TEAM 33

C.A. No. 20-000123

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

CLIMATE HEALTH AND WELFARE NOW,
Appellant

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Defendant-Appellant

-and-

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

On Appeal from the United States District Court for the District of New Union

Brief of Appellant, CLIMATE HEALTH AND WELFARE NOW

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Regulations

Other Authorities

INTRODUCTION

In the Clean Air Act, Congress created a comprehensive framework to protect public health and welfare by monitoring and improving the nation's air quality. This case is about whether that framework can be applied to greenhouse gases—the group of air pollutants largely responsible for remaking the planet's climate.

The earth is warming, and scientists agree that greenhouse gases created by human activity are a key driver. NASA, *Scientific Consensus: Earth's Climate Is Warming*, Global Climate Change: Vital Signs of the Planet, https://climate.nasa.gov/scientific-consensus/ (last visited Nov. 19, 2020). Anthropogenic climate change will create a host of challenges for human health and welfare, in the form of both direct effects, such as an increase in respiratory disease due to declining air quality, and indirect effects, such as injuries and deaths due to extreme weather events, which will become both more common and more severe. U.N. Env't Programme and World Meteorological Org., Intergovernmental Panel on Climate Change [IPCC], *Climate Change 2014 Synthesis Report: Summary for Policymakers* 7–8 (2014), https://www.ipcc.ch/site/assets/uploads/2018/02/AR5_SYR_FINAL_SPM.pdf [hereinafter *Synthesis Report*].

While addressing greenhouse gas emissions will require global action, the United States is in a unique position to lead that action for at least two reasons. First, the United States is the second biggest emitter of greenhouse gases in the world, following only China. Mengpin Ge & Johannes Friedrich, *4 Charts Explain Greenhouse Gas Emissions by Countries and Sectors*, World Resources Institute (Feb. 6, 2020), https://www.wri.org/blog/2020/02/greenhouse-gas-

emissions-by-country-sector. And second, the United States has an established regulatory structure for air pollutants, in the Clean Air Act.

However, EPA and industry groups have resisted applying that framework to greenhouse gases, insisting that these gases do not fit into the Clean Air Act framework. If that position is allowed to stand, the United States will miss a critical opportunity to moderate the effects of climate change and ameliorate its impacts on human health and welfare across the globe.

JURISDICTIONAL STATEMENT

Climate Health and Welfare Now (CHAWN) appeals from an Opinion and Order granting partial summary judgment for defendant Environmental Protection Agency (EPA) and intervenor Coal, Oil, and Gas Association (COGA), entered August 15, 2020, by the honorable Judge Remus in the United States District Court for the District of New Union, No. 66-CV-2019. The district court had subject-matter jurisdiction under the citizen-suit provision of the Clean Air Act, section 304(a), 42 U.S.C. § 7604(a) (see *infra*, pp. 13–17), and under 28 U.S.C. § 1331 because the cause of action is provided by federal law. CHAWN, COGA, and EPA all filed timely Notices of Appeal pursuant to Fed. R. App. P. 4. The United States Court of Appeals for the Twelfth Circuit has jurisdiction over this appeal under 28 U.S.C. § 1291, which provides that "the court of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States." An order granting summary judgment is a final decision, and thus appealable. *Bullard v. Blue Hills Bank*, 135 S. Ct. 1686, 1694 (2015).

STATEMENT OF ISSUES PRESENTED

I. Did the District Court have jurisdiction over CHAWN's unreasonable delay claim under the Clean Air Act section 304(a), 42 U.S.C. § 7604(a), where the rule sought would be a rule of nationwide applicability subject to review exclusively in the D.C. Circuit under section 307(b)(1) of the Act, 42 U.S.C. § 7607(b)(1)?

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

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

IV. Does EPA's ten-year delay in taking any action on listing greenhouse gases as criteria pollutants under the Clean Air Act section 108(a), 42 U.S.C. § 7408, constitute an unreasonable delay?

V. Does EPA have a nondiscretionary duty to designate greenhouse gases as a criteria pollutant under section 108 based on the 2009 Endangerment Finding?

STATEMENT OF THE CASE

A. The Clean Air Act

The Clean Air Act provides a comprehensive regulatory framework intended to improve the nation's air quality by identifying pollutants that endanger public health or welfare and reduce the amount of those pollutants in the air. *See* Clean Air Act, § 101(b), 42 U.S.C. § 7401(b). EPA is charged with implementing the Act. *Id.* § 301(a); 42 U.S.C. § 7601(a). The Act offers two mechanisms for accomplishing its goal: Where the sources of a pollutant are distinct and identifiable, source regulations define allowable emissions for a given type of

source; for instance, section 202 of the Act, 42 U.S.C. § 7521, provides a process for establishing motor vehicle emission standards. Where pollutants emanate from many, diverse sources, on the other hand, the Act requires EPA to establish National Ambient Air Quality Standards; pollutants regulated via ambient air quality standards are known as "criteria pollutants." Clean Air Act § 108, 42 U.S.C. § 7408. Sections 202 and 108 use the same language to define the trigger for regulation: in both cases, the Administrator must regulate emissions of pollutants "which, in his judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. §§ 7408, 7521.

Once an ambient air quality standard is published, states must create plans to bring their air quality into compliance. When a state fails to submit a satisfactory plan, or fails to meet compliance deadlines, EPA may directly regulate emissions within the state. Clean Air Act § 110(c)(1), 42 U.S.C. § 7410(c)(1). The state may also lose federal highway funding. Clean Air Act § 179(a), (b)(1), 42 U.S.C. §7509(a), (b)(1).

The two-year process of creating an ambient air quality standard begins when the Administrator lists a pollutant as a criteria pollutant, based on a finding that the designated pollutant presents a danger to human health or welfare. EPA made such a finding for greenhouse gases in its 2009 Endangerment Finding. This suit was brought by CHAWN to compel EPA to list greenhouse gases as a criteria pollutant and begin the process of establishing a National Ambient Air Quality Standard.

B. The Endangerment Finding

The current action has its roots in a 1999 petition by nineteen environmental groups asking EPA to regulate greenhouse gas emissions from automobiles, citing the role of greenhouse gases in climate change. *Massachusetts v. EPA*, 549 U.S. 497, 510 (2007). EPA

denied the petition in September 2003, claiming that greenhouse gas emissions did not fit the Clean Air Act's definition of "air pollutants" and so were not subject to regulation under the Act and explaining that, as a policy matter, regulation to address climate change should be supported by specific authorizing legislation rather than the Clean Air Act's general provisions. *Id.* at 513. The groups sued to compel action. *Id*. Ultimately, the U.S. Supreme Court held that greenhouse gases are "air pollutants" subject to the Clean Air Act and ordered EPA to make a finding as to whether greenhouse gases endanger public health or welfare. *Id.* at 529, 535 (2007).

EPA took more than two years to issue a formal finding that greenhouse gases endanger public health or welfare. *See* Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496 (Dec. 15, 2009) [hereinafter "Endangerment Finding"]. In the Endangerment Finding, EPA defined six greenhouse gases as a single pollutant[1] and found that these gases were emitted by a multitude of sources and that they endanger public health and welfare in a number of ways, including both direct effects of greenhouses gases themselves and indirect effects of the climate change they catalyze. Endangerment Finding, 74 Fed. Reg. at 66,497, 66,531.

