]." *Id*. at 4. "A roughly three-foot increase in sea level would threaten 128 coastal Department of Defense [naval and other] installations [valued at USD $100B and crucial to] both military personnel and civilian [livelihoods]". Union of Concerned Scientists, Exec. Summary (2016). Scientists and countries worldwide agree that regulating GHGs is one of

the only methods for curbing the long-term impact of global warming. World Bank, State and Trends of Carbon Pricing (2020).

"Delaying mitigation efforts beyond those in place today through 2030 is estimated to substantially increase the difficulty of the transition to low longer-term emissions levels and narrow the range of options consistent with maintaining temperature change below 2 °C relative to pre-industrial levels (high confidence)". IPCC, Fifth Assessment Rep. (AR5), Summary for Policy Makers (2014). For decades, EPA has understood the dire need to regulate GHGs, but has nonetheless failed to act. In implementing the CAA in 1970, Congress tasked EPA with determining whether pollutants were potential health and welfare hazards and with designating those pollutants (as "criteria pollutants") to be subject to nationwide emissions standards proposed by EPA. *See generally* Clean Air Act Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676; 116 Cong. Rec. S20607 (Dec. 18, 1970) (statement of Sen. John S. Cooper); Theodore L. Garrett and Sonya D. Winner, *History and Structure of the Clean Air Act*, 22 Enytl L. Reporter (1992). In this case, EPA has failed to in this task, and failed to perform its nondiscretionary duty, and, in doing so, has put our nation at risk.

II. EPA's longstanding record shows their complacency regarding the regulation of GHGs.

In 1990, EPA contemplated strategies for significantly reducing GHGs to halt global warming. The following excerpts outline the critical need for increased regulation of GHGs:

> Temperature increases reach 3-4°C by 2100 under our assumptions. With higher rates of economic growth . . . ***an average warming of 4-6°C could be expected by 2100, with an additional commitment of l-4°C by that date.*** On the other hand, by vigorously pursuing a variety of technical and policy options simultaneously, it would be possible to reduce the average rate of warming during the next century by more than 60%. . . . If the government desires to stabilize the concentration of greenhouse gases at or near current levels, short-term actions must be considered. Market forces do not reflect the risks of climate change and therefore, barring government intervention, emissions -- and the risks of climate change --

> can be expected to grow. The costs of taking action may increase with time; it takes many years to develop new technologies, implement policies, and replace the existing capital stock. There is also a long lag time between changes in emissions and consequent changes in the chemistry of the atmosphere, so that even with large reductions in emissions, atmospheric concentrations of some greenhouse gases may decline very slowly or even increase. The earth would continue to warm, and the climate may change for decades after atmospheric concentrations of greenhouse gases were stabilized.

U.S. Envtl. Protection Agency Rep. to Cong., Policy Planning and Evaluation, PM-221, 21-P-2003, at VII-3–VII-8 (1990) (emphasis supplied).

Nonetheless, for nearly two decades, EPA has acted with deliberate indifference concerning its duty to regulate GHGs. In 1999, several environmental groups petitioned EPA to request it find that GHGs pose a danger to human health and the environment under CAA § 202, 42 U.S.C. § 7521 (the "202 Petition"). In 2003, EPA denied those petitions, claiming GHGs were not contemplated within CAA's definition of "air pollutants." Further, EPA indicated it would not promulgate any regulations addressing global climate change without a specific legislative directive from Congress. 68 Fed. Reg. 52,922 (Sept. 8, 2003).

After several years of litigation, EPA's refusal to regulate GHGs made its way to the Supreme Court in *Massachusetts v. EPA*, 549 U.S. 497 (2007). There, the Court disagreed with EPA's interpretation of the CAA and held that GHGs fit squarely into the CAA's broad definition of "air pollutants" (thereby triggering EPA's nondiscretionary duty to regulate GHGs under CAA). *Id.* The Court ordered EPA to respond to the 202 Petition and, on December 15, 2009, EPA issued its finding that GHGs are anticipated to endanger public health and welfare.

SUMMARY OF THE ARGUMENT

The district court had jurisdiction over CHAWN's claims against the EPA because the citizen suit provision in CAA § 304(a) gives citizens the right to bring suit in a federal district court to challenge agency inaction concerning a non-discretionary duty that has been unfulfilled or to compel agency action concerning a discretionary duty that has been withheld unreasonably. The issues before this Court are herein argued as follows: (i) The EPA's 2009 Endangerment Finding is valid with respect to public health; (ii) the EPA's 2009 Endangerment Finding is valid with respect to public welfare; (iii) the EPA had a non-discretionary duty to designate GHGs as criteria pollutants under CAA § 108(a); and (iv) the EPA's refusal to list GHGs as criteria pollutants constitutes an unreasonable delay.

First, EPA's 2009 Endangerment Finding regarding public welfare is valid based upon the administrative record before it. EPA is not required to consider policy or industry concerns as part of its considerations before issuing a finding. In most cases, it would be improper to do so. The 2009 Endangerment Finding was a purely scientific acknowledgment that GHG are an endangerment to public health and welfare. This finding is justified by the near universal support of scientists and environmental experts, many of whom were able to voice their approval and/or hesitations throughout the EPA decision-making process. For these reasons, the Court should find that the public welfare Endangerment Finding is valid.

Second, the 2009 Endangerment Finding is valid with respect to public health based upon the statutory interpretation of public health. The impact of climate change on public health is evident throughout EPA's administrative record, existing case law, and within this brief. It is indisputable that EPA has been tasked with the responsibility to protect public health from the dangers of air pollutants, which encompasses the current and potential harms of GHG. Congress

did not intend to compartmentalize the harms of climate change solely within the definition of public welfare. It would be impractical to expect EPA to control these dangers while being forced to work within the confines of public welfare regulation standards and rules, rather than the more expansive abilities of the public health standard. Alternatively, because the CAA does not contain a statutory definition of public health, the Court must find that Congressional intent regarding the definition of public health is ambiguous.

Third, the EPA has a non-discretionary duty to designate GHGs as criteria pollutants under CAA § 108(a). By issuing a valid Endangerment Finding in 2009, EPA was subject to a non-discretionary duty to act. Regardless of whether the EPA reverses its decision as to the validity its Endangerment Finding, the issuance alone gives rise to a non-discretionary duty. Moreover, even assuming EPA has exclusive autonomy to decide whether there is a non-discretionary duty to designate criteria pollutants under CAA § 108(a), and by when that duty must be performed, this autonomy does not eliminate the mandatory obligation to decide without unreasonable delay.

Fourth, the EPA's inaction toward the petitioned demands to designate GHGs as criteria pollutants under CAA § 108(a) constituted an unreasonable delay. Even without a non-discretionary duty to act, the EPA's inaction in not decisively responding to the petitioned demands concerning the performance deadlines and the discretionary extent of EPA's duty is an unreasonable delay. Furthermore, in balancing the non-exhaustive list of factors set forth in *Telecommunications* as the primary determinants of whether prolonged agency inaction is egregious, it is clear that EPA's inaction was an egregious, and therefore unreasonable, delay. *Telecommunications. Research & Action Ctr. v. F.C.C.,* 750 F.2d 70 (D.C. Cir. 1984).

STANDARD OF REVIEW

This case concerns the district court's grant of summary judgment, which is a question of law. An appellate court must have a standard by which they review a previous court ruling on appeal. Bouvier Law Dictionary (7th ed. 2012) defines standard of review as "[a] rhetorical measure of the degree of deference to which a judge or other official who is reviewing a decision should accord to the judge or other official who rendered the decision under review. The corollary to the degree of deference required by a standard is the degree to which ... the reviewing judge or official should feel free to second-guess, criticize, or substitute for the judge or official whose decision is under review."

In the case at hand, the standard of review is de novo. This Court is not required to grant any deference to the district court's holding and may review the issues and questions of law anew. *See, e.g., Freeman v. Cty. of Bexar*, 142 F.3d 848 (5th Cir. 1998); *United States v. Lewis*, 621 F.2d 1382 (5th Cir. 1980). Facts are viewed in the light most favorable to the nonmoving party when there is a genuine dispute as to those facts. *Scott v. Harris*, 550 U.S. 372, 380 (2007). Summary judgment is appropriate when the non-moving party is unable to show a genuine issue of material fact. Fed. R. Civ. P. 56(c).

ARGUMENT

I. THE DISTRICT COURT HAD JURISDICTION OVER CHAWN'S CLAIMS AGAINST EPA BECAUSE SECTION 304(A) OF THE CAA GIVES DISTRICT COURTS EXCLUSIVE JURISDICTION OVER SUCH CLAIMS.

Jurisdictional requirements for claims brought under the CAA are set forth in sections 304(a) and 307(b). 42 U.S.C. § 7604(a), 7607(b)(1). Section 304(a) governs citizens' suits against EPA and gives the district courts jurisdiction over certain types of claims. 42 U.S.C. § 7604(a). "Any person may commence a civil action . . . against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary." *Id*. Further, "[t]he district courts of the United States shall have jurisdiction to compel . . . agency action unreasonably delayed." *Id*.

The district courts have jurisdiction over claims alleging unreasonable agency delay (in-action rather than final action) because: (1) there is rarely a record for the court of appeals to review when the claim is based on agency inaction, (2) evidence will need to be taken to uncover the circumstances or reasons for the agency's delay, and (3) "district courts are better equipped to find facts than courts of appeals are." *Indiana & Michigan Elec. Co. v. U.S. E.P.A.*, 733 F.2d 489, 490 (7th Cir. 1984) citing to Currie, Air Pollution: Federal Law and Analysis § 9.11, at p. 9–33 (1981). Section 304(a) does not generally proscribe which district court claims must be filed, but "an action to compel agency action referred to in section [307(b)(1)] . . . of this title which is unreasonably delayed may only be filed in a United States District Court within the circuit in which such action would be reviewable under section [307(b)(1)] . . . of this title." 42 U.S.C. § 7604(a).

The second jurisdictional provision, CAA § 307(b), governs "[a]dministrative proceedings and judicial review" and gives the courts of appeals exclusive jurisdiction over certain rule-making decisions, standard-setting actions, and other "final actions" which are nationally applicable:

> A petition for review of action of the Administrator ***in promulgating*** [1] any national primary or secondary ambient air quality standard, [2] any emission standard or requirement under section 7412 of this title, [3] any standard of performance or requirement under section 7411 of this title, [4] any standard under section 7521 of this title (other than a standard required to be prescribed under section 7521(b)(1) of this title), [5] ***any determination*** under section 7521(b)(5)1 of this title, [6] ***any control or prohibition*** under section 7545 of this title, [7] any standard under section 7571 of this title (aircraft emissions standards), [8] any rule issued under section 7413 (federal enforcement), 7419 (primary nonferrous smelter orders), or under section 7420 of this title (noncompliance penalties), or [9] ***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)(1). Stated differently, "Section 307(b)(1) of the 'CAA confers exclusive jurisdiction on the United States Court of Appeals for the District of Columbia Circuit to review Final Agency Action(s)." *Nat. Res. Def. Council v. Reilly*, 983 F.2d 259, 266 (D.C. Cir. 1993).