After EPA issued the Endangerment Finding, it passed a series of regulatory actions limiting greenhouse gas emissions. Order at 7. These actions established emission limits for new passenger vehicles and light trucks, Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 75 Fed. Reg. 25,324 (May 7, 2010), and created performance standards for new stationary sources of greenhouse gases and adopted a "tailoring rule" to limit permitting and review requirements for greenhouse gas sources, Prevention of

[1] The six greenhouse gases included in the list are carbon dioxide, methane, nitrous oxide, hydroflourocarbons, perflourocarbons, and sulfur hexafluoride.

Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514, 31,523 (June 3, 2010). The Endangerment Finding and emission limits were upheld in *Coalition for Responsible Regulation v. EPA*, 684 F.3d 102 (D.C. Cir. 2012), rev'd in part on other grounds sub nom in *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302 (2014). The other actions were struck down in whole or in part. *See, e.g., Util. Air Regul. Grp,* 573 U.S. at 325. Beginning in 2017, however, the surviving regulations were rolled back and emissions standards for new motor vehicles and power plants were relaxed. *See* The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks, 85 Fed. Reg. 24,174 (Apr. 30, 2020), and Repeal of the Clean Power Plan; Emissions Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emissions Guidelines Implementing Regulations, 84 Fed. Reg. 32,520 (July 8, 2019).

C. Proceedings Below

Shortly after EPA issued the Endangerment Finding, CHAWN and other environmental organizations filed a petition demanding that EPA list greenhouse gases as criteria pollutants under section 108 of the Clean Air Act, 42 U.S.C. § 7408. *See* Center for Biological Diversity, 350.org, & CHAWN, *Petition to Establish National Pollution Limits for Greenhouse Gases Pursuant to the Clean Air Act* (Dec. 2, 2009), https://www.biologicaldiversity.org/programs/climate_law_institute/global_warming_litigation/clean_air_act/pdfs/Petition_GHG_pollution_cap_12-2-2009.pdf. The petition asserted that the Endangerment Finding triggered a nondiscretionary duty to list greenhouse gases. *Id.* at i.

Ten years passed with no response from EPA.

On April 1, 2019, CHAWN properly served notice of its intention to sue EPA under the Clean Air Act's citizen-suit provision, § 304(a), 42 U.S.C. § 7604(a), for failure to act on its duty

to regulate greenhouse gases and unreasonable delay in carrying out its duty to designate greenhouse gases as criteria pollutants. Order at 5. EPA took no action in response to CHAWN's notice. *Id.*

CHAWN commenced this lawsuit on October 15, 2019, seeking an order compelling EPA to list greenhouse gases as criteria pollutants, an action that would trigger the process to create a national air quality standard for greenhouse gases. *Id.*

COGA, a trade association for companies engaged in the extraction and processing of fossil fuels, moved to intervene as of right under Fed. R. Civ. P. 24(a). *Id.* In its motion to intervene, COGA asserted that the regulatory actions demanded by CHAWN would cripple the market for its members' products. *Id.* The district court granted the motion to intervene, and COGA and EPA both answered CHAWN's complaint. *Id.* COGA also asserted a cross-claim against EPA, arguing that the Endangerment Finding is contrary to law and unsupported by the administrative record. *Id.*

All three parties filed cross-motions for summary judgment. *Id.* CHAWN asserted that the Endangerment Finding triggered a nondiscretionary duty to list greenhouse gases as criteria pollutants and that the ten-year delay in responding to the petition was *per se* unreasonable. *Id.* EPA denied the existence of any nondiscretionary duty and asserted that the complexities of regulating greenhouse gases more than justify the delay. *Id.* Finally, COGA attacked the Endangerment Finding as unsupported by the administrative record and inadequate to support a primary National Ambient Air Quality Standard. *Id.*

The district court acknowledged that the validity of the Endangerment Finding is a "seemingly settled issue," noting that COGA's challenges had been addressed—and rejected—in *Coalition for Responsible Regulation*. *Id.* at 8. Nonetheless, the district court only partially

upheld the Finding. The court held that the public welfare portion of the Endangerment Finding was valid. *Id.* at 9–10. The agency's public health findings, however, did not fit within the Act's definition of "public health," according to the court. *Id.* at 10. The court interpreted the inclusion of "climate change" in the Act's definition of "public welfare" as exclusive, taking it as an indication that "Congress saw climate impacts of air pollution solely as a matter of public welfare." *Id.* Thus, the public health portion of the Endangerment Finding was contrary to law. *Id.*

The court then turned to CHAWN's claims. Because section 108 provides no deadline for action, the court held that the action required by that section is not purely nondiscretionary; the agency can decide *when* to act. *Id.* at 11. However, EPA's ten-year delay in responding to the petition or taking up its nondiscretionary duty to list greenhouse gases was *per se* unreasonable, the court held. *Id.* at 12–13.

This appeal followed.

SUMMARY OF THE ARGUMENT

The district court was correct in holding that EPA's ten-year delay in responding to the 2019 petition to act on its Endangerment Finding was unreasonable, and that EPA had a duty to list greenhouse gases under section 108. The court was incorrect in finding the public health portion of the Finding contrary to law.

The district court had jurisdiction over CHAWN's action because the provisions in section 304(a) that require an act of nationwide "scope or effect" to be filed in the U.S. Court of Appeals for the District of Columbia are waivable venue provisions, not nonwaivable limits on jurisdiction. Although the limitations on where an action may be filed are included in the same

long paragraph that confers jurisdiction, the language of those provisions focuses on what petitioners should do—where a given suit "may be filed"—not what courts can do. Furthermore, the U.S. Supreme Court has held that ambiguous restrictions should be treated as nonjurisdictional. The ambiguous language here, combined with statutory context and other courts' interpretations of the provisions as speaking to venue all weigh against reading the restrictions as jurisdictional limitations. Venue provisions, unlike jurisdictional limitations, are waivable. Thus, because EPA did not object to venue at the outset of the action, objections to venue are waived and the district court properly heard the case.

The 2009 Endangerment Finding is valid with regard to both public welfare and public health.

COGA argues that the Endangerment Finding with respect to public health is invalid because EPA failed to consider the regulatory and economic consequences of the Endangerment Finding. COGA also asserts that the science relied on by EPA in making the Endangerment Finding is too uncertain and speculative to support the finding. However, regulatory and economic impacts and futility are all irrelevant to the Endangerment Finding. The Administrator need only determine whether a particular air pollutant endangers public health or welfare—not whether regulating that pollutant is feasible. Both the U.S. Supreme Court and the D.C. Circuit have held that such extrinsic considerations cannot justify EPA's refusal to make an Endangerment Finding.

COGA also argued that the science EPA relied on to determine that greenhouse gas emissions endanger human health and welfare is too uncertain to support a current finding of endangerment. But EPA relied on a number of overview assessments from national and international bodies. These assessments synthesized thousands of peer-reviewed studies, drawing

on the work of myriad scientists and scientific review bodies. These sources provide a comprehensive overview of the state of climate change science, and they provide a rational basis for the 2009 Endangerment Finding.

That the scope of the potential harm from greenhouse gases is uncertain is irrelevant. The Clean Air Act operates on a precautionary principle; the agency may act—indeed, is obligated to act—to prevent harm even if the Administrator is not fully certain that the harm is inevitable. Under this precautionary standard, EPA can take regulatory action *before* the threatened harm actually occurs. The standard is not that the anticipated impacts are certain to occur but whether sufficient information exists to support a reasonable finding that human health and welfare are endangered.

Although the district court erroneously held otherwise, COGA's argument that the public health portion of the Endangerment Finding is contrary to law also relies on the wrong standard in several dimensions. First, *Chevron* requires that the courts defer to the agency's interpretation of an ambiguous statutory term. *See Chevron USA, Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 842–43 (1984). Because the Clean Air Act does not explicitly define "public health," the term is open to interpretation by the agency. The statute's expansive language where it discusses the concept public health is suggestive, supporting EPA's inclusive definition. The district court ignored this expansiveness, and the requirement of deference, relying instead on the inclusion of climate effects under the Act's definition of "public welfare" to hold climate effects may be considered only under the aegis of public welfare.

Even if secondary effects from climate change are discounted, the portions of the public health endangerment finding that consider direct effects are still valid. For instance, the

Endangerment Finding anticipates health effects in the form of increased incidence of respiratory diseases and premature death due to reduced air quality.

Furthermore, at the listing stage of regulation, the distinction between primary and secondary air quality standards, highlighted by the district court in its analysis, is irrelevant. The only concern at this stage is whether sufficient evidence exists to support a finding that a given pollutant poses a sufficient danger to public health or welfare to create a duty to list the pollutant as a criteria pollutant under section 108. Whether a pollutant requires a primary or secondary air quality standard is not of concern until after the pollutant is listed. It has no bearing on the validity of the Endangerment Finding with regard to public health or on the agency's duty to list greenhouse gases as a criteria pollutant.

EPA has allowed ten years to elapse without fulfilling its duty to list greenhouse gases as criteria pollutants. That delay is unreasonable, particularly given the extraordinary risks to human health and welfare posed by these pollutants and the vast array of interests that will be affected by failure to reduce the levels of greenhouse gases in the air. The agency's delay cannot be explained by the complexity of the regulation required, given that the agency has passed significant regulation of greenhouse gases even as it did not respond in any way to the 2009 petition. Nor do competing priorities tip the balance in the agency's favor, given the scope and extent of the likely harms from greenhouse gases and the climate change they catalyze. Furthermore, much shorter delays—from five to eight years—have been found sufficiently unreasonable to warrant mandamus in other cases.

Finally, EPA did in fact have a duty to list greenhouse gases as a criteria pollutant once it made the Endangerment Finding. While the Clean Air Act does offer two routes to regulate air pollutants—via a national ambient air quality standard or via source regulation—those options

are "neither mutually exclusive nor alternative." *Nat. Res. Def. Council v. Train*, 411 F. Supp. 864, 869 (S.D.N.Y. 1976), *aff'd*, 545 F.2d 320 (2d Cir. 1976). Rather, the duty to regulate sources falls primarily on the states, and EPA's primary duty is the creation of national air quality standards to guide state efforts. As a result, EPA may not choose to regulate via emission controls rather than air quality standards when a pollutant meets the criteria for listing laid out in section 108. Thus, section 108 creates a nondiscretionary duty to list a pollutant once the agency finds that it presents a danger to human health or welfare.

This Court should hold that the Endangerment Finding is valid and that EPA's ten-year delay in taking up its nondiscretionary duty to list greenhouse gases based on that finding is unreasonable.

STANDARD OF REVIEW

Subject-matter jurisdiction is a matter of law, which is reviewed de novo. *Rajasekaran v. Hazuda*, 815 F.3d 1095, 1098 (8th Cir. 2016). Courts have "an independent obligation to inquire into" jurisdiction, even if parties do not raise it. *Bova v. City of Medford*, 564 F.3d 1093, 1095 (9th Cir. 2009).

A district court's grant or denial of summary judgment is also reviewed de novo. *See, e.g., Collins v. Bellinghausen*, 153 F.3d 591, 595 (8th Cir. 1998); *Gasner v. Bd. of Supervisors of the City of Dinwiddie, Va.,* 103 F.3d 351, 356 (4th Cir. 1996); *Twiss v. Kury*, 25 F.3d 1551, 1554 (11th Cir. 1994). Summary judgment is appropriate if the pleadings and discovery record reveal no genuine dispute with regard to any material fact and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986); Fed. R. Civ. P. 56(c).

ARGUMENT

I. The District Court Had Jurisdiction over CHAWN'S Unreasonable Delay Claim Because Section 304's Provisions Regarding Where an Action Must Be Filed Are Venue Provisions, Not Jurisdictional Limitations.

The district court had jurisdiction over CHAWN's action because the provisions in section 304(a) that require an act of nationwide "scope or effect" to be filed in the U.S. Court of Appeals for the District of Columbia are waivable venue provisions, not nonwaivable limits on jurisdiction.

Agency actions, or failures to act, may be contested under two provisions of the Clean Air Act. Section 307(b), 42 U.S.C. § 7607(b), allows review of agency actions, including "action by the Administrator in promulgating any national primary or secondary ambient air quality standard," by a U.S. Court of Appeals. Section 307(b) applies only to final agency actions. *Massachusetts v. EPA*, 415 F.3d 50, 54 (D.C. Cir. 2005), *rehearing en banc denied*, 433 F.3d 66, *cert. granted*, 548 U.S. 903, *rev'd*, 549 U.S. 497, *on remand*, 249 Fed. Appx. 829 (2007). Where the agency has not taken a required action, or has unreasonably delayed action, section 304(a)(2), 42 U.S.C. § 7604(a)(2), allows citizen suits to compel action.

Both provisions specify where such actions may be brought. Section 307(b) confers jurisdiction on the U.S. Courts of Appeals to hear challenges to final agency actions. Such actions must be filed in the geographically relevant circuit, for regulations that have local or regional effect, or in the U.S. Court of Appeals for the District of Columbia, if the challenged action has national "scope or effect." Section 304(a) explicitly confers jurisdiction on the district courts to compel nondiscretionary action, including unreasonably delayed action, and directs that the action be filed within the circuit in which the final action sought would be reviewable under

section 307(b). Thus, to determine whether an action may be heard by a given court under section 304(a), we must look to the provisions of section 307(b).

Section 307(b) is unambiguously a "conferral of jurisdiction upon the courts of appeals." *Harrison v. PPG Industries, Inc.,* 446 U.S. 578, 593 (1980). However, the structure of the statute creates ambiguity regarding the reach of that conferral of jurisdiction. In a single, long paragraph under the heading "judicial review," section 307(b)(1) defines three different sets of actions that may be reviewed by the Courts of Appeals and dictates where each "may be filed": Petitions for review of nationally applicable actions—including publication of air quality standards—and for local actions that have nationwide effects "may be filed only in the United States Court of Appeals for the District of Columbia." *Id.* Petitions for review of actions that are locally or regionally applicable "may be filed only" in the geographically appropriate circuit court. *Id.* Thus, a petition for review of a published air quality standard should be filed in the D.C. Circuit. By extension, an action under section 304(a) to compel the agency to create an air quality standard must be filed in the D.C. district court.