Taken together, the statutory language in 304(a) and 307(b) requires Plaintiffs to file claims of unreasonable agency delay in the United States District Court for the District of Columbia ("D.C. Circuit") when the agency action Plaintiffs seek to compel falls within the scope of 7607(b)(1). At first glance, the issue in this case is whether CHAWN's claim–that EPA has unreasonably delayed designating GHGs as criteria pollutants despite its nondiscretionary statutory duty to do so–falls within the scope of 7607(b)(1). Accordingly, the Court would look to CHAWN's prayer for relief to determine whether a remedy in favor of CHAWN would result in a final agency action with national applicability. If that was the proper interpretation of the statute, this Court would be forced to find that the district court lacked subject matter jurisdiction because the claim should have been filed in the D.C. Circuit. However, the district court did have jurisdictional authority to adjudicate CHAWN's claim and compel EPA action because EPA failed to carry-out a nondiscretionary statutory duty rather than a discretionary duty. *See Am. Lung Ass'n v. Reilly*, 962 F.2d 258, 262 (2d Cir. 1992); *Nat. Res. Def. Council, Inc. v. Train*, 545 F.2d 320,

328 (2d Cir. 1976); *Nat. Res. Def. Council, Inc. v. New York State Dep't of Envtl. Conservation*, 700 F. Supp. 173, 178 (S.D.N.Y. 1988).

A. The District Court Had Jurisdiction to Adjudicate CHAWN's Claim and Compel EPA Action Because Nondiscretionary Duty Cases are Distinct From Unreasonable Delay Cases Pursuant to the Legislative Purpose of the CAA.

In *American Lung Association v. Reilly*, appellants argued that the district court lacked subject-matter jurisdiction because its final order, which would compel EPA to carry-out a nondiscretionary duty, would result in a "nationally applicable regulation referred to in section 7607(b)." *Am. Lung Ass'n v. Reilly*, 962 F.2d 258, 262 (2d Cir. 1992). The appellants reasoned that the district court's ruling would transform the case into "an action to compel agency action referred to in section 7607(b)." *Id*. The court of appeals rejected appellants interpretation of the statute, finding a categorical distinction between CAA nondiscretionary duty cases and unreasonable delay cases. *Id*. "The [appellants reasoning] is bottomed on a fallacy, namely their theory that 'Clean Air Act nondiscretionary-duty cases are a subset of unreasonable delay cases.'" *Id*. at 262-263, citing to Utilities' brief at 40. EPA's failure to carry-out a statutorily defined nondiscretionary duty is not subject to reasonable basis scrutiny because the agency has no discretion to decide whether it must perform such duties. *Id*. Accordingly, such claims are structurally different from claims of 'agency action unreasonably delayed . . . [which] confer exclusive jurisdiction on the district court for the District of Columbia,". *Am. Lung Ass'n v. Reilly*, 962 F.2d 258, 263 (2d Cir. 1992).

The jurisdictional issues in *American Lung Association v. Reilly* form the underlying basis of this Court's inquiry into whether the district court had subject matter jurisdiction over CHAWN's claims. Although there is little precedent in this area of CAA jurisprudence, this Court should follow the Second Circuit Court of Appeals well-reasoned interpretation of the jurisdictional provisions in 403(a) and rule that the district court had jurisdiction over CHAWN's

claim. This interpretation of the 403(a) follows the cannons of statutory construction and aligns with the legislative purpose of the CAA. Accordingly, this Court should rule in favor of CHAWN and reject EPA's claim that the district court lacked subject-matter jurisdiction.

II. EPA'S 2009 PUBLIC WELFARE ENDANGERMENT FINDING IS VALID.

The Environmental Protection Agency issued an Endangerment Finding in 2009, determining that "greenhouse gases in the atmosphere may reasonably be anticipated both to endanger public health and to endanger public welfare." Endangerment Finding, 74 Fed. Reg. at 66,497 (Dec. 15, 2009). EPA's Endangerment Finding was supported by an extensive administrative record which included climate modeling data and internationally accepted scientific research, and it is considered settled law. *Id*. Nonetheless, COGA is challenging the validity of the Endangerment Finding more than ten years after its promulgation. COGA asserted a cross-claim against EPA seeking a declaration that the 2009 Endangerment Finding is unsupported by the record and contrary to law.

A. COGA's Challenge to the 2009 Endangerment Finding is Untimely and Must be Dismissed for Lack of Subject Matter Jurisdiction Because COGA Failed to Comply with the CAA's Jurisdictional and Statutory Requirements.

The Court should dismiss COGA's untimely cross-claim against EPA because both the district court and this Court lack subject matter jurisdiction over the claim. 42 U.S.C. § 7607(b)(1). The Court of Appeals for the District of Columbia has exclusive jurisdiction over COGA's crossclaim because COGA is challenging a final agency decision which has national applicability. *Id*. The Endangerment Finding clearly states the jurisdictional and procedural requirements:

> Under CAA § 307(b)(1), judicial review of this final action is available only by filing a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit by February 16, 2010. Under CAA § 307(d)(7)(B), only an objection to this final action that was raised with reasonable specificity during the period for public comment can be raised during judicial review.