Although this issue was not briefed below, EPA has argued elsewhere that the construction of this provision as one long paragraph under the heading "judicial review" makes all of these provisions jurisdictional. *See, e.g., Texas v. EPA,* 829 F.3d 405, 418–20 (5th Cir. 2016); *Tex. Mun. Power Agency v. EPA*, 89 F.3d 858, 867 (D.C. Cir. 1996) (per curiam). Under this reading, only the D.C. Circuit would have subject-matter jurisdiction to review the agency's publication of an ambient air quality standard. And consequently, only the U.S. District Court for the District of Columbia would have jurisdiction over a suit to compel the agency to create a standard.

This Court has not addressed this question, and neither has the U.S. Supreme Court, but every circuit that has done so has rejected this reading. *See S. Ill. Power Coop. v. EPA*, 863 F.3d 666, 670–71 (7th Cir. 2017); *Texas v. EPA*, 829 F.3d at 418–20; *Dalton Trucking, Inc. v. EPA*, 808 F.3d 875, 879–80 (D.C. Cir. 2015); *New York v. EPA*, 133 F.3d 987, 990 (7th Cir. 1998); *Tex. Mun. Power Agency*, 89 F.3d at 867.

Indeed, as the Seventh Circuit pointed out in *New York v. EPA*, to read the provision in this way would create an anomaly in the doctrine of jurisdiction, by defining jurisdiction in terms of what *parties* should do rather than in terms of what *courts* can do. 133 F.3d at 990. Generally, "jurisdictional statutes speak to the power of the court rather than to the rights or obligations of the parties." *League of Lat. Am. Citizens v. Wheeler*, 899 F.3d 814, 821 (9th Cir. 2018), *reh'g en banc granted*, 914 F.3d 1189 (9th Cir. 2019) (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 274 (1994)). Jurisdiction defines what court system has power to decide a particular type of case. When a court hears a case over which it lacks jurisdiction, it usurps the power of the court that does have that jurisdiction. *New York v. EPA*, 133 F.3d at 990. But a federal court of appeals that hears a case that should be heard in another federal court of appeals usurps no power. *Id.* The intrusion is only geographic—territorial, not jurisdictional.

The categories in section 307(b) are defined by geographic reach, not statutory or constitutional differences in the courts' powers. Where an action should be filed under the statute depends upon the geographic scope of the agency action at issue—*not* any distinction in the powers exercised by the agency or accorded to the various circuit courts. *See S. Ill. Power Coop.,* 863 F.3d at 670 ("[V]enue depends entirely on—and is fixed by—the nature of the agency's action; the scope of the petitioner's challenge has no role to play in determining venue.").

Reading these provisions as jurisdictional runs afoul of U.S. Supreme Court's test for when a statutory restriction is jurisdictional. Under this test, "a rule qualifies as jurisdictional only if 'Congress has clearly stated that the rule is jurisdictional.'" *League of Lat. Am. Citizens*, 899 F.3d at 821 (quoting *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153 (2013)). In the absence of a clear statement, the Supreme Court said, a restriction should be treated as nonjurisdictional. *Id.* The goal of the rule is to "ward off profligate use of the term 'jurisdiction.'" *Id.* In establishing whether Congress has spoken clearly enough to create a jurisdictional restriction, courts should consider the language and context of the statute—including past judicial interpretations. *Id.* (quoting *Reed Elsevier, Inc. v. Muchnick* 559 U.S. 154, 168 (2010)). Here, the language is ambiguous, but context and past interpretations all weigh against reading the restrictions purely as jurisdictional limitations.

The more logical reading of the statute interprets it as a "two-fold provision," providing both jurisdiction and venue. *Texas v. EPA*, 829 F.3d at 418. By this reading, the statute both "empowers . . . the D.C. Circuit and the regional circuits" and provides "instruction to petitioners" about where to file a given action. *Id.* In other words, "Section 307(b)(1) can be read as prescribing the choice among circuits and not the power of a particular federal circuit court to hear a claim." *Tex. Mun. Power Agency*, 89 F.3d at 867. The choice among circuits is a question of venue, not of jurisdiction, and instructions about where to file a case are generally understood as defining venue. *New York v. EPA,* 133 F.3d at 990; *see Texas v. EPA*, 829 F.3d at 418 (noting that the language of the statute provides "instructions to petitioners" rather than conferring powers on courts). It also accords with the legislative history and intent of the statute. *See Tex. Mun. Power Agency*, 89 F.3d at 867.

The language of section 304(a) echoes that of section 307(b): district courts are given "jurisdiction to compel . . . agency action unreasonably delayed," but the action to compel "may only be filed in a United States District Court within the circuit in which such action would be reviewable under section 7607(b) of this title." The first part of the sentence provides jurisdiction; the second instructs plaintiffs where to file. Like the statute the Ninth Circuit found to be nonjurisdictional in *League of Latin American Citizens v. Wheeler*, that phrase "is structured as a limitation on the parties rather than the courts." 899 F.3d at 826.

Venue provisions, unlike jurisdictional limitations, are waivable. Fed. R. Civ. P. 12(h)(1); 28 U.S.C. §§ 1406, 2343. Failure to object to venue is understood as consent to be sued in a given court, even if the venue is otherwise improper. *Dalton Trucking*, 808 F.3d at 880 (citing *Tex. Mun. Power Agency,* 89 F.3d at 867). Thus, EPA's failure to object to venue at the outset of the action waives the venue provisions of section 304(a)(2) and section 307(b)(1), allowing the district court to properly hear the action.

This Court should follow its sister circuits in reading sections 307(b)(1) and 304(a)(2) as providing both jurisdiction and venue for the relevant actions. Consequently, this Court should hold that the district court had jurisdiction to hear the action and EPA waived its objection to venue by failing to timely assert it.

II. EPA's Endangerment Finding Is Valid With Respect to Public Welfare Because EPA May Not Consider Regulatory Impacts of Endangerment Findings and the Finding Has a Rational Scientific Basis.

The Endangerment Finding is valid with respect to public welfare because the potential regulatory impacts of an endangerment finding are not part of the consideration when making such a finding and the finding has a rational scientific basis.

COGA challenges EPA's Endangerment Finding with regard to public welfare on the same bases the D.C. Circuit rejected in *Coalition for Responsible Regulation*. 684 F.3d at 102. COGA argues that EPA erred in failing to consider the regulatory consequences of the Endangerment Finding, which COGA argues are absurd; the implementation costs involved in setting and complying with air quality standards for greenhouse gases; and the futility of regulating greenhouse gases in this way. Order at 9. COGA also asserts that the science relied on by EPA in making the Endangerment Finding is too uncertain and speculative to support the finding. Order at 10. Both of these arguments fail.

A. EPA is neither required nor permitted to consider the regulatory impacts, costs, or futility of an endangerment finding.

COGA first argues that the district court erred in failing to consider the regulatory impacts, implementation costs, or futility associated with regulating atmospheric greenhouse gas concentrations. This argument fails because EPA is not required to consider the extrinsic impacts or feasibility of an endangerment finding.