Endangerment Finding, 74 Fed. Reg. at 66,497 (Dec. 15, 2009). Furthermore, even if jurisdiction were proper, judicial review of COGA's claim is still improper because it failed to follow the procedural requirements set forth 7607(b)(1):

> Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise.

42 U.S.C. § 7607(b)(1).

EPA issued the Endangerment Finding being challenged more than ten years prior to this suit. When other industry groups attempted to dismantle the finding by bringing a timely challenge before the court in 2010, the challenge was rejected. *Coalition for Responsible Regulation, Inc. v. E.P.A.*, 684 F.3d 102 (D.C. Cir. 2012). This challenge, conversely, is untimely and should not be considered before the Court. The 2009 Endangerment Finding has been involved in ample litigation sufficient to render it settled law, and it has repeatedly been upheld by the courts. *Id*.

Statutorily, the CAA requires that any petition for review of an EPA action be filed within sixty days "from the date notice of such ... action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise." 42 U.S.C. § 7607(b)(1). Unquestionably, this petition for review was brought years after the passage of the sixty-day deadline. COGA now argues that the existence of a mandatory duty to list greenhouse gases as a criteria pollutant constitutes "grounds arising after such sixtieth day." However, it is a fundamental mischaracterization to suggest that the duty to list a criteria pollutant following the issuance of an endangerment finding is unexpected or unique to this challenge.

The EPA has routinely listed criteria pollutants following published endangerment findings for decades, and the duty to do so is certainly not a novel issue. *Natural Resources Defense Council v. Train*, 545 F.2d 320 (2d Cir. 1976). Although the court hearing the initial challenge did not directly confront the issue of whether the Endangerment Finding triggers a non-discretionary duty to list, it did discuss at length the custom of listing pollutants after issuing endangerment findings. *Coalition for Responsible Regulation, Inc. v. E.P.A.*, 684 F.3d 102 (D.C. Cir. 2012). That the EPA would or could be required to list greenhouse gases as a criteria pollutant should come as no surprise following litigation of such kind. EPA's mandatory duty to list GHGs as a criteria pollutant under CAA § 108 was triggered immediately upon the promulgation of its Endangerment Finding, and COGA has failed to argue any valid grounds arising after such sixtieth day from promulgation. In light of these jurisdictional and procedural defects, this court should dismiss COGA's cross-claim against EPA as untimely and lacking subject matter jurisdiction.

However, should the Court hold that the challenge is proper and timely, COGA's argument regarding public welfare rests on two claims, both of which were rejected by the D.C. Circuit court. *Coalition for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102 (D.C. Cir. 2012). Although the decision is not binding on this Court, the D.C. Circuit court was given special authority to hear challenges of this nature and should be given some level of deference by the Court. 42 U.S.C. § 7607(b). Furthermore, the District Court for the District of New Union also rejected both challenges brought by COGA.

B. EPA is Not Required to Consider Policy Arguments in Making a Scientific Determination as to the Endangerment of Public Welfare.

The Environmental Protection Agency has long been heralded as an effective and necessary governmental agency, in large part due to its ability to better the lives of Americans. This is evidenced by the success of the Clean Air Act over the last five decades. However, the EPA's

ability to preserve public health and welfare would be impeded if it were required to consider the possible financial and industrial consequences of its findings and regulations. There is no shortage of case law to support the idea that the EPA should be free from policy-oriented thinking in their effort to protect the public. *See Massachusetts v. E.P.A.*, 549 U.S. 497 (2007); *Coalition for Responsible Regulation, Inc. v. E.P.A.*, 684 F.3d 102 (D.C. Cir. 2012). Despite the best efforts of industry groups to infiltrate EPA decision-making with their own goals and preferences, courts have generally found that even the most serious concerns, such as foreign policy, should not "prevent EPA from carrying out its congressionally mandated regulatory duties." *Cent. Valley Chrysler-Jeep, Inc. v. Goldstene*, 529 F. Supp. 2d 1151, 1181 (E.D. Cal. 2007).

The Supreme Court was almost entirely dismissive of similar industry challenges, holding the following:

> Although we have neither the expertise nor the authority to evaluate these policy judgments, it is evident they have nothing to do with whether greenhouse gas emissions contribute to climate change. Still less do they amount to a reasoned justification for declining to form a scientific judgment.

Massachusetts v. E.P.A., 549 U.S. 497, 533–534 (2007). The Court views the EPA's decision to issue the finding as one of statutory compliance with the CAA. *Id*. at 533. According to the CAA, the EPA is responsible for making a judgement as to whether an air pollutant "cause[s], or contribute[s] to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7521(a)(1). This language certainly does not allude to any sort of financial, economic, or political concerns, and the Court firmly agreed that those concerns do not give license to ignore the statutory text. *Massachusetts*, 549 U.S. at 533.

C. The Scientific Record Before EPA is Sufficient to Justify the 2009 Endangerment Finding with Respect to an Endangerment of Public Welfare.