Sections 108(a) and 202(a) of the Clean Air Act require the Administrator to determine whether a particular air pollutant endangers public health or welfare. Under section 108(a), the Administrator is required to list air pollutants that meet two criteria: they have been found to have adverse effects on public health or welfare, and their presence in the air results from numerous, diverse sources. Clean Air Act, § 108(a), 42 U.S.C. § 7408(a); *see Nat. Res. Def. Council v. Train,* 545 F.2d 320, 325 (2d Cir.1976); *Ind. & Mich. Elec. Co. v. EPA*, 509 F.2d 839, 841 (7th Cir. 1975). The inquiry is largely the same under section 202, which requires that the Administrator determine "whether particular air pollution—here, greenhouse gases—'may reasonably be anticipated to endanger public health or welfare,' and whether motor-vehicle

emissions 'cause, or contribute to that endangerment.'" *Coal. for Responsible Regul.,* 684 F.3d at 117 (internal citations omitted). Absent from this language is any requirement that EPA consider regulatory or policy impacts in an endangerment finding.

In fact, courts—including the U.S. Supreme Court—have held the opposite. In *Massachusetts v. EPA,* several state and local governments and private organizations sought review of EPA's denial of a petition to list greenhouse gases under section 202 of the Clean Air Act. 549 U.S. at 497. The Court determined that EPA could avoid forming a scientific judgment regarding greenhouse gases "*only* if it determines that greenhouse gases do not contribute to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do." *Id.* at 533 (emphasis added). The Court noted that EPA offered a "laundry list of reasons not to regulate," including "that regulating greenhouse gases might impair the President's ability to negotiate with 'key developing nations' to reduce emissions, and that curtailing motor-vehicle emissions would reflect an inefficient, piecemeal approach to address the climate change issue." *Id.* These policy judgments, the Court held, were entirely unrelated to the question of whether greenhouse gas emissions contribute to climate change, and they could not provide "a reasoned justification for declining to form a scientific judgment" regarding endangerment. *Id.* at 533–34. Therefore, EPA could not avoid deciding whether greenhouse gases endangered public health or welfare by citing these issues. *Id.* at 535.

The D.C. Circuit reiterated that principle in *Coalition for Responsible Regulation*, which upheld the Endangerment Finding in the face of challenges by states and industry groups. 684 F.3d at 113. Because greenhouse gases are emitted in higher volumes than other air pollutants, the plaintiffs argued, hundreds of thousands of small, stationary sources would exceed the

statutory thresholds. *Id.* The "overbroad regulation" resulting from the Endangerment Finding would create "an absurd result"—an outcome, the plaintiffs claim, that EPA recognized in its creation of the Tailoring Rule, which raised statutory emissions thresholds. *Id.* The D.C. Circuit rejected this reasoning as a basis for invalidating the Endangerment Finding. The plain language of section 202, the court held, "does not leave room for EPA to consider as part of the endangerment inquiry" the regulations that might be triggered by an endangerment finding—even if those regulations might be "absurd." *Id.* at 119. Indeed, regulatory impacts "are wholly irrelevant to the endangerment inquiry." *Id.*

The Supreme Court similarly rejected an argument that EPA should consider futility in making an endangerment finding in *Massachusetts v. EPA.* In that case, EPA argued that an endangerment finding and subsequent regulation of greenhouse gases offered no realistic probability of mitigating global climate change given the global nature of the problem; emissions from developing nations would offset any decrease in U.S. emissions. 549 U.S. at 524. The Court, however, was unconvinced. Predicted increases in greenhouse gas emissions from developing nations were irrelevant to EPA's endangerment determination, the Court held, because "a reduction in domestic admissions would slow the pace of global emissions increases, no matter what happens elsewhere." *Id.* at 526. Nor would such futility alter the fundamental scientific finding that greenhouse gases pose a threat to human health and welfare.

The Supreme Court and the D.C. Circuit have both ruled that EPA is neither required nor permitted to consider policy impacts, costs, or futility of subsequent regulation in making an endangerment finding. This court should follow suit.

B. EPA has presented a rational basis for its endangerment finding that is congruent with the precautionary principle embodied by the Clean Air Act.

COGA next argues that the science relied on by EPA to determine that greenhouse gas emissions endanger human health and welfare is too uncertain to support a current finding of endangerment. Order at 9. This argument fails because the Clean Air Act operates on the precautionary principle, permitting EPA to prevent potentially grave harms through regulation even when the scope and causation of those harms are uncertain.

Review of EPA's evaluation of scientific data within its expertise is highly deferential. An agency's scientific analysis is presumed valid so long as the agency provides a "rational basis" for its scientific analysis. *Am. Farm Bureau Fed'n v. EPA*, 559 F.3d 512, 519 (D.C. Cir. 2009). EPA has provided such a rational basis.

In its Endangerment Finding, EPA relied on "major assessments" from the Intergovernmental Panel on Climate Change, the United States Global Climate Research Program, and the National Research Council. Endangerment Finding, 74 Fed. Reg. at 66,510. These assessments synthesized thousands of peer-reviewed studies, drawing on the work of myriad scientists and scientific review bodies to support general conclusions about the state of the science regarding greenhouse gases and climate change. *Id*. These assessments are uniquely inclusive, as the agency described: "No other source of information provides such a comprehensive and in-depth analysis across such a large body of scientific studies, adheres to such a high and exacting standard of peer review, and synthesizes the resulting consensus view of a large body of scientific experts across the world." *Id.* at 66,511. Even absent the "extreme degree of deference" required in assessing an agency's scientific analysis, *Am. Farm Bureau Fed'n,* 559 F.3d at 519, these assessments provide a rational scientific basis for the 2009 Endangerment Finding.

That the scope and nature of the potential harm from greenhouse gases is uncertain is irrelevant. Prevention of pollution and its harms is a stated purpose of the Clean Air Act. *See* Clean Air Act, § 101(c), 42 U.S.C. § 7401(c). Congruent with that purpose, the Act calls for the agency to regulate any pollutants that "may *reasonably be anticipated* to endanger public health or welfare." Clean Air Act §§ 108(a)(1)(A), 202(a) (emphasis added). Under the precautionary principle expressed in those words, EPA is permitted to act to prevent harm even if the harm is not certain or inevitable. *See Ethyl Corp. v. EPA*, 541 F.2d 1, 25 (D.C. Cir. 1976). In *Ethyl Corp*, the D.C. Circuit considered the level of certainty required to sustain action regarding lead particulate emissions from automobiles. 541 F.2d at 7. Stating that "Congress used the term 'endangering' in a precautionary or preventive sense, and, therefore, evidence of potential harm as well as actual harm comes within the purview of that term," the court held that the agency was not required to find actual harm to sustain regulation. *Id.* at 17. Under this precautionary "will endanger" standard, EPA can take regulatory action *before* the threatened harm actually occurs, and before its extent becomes certain. *Id.* at 13.

Furthermore, as the Supreme Court noted in *Massachusetts v. EPA,* the standard is not that the anticipated impacts are certain to occur but whether sufficient information exists to support a reasonable finding that the harms may occur. 549 U.S. at 534. EPA could not escape its obligation to make an Endangerment Finding by pointing to uncertainty in the science, the Court held, unless that uncertainty is "profound" enough to make reasonable judgment impossible. *Id*.; *see also Coal. for Responsible Regul.,* 684 F.3d at 122 ("Requiring that EPA find certain endangerment of public health or welfare before regulating greenhouse gases would effectively prevent EPA from doing the job Congress gave it in § 202(a)—utilizing emission standards to prevent reasonably anticipated endangerment from maturing into concrete harm.")

In the present case, the agency found sufficient scientific information to make that reasoned judgment ten years ago, when it issued the Endangerment Finding. Here, as in *Massachusetts v. EPA*, that EPA "would prefer not to regulate greenhouse gases because of some residual uncertainty . . . is irrelevant." *Id*.

*****

Because EPA is not required to consider the potential regulatory or policy impacts of the Endangerment Finding, and because the agency presented a rational basis for its analysis of the risks in the Endangerment Finding, the district court did not err in holding the Endangerment Finding valid with respect to public welfare. This court should affirm that holding.

III. EPA's Endangerment Finding on Public Health Is Valid Because EPA Is Entitled to Deference When It Interprets an Ambiguous Statutory Term and Because the Distinction Between Primary and Secondary Harms Is Not Relevant to the Endangerment Finding.

COGA argues that the Endangerment Finding with regard to public health is contrary to law because Congress intended that endangerment to public health should consist solely of the direct health hazards of air contaminants. COGA asserts that EPA's Endangerment Finding with regard to public health relies on consequential harms from changing climate rather than direct health impacts due to personal exposure to a pollutant.

But COGA's argument ignores the deference due an agency's interpretation of a statute it is empowered to implement. In reviewing EPA's interpretation of the Clean Air Act, the Court must consider "whether Congress has directly spoken to the precise question at issue." *Chevron,* 467 U.S. at 843. If Congress has spoken directly, then "the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id*. If, however, Congress has not directly spoken to the precise question at issue, then "the question for the court is whether the

agency's answer is based on a permissible construction of the statute." *Id.* An agency's regulations are controlling unless they are "arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 844. Under this standard, considerable weight is given to the agency's construction of a statutory scheme; this principle of deference has been consistently followed by courts "whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies." *Id.* (quoting *United States v. Shimer*, 367 U.S. 374, 382, 383 (1961)). If the agency's interpretation represents a reasonable accommodation of conflicting policies, this Court should not disturb it "unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." *Id.* (quoting *Shimer*, 367 U.S. at 383).[2]

Here, Congress has not spoken directly to the precise question at issue. The Clean Air Act does not anywhere explicitly define "public health." The court must determine, then, whether the agency's interpretation is reasonable and based on a permissible construction of the statute.

EPA's interpretation of the term "public health" in the Endangerment Finding is expansive, encompassing both direct harms and "the effects on peoples' health from changes to climate" due to greenhouse gases in the atmosphere. Endangerment Finding, 74 Fed. Reg. at 66,527. In making the Endangerment Finding, EPA determined that its consideration was not limited to direct health effects but could extend to any effects from air pollution that "cause[ ]

---

[2] As the district court noted, EPA's about-face on this issue is not entitled to the same deference because it was espoused for the first time during this litigation and thus has not been subjected to the notice-and-comment rule-making processes that invoke *Chevron* deference. Order at 10. *See United States v. Mead Corp.,* 533 U.S. 218, 226–27 (2001) (holding that *Chevron* deference is invoked "when . . . the agency interpretation claiming deference was promulgated in the exercise of [Congressionally delegated] authority. Delegation of such authority may be shown . . . by an agency's power to engage in adjudication or notice-and-comment rulemaking."); *see also Texas v. EPA*, 829 F.3d 405, 430 n.34 (5th Cir. 2016).

sickness or death." *Id*. at 66,524. That broad usage accords with the agency's analysis elsewhere; in the past, EPA has considered "morbidity, such as impairment of lung function, aggravation of respiratory and cardiovascular disease, and other acute and chronic health effects, as well as mortality" in endangerment findings. *Id.* at 66,510 (citing Final National Ambient Air Quality Standard for Ozone, 73 Fed. Reg. 16436 (Mar. 27, 2008)).

EPA's definition of public health is entitled to *Chevron* deference because Congress has expressly delegated authority to EPA to regulate air pollutants—including greenhouse gases—and EPA's statutory interpretation was promulgated in the exercise of that authority. *See United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001). Furthermore, the definition is not arbitrary, capricious, or manifestly contrary to the statute. Rather, it is in line with the statute's expansive language where it discusses public health. For instance, section 112(b)(2), 42 U.S.C. § 7412(b)(2), requires that the Administrator add to the list of criteria pollutants "pollutants which present, or may present, through inhalation or *other routes of exposure*, a threat of adverse human health effects (*including, but not limited* to, substances which are known to be, or may reasonably be anticipated to be, carcinogenic, mutagenic, teratogenic, neurotoxic, which cause reproductive dysfunction, or which are acutely or chronically toxic) . . ." (emphasis added). This inclusive language allows consideration of other adverse health effects, including indirect health impacts of climate change, to be considered in determining whether an air pollutant endangers public health. It cuts against the district court's holding that the inclusion of climate under public welfare concerns in section 302(h) of the Act, 42 U.S.C. § 7602(h), precludes consideration of the effects on public health of climate change generated by greenhouse gases. *See* Order at 10.

The district court also relied on the significance of the distinction between primary and secondary ambient air quality standards in assessing the validity of the Endangerment Finding.

Id. That distinction is simply not relevant at this stage of regulation. *See supra*, pp. 18–21. The only concerns at this early stage of regulation are (1) whether sufficient evidence exists to support a finding that a given pollutant poses a danger to public health or welfare, and then (2) whether the pollutant meets the criteria for listing under section 108. *See* Clean Air Act, § 108(a)(1)(A), 42 U.S.C. § 7408(a)(1)(A). The distinction on which the district court relies, between primary and secondary ambient air quality standards, is not of concern until after the pollutant is listed, when the agency must define the required standards. *See* § 109, 42 U.S.C. § 7409. It has no bearing on the validity of the Endangerment Finding with regard to public health or on the agency's duty to list greenhouse gases as a criteria pollutant once they have been found to endanger public health or welfare.

Finally, the Endangerment Finding is valid even if the consideration is limited to direct health harm because EPA did consider direct health impacts in making it. The agency ultimately concluded that greenhouse gases endangered public health via exacerbation of respiratory diseases and other effects due to direct exposure to greenhouse gases in the air, as well as through the effects of climate change, including the effects of rising temperatures, increased prevalence of vector-borne diseases, and increased frequency of extreme weather events. Endangerment Finding, 74 Fed. Reg. at 66,525. Because greenhouse gases will likely increase regional ozone pollution, their presence in the atmosphere will create more risk of respiratory illnesses and premature death. *Id.* And greenhouse gases, especially carbon dioxide, will likely increase the "production, distribution, dispersion and allergenicity of aeroallergens and the growth and distribution of weeds, grasses, and trees that produce them." *Id.* These changes in aeroallergens may increase both the prevalence and severity of allergy symptoms, even as

increasing ozone levels make respiratory diseases more common. *Id.* All of these are direct effects of greenhouse gases on human health.