The existing and potential harms of global climate change, which is exacerbated by unregulated GHG emissions, gravely endangers the public welfare, and threatens the very survival of United States citizens. It is a virtual certainty that there will be, in the coming decades, a rise in sea levels, decreased snow and ice, increase in the spread of disease, and increasingly dangerous weather events. *Massachusetts v. E.P.A.*, 549 U.S. 497, 499 (2007). Climate change is a global danger, and it is well-documented and widely recognized within the scientific community. *Id*. The EPA as an agency is tasked with the formidable responsibility of attempting to avoid such harm to the general public, and it has access to a vast amount of scholarship, data, and research to aid them in making such important decisions. Therefore, EPA should be trusted and relied upon as an authority over such matters, and its decisions are highly deferential. *See Coalition for Responsible Regulation, Inc. v. E.P.A.*, 684 F.3d 102, 120 (D.C. Cir. 2012)*; Am. Farm Bureau Fed'n v. EPA*, 559 F.3d 512 (D.C. Cir. 2009).

i. EPA's Endangerment Finding is Entitled to Significant Deference.

As the District Court for the District of New Union stated, the EPA must only show that that it has made a rational determination based on the record before it. *Am. Farm Bureau Fed'n*, 559 F.3d at 519. The Court does not have to come to precisely the same conclusion as the EPA, so long as the EPA's finding is supported by the record. *Am. Petroleum Inst. v. Costle*, 665 F.2d 1176, 1187 (D.C. Cir. 1981). Because EPA is evaluating scientific data within its realm of technical expertise, the agency should be given an extreme degree of deference from the Court. *Coalition for Responsible Regulation*, 684 F.3d at 120.

Furthermore, EPA's Endangerment Finding is entitled to deference because it was subject to notice-and-comment rulemaking prior to its issuance. *See United States v. Mead Corp.*, 533 U.S. 218 (2001); *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). Congress may delegate authority to agencies to make rules carrying the force of law through the practice of notice-and-comment rulemaking. *Mead Corp.*, 533 U.S. at 227. When a rule promulgated by an agency is a result of notice-and-comment rulemaking, it is entitled to deference and should be considered to carry the force of law. *Id*. EPA can take into consideration the expertise and concerns of both the scientific community and industrial groups prior to solidifying their decision, along with the opinions of the general public and any other interested party. Because this provides a general level of consensus and gives a voice to all parties, the Endangerment Finding is entitled to deference. *See generally*, Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act; Final Rule EPA, 74 Fed. Reg. 66495 (January 14, 2010).

ii. Possible Uncertainty Regarding Potential Harm to Public Welfare and Health Does Not Preclude EPA from Promulgating Regulations and Findings.

The District Court for the District of New Union was correct in holding that potential uncertainty concerning the scope or breadth of climate change impact does not prevent EPA from promulgating regulations and findings. The D.C. Circuit court has repeatedly acknowledged the inherently uncertain nature of science, particularly the science of human impact on the environment. *Ethyl Corp. v. Envtl. Prot. Agency*, 541 F.2d 1, 24 (D.C. Cir. 1976). Despite the fact that the decision was issued more than forty years ago, the opinion remains relevant to the discussion at hand. The court opined that technological advances had created unknown consequences, which would only increase the level of doubt and uncertainty for the EPA in their task to protect public health and welfare. *Id*. EPA should be allowed to regulate as a precautionary

measure and cannot be prevented from protecting the public because of scientific uncertainty. *Id*. at 37. The court's prescience is undoubtedly an accurate depiction of EPA's current dilemma. Therefore, the wisdom of the court must be heeded so as to avoid impeding the EPA in their Congressionally delegated functions.

III. EPA'S 2009 PUBLIC HEALTH ENDANGERMENT FINDING IS VALID.

A. Public Health, as Defined by the Clean Air Act, Must be Interpreted to Include Health Impacts that Result from Climate Change.

Just as the EPA issued the 2009 Endangerment Finding regarding public welfare, the finding also established that greenhouse gases in the atmosphere may reasonably be anticipated to endanger public health. Endangerment Finding, 74 Fed. Reg. at 66,497 (Dec. 15, 2009). The impact of greenhouse gases on public welfare often results in an exacerbation of existing public health disparities. It is indisputable that many of the present and potential effects of greenhouse gas on public welfare, such as rising sea levels and higher global temperatures, have a severe and direct impact on public health, manifesting as increased levels of insect borne diseases and heat related deaths. It would be impractical to suggest that the EPA should be compelled to manage and limit these public health crises while only being able to regulate the pollutants under the public welfare standard.

While it is true that Congress included effects on climate under the definition of welfare, the statute also states that the definition of public welfare "includes, but is not limited to" the list of accompanying categories. 42 U.S.C. § 7602(h). It seems clear that the definition of public health would also possess the same leniency, particularly because there is no corresponding statutory definition of public health within 42 U.S.C. § 7602(h). Congress appears to have intentionally given space for the courts to interpret the definition of public health and potentially to allow the definition of public health to encompass unexpected or unknown circumstances.

Other categories listed under the definition of public welfare, such as effects on personal comfort and well-being, could be considered public health impacts when resulting in psychological trauma or mental health difficulties. *Juliana v. United States*, 947 F.3d 1159, 1165 (9th Cir. 2020). There is no reason to limit the vast and expansive impact of widespread climate change exclusively to public welfare, particularly when Congress had an elementary understanding of the science of climate change at the time the terms were statutorily defined. *Ethyl Corp. v. Envtl. Prot. Agency*, 541 F.2d 1, 24 (D.C. Cir. 1976). It is entirely possible that Congress did not anticipate the impact climate change could have on public health and therefore did not find it necessary to expressly include it as such. However, assuming arguendo that the Court is not persuaded, these uncertainties in Congressional intent indicate that the definition of public health is ambiguous.

i. Congressional Intent Relating to the Inclusion of Indirect Health Impacts in the Interpretation of Public Health is Ambiguous.

The lack of a specific statutory definition of public health within the CAA certainly creates an abundance of uncertainty regarding Congressional intent. The intent of Congress remains largely obscure due to its refusal to draft a definition. This challenge highlights the deficiencies in our understanding of Congressional intent surrounding public health, particularly relating to the exact categories of health concerns that should be included under such definition. Therefore, Congressional intent regarding the definition of public health is ambiguous. Assuming the Court is persuaded that Congressional intent is ambiguous, then EPA is entitled to deference on the matter.

B. EPA's Reversal of its Position Regarding the Public Health Endangerment Finding is Not Entitled to Deference.

EPA is entitled to significant deference regarding its interpretation of public health and its issuance of the Endangerment Finding. *See United States v. Mead Corp.*, 533 U.S. 218 (2001),

Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984). However, EPA's position reversal complicates the matter to some degree. Courts have often justified the deference granted to the EPA over such matters by referring to the notice-and-comment rulemaking conducted by the EPA. *Mead Corp.*, 533 U.S. at 227. The process of notice-and-comment rulemaking gives the force of law to EPA's findings and rules by conveying Congress's delegation of authority. *Id*. Indisputably, EPA's 2009 Endangerment Finding was issued after notice-and-comment rulemaking, while EPA's newly changed position regarding the finding was not subject to such a process. Not only does this position reversal lack the same force of law as the EPA's previous position, but it is also bereft of the expertise of the scientific community. *Id*. There is no available case law to suggest that new agency positions issued during litigation should receive any level of deference. It is clear that EPA's initial position was supported by the administrative record and the scientific community, while nothing has been submitted by EPA to support its current position. Therefore, the 2009 Endangerment Finding regarding public health is entitled to deference by the Court.

IV. EPA HAS A NON-DISCRETIONARY DUTY TO LIST GHGS AS CRITERIA POLLUTANTS UNDER CAA 108(A).

A. EPA Has a Non-Discretionary Duty Based Upon Its Valid 2009 Endangerment Finding.

The EPA has a general duty to update the regulatory standards of pollutants that pose hazardous risks to public health and welfare. In addition to that general duty, the EPA has a specific duty to update regulatory standards when it issues a valid endangerment finding for a particular pollutant. *Zook V. McCarthy*, 52 F. Supp.3d 69 (D.D.C. 2014) See *Zook V. McCarthy*, 52 F. Supp.3d 69 (D.D.C. 2014) (a non-discretionary duty to issue pollutant standards does not exist unless and until an endangerment warning is issued for that pollutant). Under CAA § 108(a), EPA

is required to designate criteria pollutants upon an affirmative Endangerment Finding, and that duty arises before the Endangerment Finding officially goes into effect. *See Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 62–64; 81 Fed. Reg. at 54,422 (August 15, 2016). If EPA fails to designate pollutants after finding they endanger health and welfare, CAA § 304(a)(2) permits citizen suits to pursue a court order to compel an EPA listing of those pollutants. *Nat. Res. Def. Council v. Train*, 545 F.2d 320 (2d Cir. 1976).

Regardless of whether the Endangerment Finding is valid or invalid (even in part), its issuance alone gives rise to a non-discretionary duty. *E.g., Envtl. Defense v. Leavitt*, 329 F. Supp. 2d 55 (2004). Accordingly, beginning on December 15, 2009, EPA had a non-discretionary duty to list GHGs as criteria pollutants under CAA § 108 even though EPA is now arguing its Endangerment Finding is invalid. This result is supported by the fact that an agency endangerment finding in and of itself is sufficient to compel a regulatory proposal. *See* CAA § 2020(a)(1) (EPA must "by regulation prescribe . . . standards applicable to the emission of any air pollutant [that in EPA's judgement may] cause, or contribute to, air pollution which may [endanger either] public health *or* welfare") (emphasis added); *see also* Nathan Richardson, *Greenhouse Gas Regulation Under the CAA*, RFF DP 09-50, at 4 (2009) (observing that "[r]egulation of one provision of the CAA will likely trigger regulation under other provisions [since] provisions of the CAA are best understood not as independent regulatory islands but [as a] comprehensive framework for attacking the air pollution problem.")

In summation, even if the Endangerment Finding is invalid, the EPA nonetheless failed to carry-out a non-discretionary duty for a period of ten years. CHAWN's petition, which was filed shortly after the promulgation of the Endangerment Finding, should have–at a minimum–put EPA on notice of its non-discretionary duty to list GHGs as criteria pollutants. During the last decade,

EPA could have: (1) responded to CHAWN's petition, (2) filed a statement indicating the reason(s) for its delay, (3) taken action to reverse or reconsider its Endangerment Finding–in part or in whole–in a manner allowing public notice and comment, (4) sought interpretative guidance. EPA has not only failed to carry-out a statutorily proscribed non-discretionary duty, it has chosen to do so in a manner that completely frustrates the purpose of the CAA.