EPA's Endangerment Finding with respect to public health is valid because, given the absence of a clear definition of "public health" in the statute and the statute's expansive language when discussing public health, the agency's interpretation of "public health" is not arbitrary or contrary to the statute and thus is entitled to *Chevron* deference. Furthermore, the distinction between primary and secondary air quality standards on which the district court relied is not relevant at the Endangerment Finding and listing stages of regulation. Finally, EPA did consider direct health hazards in its Endangerment Finding, as well as secondary harms due to climate change. The district court erred in holding that the Endangerment Finding with respect to public health was invalid, and this Court should reverse that holding.

IV. EPA's Ten-Year Delay in Listing Greenhouse Gases as Criteria Pollutants Under Section 108(a) of the Clean Air Act Is Unreasonable.

Since the 2009 Endangerment Finding, EPA has allowed ten years to elapse without listing greenhouse gases as criteria pollutants, as required by section 108(a). Order at 7. That delay is unreasonable, particularly given the extraordinary risks to human health and welfare posed by these pollutants and the vast array of interests that will be affected by failure to reduce the levels of greenhouse gases in the air.

Section 304(a), 42 U.S.C. § 7604(a). of the Clean Air Act allows any person to file suit to compel EPA "to perform any act or duty . . . which is not discretionary with the Administrator" and vests jurisdiction in the district courts "to compel . . . agency action unreasonably delayed." In this case, CHAWN sought relief for EPA's failure to perform a nondiscretionary act. However, the district court, following *Sierra Club v. Thomas*, held that an action that does not

have a statutory deadline must be discretionary. Order at 11; *see also Am. Lung Ass'n v. Reilly*, 962 F.2d 258, 263 (2d. Cir. 1992). Whether or not the action itself is discretionary, the D.C. Circuit reasoned in *Sierra Club v. Thomas*, the agency retains discretion regarding *when* to act. 828 F.2d 783, 791 (D.C. Cir. 1987) ("In order to impose a clear-cut nondiscretionary duty, we believe that a duty of timeliness must 'categorically mandate' that *all* specified action be taken by a date-certain deadline."). Thus, because section 108 requires only that the Administrator list pollutants "from time to time," the action CHAWN seeks to compel here is not purely nondiscretionary.

The action is, however, unreasonably delayed.

Agencies are generally entitled to wide discretion with regard to their timetables for action. *Beyond Pesticides/Nat'l Coal. Against the Misuse of Pesticides v. Johnson*, 407 F. Supp. 2d 38, 40 (D.D.C. 2005). When the relevant statute provides no concrete timeline, as Section 108 does not, the delay must be "egregious" before a court will compel action. *Orion Reserves Ltd. P'ship v. Kempthorne*, 516 F. Supp. 2d 8, 11 (D.D.C. 2007) (citing *Telecomm. Research & Action Ctr. v. FCC*, 750 F.2d 70, 79 (D.C. Cir. 1984) [hereinafter "*TRAC*"]). Courts will compel action only in "exceptionally rare cases." *In re Barr Labs, Inc.*, 930 F.2d 72, 76 (D.C. Cir. 1991). The consideration of whether a delay is unreasonable is "fact bound and case specific." *Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 555 (D.C. Cir. 2015).

In assessing claims of unreasonable delay in agency action, courts apply the D.C. Circuit's six "*TRAC* factors":

1. The agency's decision-making pace "must be governed by a 'rule of reason'";
2. The relevant statutory scheme can provide the required "rule of reason";

3. Delays are "less tolerable" when human health and welfare are involved, as opposed to mere economic interests;

4. The agency's competing priorities may be a factor in determining whether a delay is unreasonable;

5. The nature and extent of the interests endangered by the delay should also be considered; and

6. The delay need not be due to impropriety to be found unreasonable.

TRAC, 750 F.2d at 80. Several courts have adopted these standards in the context of statutes waiving sovereign immunity when an agency unreasonably delays action. *See, e.g., South Carolina v. United States*, 907 F.3d 742, 759 (4th Cir. 2018); *In re A Cmty. Voice*, 878 F.3d 779, 786 (9th Cir. 2017); *Am. Hosp. Ass'n v. Burwell*, 812 F.3d 183, 189 (D.C. Cir. 2016); *Nat. Res. Def. Council v. U.S. Food & Drug Admin.*, 710 F.3d 71, 84 (2d. Cir. 2013).

In this case, the district court correctly found that the factors weigh in CHAWN's favor.

First, because Section 108 provides no statutory deadline for listing a given pollutant and neither party has alleged impropriety, the second and sixth factor need not be considered here.

Of the remaining factors, EPA argued that two weigh in its favor. First, the agency argued that the delay fell within the "rule of reason" required by the first factor because the "thorny policy and scientific issues" involved in listing greenhouse gases and creating air quality standards require time and care to unravel. Order at 12. Second, addressing the fourth factor, EPA argued that dealing with greenhouse gases would conflict with higher agency priorities, specifically an executive order requiring the agency to focus on rolling back regulations. *Id*.

In fact, neither of these factors helps the agency.

With regard to the first factor, EPA's argument cannot be reconciled with its conduct. Regulating greenhouse gases is, concededly, a complex endeavor. The gases emanate from many sources, some of which are central to the nation's economy and infrastructure and many of which are pervasive. But the agency has offered no evidence that it is working to resolve the "thorny issues" around air quality standards for greenhouse gases. Order at 12. Although it has issued a number of regulations related to greenhouse gases in the years since the petition, *see* Order at 7, it has not responded to the petition, acted to list greenhouse gases under section 108, or provided indication that it is developing a plan to do so. On the other hand, the issuance of these other regulations suggests that the agency has in fact disentangled at least some of those issues, undermining its claim that doing so requires years of delay with no evident response to the petition.

With regard to the fourth factor, the executive branch is free to establish priorities for its agencies. But no executive preference to reduce regulatory burdens can overcome a statutory mandate to regulate. Here, EPA had a duty, at least, to assess whether the action requested by the petition was required by law. The lack of any agency response to the petition indicates that it did not take even that basic action.

The remaining two factors weigh strongly in favor of CHAWN's argument that the delay is unreasonable.

The third factor weighs particularly heavily in CHAWN's favor. Greenhouse gases have varied, serious effects on human health and welfare, as the agency's own Endangerment Finding documented. Greenhouse gases exacerbate respiratory and allergic illnesses, leading to early death, and endanger human life via the secondary effects of climate change. Endangerment Finding, 74 Fed. Reg. at 66,525. Rising global temperatures as a result of greenhouse gases

contribute to heat-related illnesses and deaths, and climate change leads to more frequent and more severe injury and loss of life from extreme weather and other effects—all of which will have a profound effect on human health *and* welfare. *Id*. These effects are already visible, and they are widespread. Without immediate action, they will only get worse.

The widespread effects climate change caused by greenhouse gases will have on health and welfare tip the fifth factor in CHAWN's favor. The interests at risk are extensive and multifarious. Climate change catalyzed by rising greenhouse gases in the atmosphere will affect individuals, businesses, and the nation itself. Climate change will radically reshape entire sectors of the economy. *See, e.g.,* Ian Urbina, *Perils of Climate Change Could Swamp Coastal Real Estate*, NY Times (Nov. 24, 2016), https://www.nytimes.com/2016/11/24/science/global-warming-coastal-real-estate.html (detailing widespread economic effects of shifts in coastal real estate market due to climate change). It will also affect national security and have wide-ranging effects on international relations. *See, e.g.,* Bruce Lieberman, *A Brief Introduction to Climate Change and National Security*, Yale Climate Connections (July 23, 2019), https://yaleclimateconnections.org/2019/07/a-brief-introduction-to-climate-change-and-national-security/; *Synthesis Report* at 16 (noting that climate change will increase displacement and risk of violent conflict). No person or institution will be immune from the effects.