B. EPA's Discretion Over Performing Its Duties Does Not Excuse Its Inaction.

EPA argues its duty to designate a criteria pollutant is limited to only those pollutants for which the EPA intends to issue air quality criteria under 42 U.S.C. § 7408(a)(1)(C). . EPA's liberal construction of the CAA constricts its non-discretionary (mandatory) duty to designate criteria pollutants, and significantly expands the scope of EPA's discretionary duties. If Congress wanted to limit EPA's non-discretionary duty to only those situations in which the agency intends to impose additional air quality standards for the pollutants, it could have done so in the text of the CAA. This Court should reject EPA's argument because its interpretation of the statute undermines the comprehensive structure of the CAA. *Natural Resources Defense Council v. Train,* 545 F.2d 320 (2d Cir. 1976); *Ctr. for Biological Diversity v. EPA*, 749 F.3d 1079, 1083 (D.C. Cir. 2014); *Zook v. McCarthy*, 52 F. Supp.3d 69, at 74.

The Court should also reject EPA's argument that its inaction – or impending action – is permissible under the date certain doctrine. The date certain doctrine is a judicially created concept which assumes that a specific, certain, and fixed deadline is requisite to any nondiscretionary EPA duty under CAA § 304(a)(2). Stated differently, all of EPA's duties under the CAA are discretionary unless the statute identifies a specific point in time by which the agency must act. The EPA argues that without such a deadline, the deadline for performing the duty is within the limits of the EPA administrator's exclusive responsibilities. *See Sierra Club v. Thomas,*

828 F.2d 783, 791 (D.C. Cir. 1987) (in deciding whether an EPA duty is mandatory or discretionary in a citizen suit claim brought under CAA Section 304(a)(2), the court holds that a certain date is necessary before a nondiscretionary duty may be found to constitute a mandatory duty).

Although many courts have relied on this judge-made concept, this Court should reject the date certain doctrine because it misinterprets CAA § 304(a)(2) and frustrates the purpose of the citizens suit provision. The court's decision in *Sierra Club v. Thomas*, significantly reduced the district court's jurisdiction over unreasonable delay claims, and–as a result–district courts can only compel agency action when the EPA has failed to comply with a fixed deadline. See Sierra Club v. Thomas, 828 F.2d 783, 791 (D.C. Cir. 1987). As EPA has argued above, the date certain doctrine gives it discretion to delay agency performance–apparently for a period of ten years or longer–since EPA's duty to list GHGs as criteria pollutants under CAA § 108 lacks any fixed deadline. *Id.* EPA's decade-long delay is exactly the type of agency behavior that the citizen suit provision is intended to guard against, and yet, the date certain doctrine shields EPA's delay from judicial review. 42 U.S.C. § 7604(a).

This Court should reject EPA's argument that the date certain doctrine insulates its failure to act from judicial review, because holding otherwise will lead to a precedent that undermines the legislative purpose of CAA's citizen suit. *Id*. Additionally, EPA argues its Endangerment Finding did not trigger an agency duty while simultaneously arguing that it is free to delay such duty for as long as it pleases since the duty is not attached to a specific or certain deadline. The EPA cannot have it both ways. Furthermore, even if this Court determines that the date certain doctrine is controlling, it should carve out an exception to the rule because CHAWN has demonstrated that EPA's inaction is so egregious that it frustrates the purpose of the CAA. See 42 U.S.C. § 7604(a),

§ 707(f), Pub. L. No. 101-549, 104 Stat. 2574, 26883 *See* 42 U.S.C. § 7604(a), (when the duty is neither mandatory nor subject to a certain deadline, courts may enforce unreasonably delayed agency action).

V. EPA's Prolonged Inaction Constitutes Unreasonable Delay Based on Overwhelming Precedent.

Regardless of whether EPA is obligated to act in performance of a nondiscretionary or discretionary duty, precedent is clear that the ultimate question is whether there has been unreasonable delay. *WildEarth Guardians v. Jackson*, 885 F.Supp.2d 1112, 1116 (D.N.M. 2012). Claims under the CAA to compel action on a nondiscretionary duty are distinct from claims to compel action that is unreasonably delayed.

When a "precise statutory timetable" is absent, unreasonable delay claims are evaluated based on reasonableness factors. *Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 556 (D.C. Cir. 2015). Nondiscretionary duty claims may be brought in district courts where venue is proper. 28 U.S.C. § 1391. Unreasonable delay claims must be brought in district courts. 42 U.S.C. § 7604(a). See *Am. Lung Ass'n v. Reilly*, 962 F.2d 258, 263 (2d Cir. 1992) (unreasonable delay claims must be brought in the district court for the District of Columbia when the challenged action will have nationwide effect or scope). *Cf.*, 42 U.S.C. § 7604(a) (authorizing unreasonable delay claims for nondiscretionary duties); *Friends of the Earth v. EPA*, 934 F. Supp. 2d 40, 46 (D.D.C. 2013) (when an unreasonable delay claim is brought as a nondiscretionary suit, courts will not consider whether the challenged action will have a nationwide effect or scope).

When there is a specific and certain date on which an agency must act to fulfil its obligations and duties, the inquiry should focus on whether the duty is purely nondiscretionary. When, however, there is no such deadline but only an indefinite period of time, the initial and dispositive question is exclusively one of delayed action, and whether the delay was unreasonable.

E.g., *In re Pesticide Action Network N. Am., Inc.*, 798 F.3d 809 (9th Cir. 2015). Unreasonable delay is primarily determined by balancing the non-exhaustive list of factors to assess the reasonableness of an agency's delayed action. *Telecommunications. Research & Action Ctr. v. F.C.C.*, 750 F.2d 70 (D.C. Cir. 1984).