As a whole, then, the TRAC factors weigh in favor of finding the delay unreasonable.

Furthermore, a ten-year delay exceeds delays found sufficiently unreasonable to warrant mandamus in other cases. Courts have found far shorter delays unreasonable. The D.C. Circuit held that a five-year delay in rulemaking "treads at the very lip of the abyss of unreasonable delay." *Pub. Citizen Health Rsch. Grp v. Brock*, 823 F.2d 626, 629 (D.C. Cir. 1987); *see also, e.g., In re Pesticide Action Network N. Am., Inc.*, 798 F.3d 809, 814 (9th Cir. 2015) (finding

unreasonable EPA's eight-year delay in responding to a petition to ban a pesticide); *In re Core Commc'ns, Inc.*, 531 F.3d 849, 850 (D.C. Cir. 2008) (finding "egregious[ly]" unreasonable FCC's seven-year delay in issuing justification for a rule); *In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 420 (D.C. Cir. 2004) (finding unreasonable FERC's seven-year delay in responding to a rulemaking petition); *In re United Mine Workers of America Intern. Union*, 190 F.3d 545, 554 (D.C. Cir. 1999) (finding unreasonable MSHA's eight-year delay in final rulemaking).

EPA's delay of more than ten years in responding to CHAWN's petition exceeds all of the delays these courts found unreasonable. The district court was thus correct to find that EPA's delay in responding to the petition, and in acting to list greenhouse gases as criteria pollutants as required by section 108, was unreasonable. This Court should sustain that holding.

V. EPA Had a Nondiscretionary Duty to Designate Greenhouse Gases as a Criteria Pollutant Under Section 108 of the Clean Air Act.

The Clean Air Act provides two mechanisms for regulating air pollution: establishing ambient air quality standards for selected pollutants that states must then create a plan to meet, under sections 108–111, and regulating production of pollutants at their source, under section 211. Ambient air quality standards are established through a process that begins with the Administrator's listing of a given pollutant as described in section 108, 42 U.S.C. § 7408(a):

> (a)(1) For the purpose of establishing national primary and secondary ambient air quality standards, the Administrator shall within 30 days after December 31, 1970, publish, and shall from time to time thereafter revise, a list which includes each air pollutant
>
> (A) which in his judgment has an adverse effect on public health or welfare;

> (B) the presence of which in the ambient air results from numerous or diverse mobile or stationary sources; and
>
> (C) for which air quality criteria had not been issued before December 31, 1970, but for which he plans to issue air quality criteria under this section.

Listing a pollutant under section 108 launches a regulatory process that culminates in the development of national ambient air quality standards for the pollutant.

EPA argues that the third criterion makes the duty to list a pollutant discretionary: the agency need only list pollutants "for which [the Administrator] plans to issue air quality criteria." Order at 13. Under this interpretation, the agency could choose to rely on source regulation of a given pollutant and avoid the ambient air quality standard–setting process. *See Nat. Res. Def. Council v. Train*, 411 F. Supp. at 867.

However, this interpretation is at odds with the legislative purpose of the Act. Indeed, as the Second Circuit pointed out in its opinion affirming the district court's decision in *Natural Resources Defense Council v. Train*, to read section 108 this way would largely defeat the purpose of the Clean Air Act. 545 F.2d at 326. *Natural Resources Defense Council v. Train* concerned a citizen suit to compel EPA to list lead as a criteria pollutant. 411 F. Supp. at 866. As in the current case, the agency had made the judgment required by 108(a)(1)(A) that lead had "adverse effect[s]" on human health but had not acted to list it as a criteria pollutant. *Id.* at 872. The agency argued that the Clean Air Act provided a range of approaches to regulating a given pollutant and the agency had discretion to decide which to use. *Id.* at 869. Regulation of lead, the agency asserted, was more suited to regulation at the source than to regulation via an ambient air quality standard. *Id.*

The *Train* courts categorically rejected this argument. Section 108(a)(1)(C), the district court held, is not a separate criterion on par with the first two criteria. Rather, it refers to

pollutants that were known to cause adverse effects when the Act was passed but that did not yet have established criteria at that time. *Id.* at 868. This reading matches EPA's initial interpretation of the provision. *Id.* (citing 36 Fed. Reg. 1515 (1971)). Furthermore, although no other courts had directly addressed this question, this interpretation fits the construction offered by other courts in dicta. *Id.* (citing *Ind. & Mich. Electric Co.,* 509 F.2d at 841; *Ennecott Copper Corp. v. EPA*, 462 F.2d 846, 847 (1972)). As a result, the court held that "the statutory scheme contemplates a mandatory duty on the part of the Administrator which is enforceable in the instant action." *Id.* at 867. Because EPA conceded that lead has adverse health impacts and comes from numerous sources, both mobile and stationary, the district court held that the statutory criteria defined by section 108 had been met and the agency was required to list lead as a criteria pollutant. *Id.* at 870–71.

The Clean Air Act's two routes to regulate air pollutants—via a national ambient air quality standard or via source regulation— are "neither mutually exclusive nor alternative provisions." *Id.* at 869. Indeed, as the U.S. Supreme Court has held, the Clean Air Act contemplates a division of responsibilities between EPA and states. *Train v. Nat. Res. Def. Council*, 421 U.S. 60, 79 (1975). Under the Act "the Agency is plainly charged . . . with the responsibility for setting national ambient air standards. Just as plainly, however, it is relegated . . . to a secondary role" in regulating the source emission limitations required to meet the national standards. *Id.* In other words, although EPA *can* regulate emissions by source, that duty falls primarily on the states, which are charged with creating plans to comply with national air quality standards announced by the agency. EPA's primary duty is the creation of national air quality standards to guide state efforts. As the Second Circuit noted, in its decision affirming the district court's order in *Train*, this interpretation of the statute "lends no support" to EPA's

position that it may choose to regulate via emission controls rather than air quality standards. *Nat. Res. Def. Council v. Train*, 545 F.2d at 327.

As the district court here correctly notes, *Train* remains good law and its conclusions have been adopted by several courts. Order at 13. This court should follow suit and hold that section 108 creates a nondiscretionary duty to list a pollutant once the agency finds that it presents a danger to human health or welfare.

*****

For these reasons, this Court, acting within the jurisdiction conveyed on it by the Clean Air Act's citizen-suit provisions, should hold that EPA's complete Endangerment Finding with regard to greenhouse gases is not contrary to law and that EPA's delay in listing greenhouse gases as a criteria pollutant under section 108 of the Clean Air Act is unreasonable.

CONCLUSION

Upon the foregoing, Appellant CHAWN respectfully requests that this Court affirm the district court's partial grant of summary judgment for CHAWN, reverse the district court's partial grant of summary judgment for COGA and EPA, and remand for further proceedings consistent with that decision.