In evaluating whether an agency action has been unreasonably delayed, courts must analyze the circumstances in each case by balancing a non-exhaustive list of reasonableness factors. *Id*. Unreasonable delay is an egregious delay. *Id*. at 80. The relevant factors include, first and foremost, the time of any delay. Further, the analysis considers statutory timetables as well as the impact of delayed action on public health and welfare. *Id*. This evaluation accounts for the delaying agency's competing priorities, but impropriety from the delaying agency is not necessary to find that it has delayed unreasonably. *E.g.*, *RDC v. FDA*, 710 F.3d 71, 84 (2d Cir. 2013). Lastly, the history of the delaying agency is also relevant. *In Re Core Commc'ns, Inc.*, 531 F.3d 849 (D.C. Cir. 2008). *See also Sierra Club v. Froehlke*, 816 F.2d 205 (1987) (holding that EPA's performance of nondiscretionary duties is subject to a duty of timeliness, but courts may consider an agency's explanation for its delay).

EPA argues its ten-year delay is reasonable since regulating GHGs requires thorny policy and scientific issues. EPA further argues that, since other superseding activities would be impeded if the EPA were to designate GHGs as criteria pollutants, its delay concerning the designation is reasonable. *See* Reducing Regulation and Controlling Regulatory Costs, Exec. Order 13771, 82 Fed. Reg. 9,339 (Feb. 3, 2017) (superseding priorities include efforts to curb regulations that are economically burdensome). However, neither of these arguments can override the authoritative method by which courts determine whether agency inaction constitutes unreasonable delay. *Telecommunications v. FCC*, 750 F.2d 70.

The amount of time that agency action is delayed is the most crucial factor. Delayed agency action of as short as two and a half years has been found to be egregious and, therefore, unreasonable. *Families for Freedom v. Napolitano*, 628 F. Supp. 2d 535 (S.D.N.Y. 2009); *see also Midwest Gas Users Ass'n v. F.E.R.C.*, 833 F.2d 341 (D.C. Cir. 1987) (finding a delay of approximately four years to be unreasonable). In circumstances similar to this case, the court will most often find the delayed action to egregious under the rule of reason approach and, therefore, unreasonable under the CAA. *E.g., In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413 (D.C. Cir. 2004) (six-year- plus delay unreasonable); *In Re Core Commc'ns, Inc.*, 531 F.3d 849 (D.C. Cir. 2008) (seven-year delay unreasonable); *In re A Cmty. Voice v. U.S. E.P.A.*, 878 F.3d 779 (9th Cir. 2017) (eight-year delay unreasonable). It is safe to say, therefore, that in light of the most important factor in determining whether delayed agency action is unreasonable, that EPA's decade-long inactivity and utter silence concerning the demands for listing GHGs as criteria pollutants constitutes an unreasonable delay.

There is no statutory timetable or congressional instructions in this instance. Further, the impact of the EPA's delay is in direct relation to public health and welfare. As argued above in more detail, the pollutants for which criteria listings are sought are anticipated hazards to the well-being and general health of the social economy. At best, the EPA's delay prolongs uncertainty. At worst, the EPA's delay prolongs public endangerment. Given this fact, the EPA cannot excuse its inactivity by citing to superseding concerns – in fact, in *Telecommunications v. FCC*, factors stipulate that considerations of public health and welfare are considered "rather than economic [health and welfare]". 750 F.2d 70, at 80. The analysis is similar, if not the same, when factoring in the impact of EPA's delay on third-parties. Lastly, the EPA has a history of unreasonably delaying action in response to demands for a criteria pollutant designation. *See, e.g., Winter v. Nat.*

Res. Def. Council, Inc., 555 U.S. 7 (2008). *See also* Recent EPA Rulemakings: Hearing on H.R. 2055 Before the S. Comm. on Energy and Com. Before the Energy and Power Comm., 112th Cong. 8–11 (2011) (testimony of John D. Walke, CAA Director, Nat. Res. Def. Council) (noting a long history of unlawful EPA delay in acting under its CAA duties to regulate GHGs). In short, controlling precedent and prevailing circumstance provides the patent truth: in what has now become over a decade of silent inaction concerning its duty to list GHGs as criteria pollutants, the EPA has unreasonably delayed.

CONCLUSION

For the foregoing reasons, CHAWN respectfully asks the Court to reverse the district court's determination granting COGA's cross motion for summary judgment. CHAWN also asks this Court to reverse the district court's declaratory judgment ruling the portion of the Endangerment Finding determining GHGs endanger public health is contrary to law and vacating it to the extent that it declares GHGs endanger public health.

CHAWN further asks the court to affirm the district court's rulings that: 1) the Endangerment Finding is valid with respect to an endangerment to public welfare, 2) EPA has unreasonably delayed action on responding to Plaintiff's petition for designation of GHGs as a criteria pollutant, and has unreasonably delayed designating GHGs as a criteria pollutant, and 3) EPA has a duty that is not discretionary to designate GHGs as a criteria pollutant.

Finally, CHAWN asks the Court to affirm the district court's grant of declaratory judgment ordering EPA to publish notice of a proposed rule designating GHGs as a criteria pollutant within 90 days of entry of this order, and to publish a final rule designating GHGs as a criteria pollutant within 180 days following publication of the notice of proposed rulemaking.