C.A. No. 20-000123

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

Climate Health and Welfare Now,
Plaintiff-Appellee-Cross Appellant,

v.

United States Environmental Protection Agency,
Defendant-Appellant,

and

Coal, Oil, and Gas Association,
Intervenor-Defendant-Appellant-Cross Appellee.

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

BRIEF OF PLAINTIFF-APPELLEE-CROSS APPELLANT CLIMATE HEALTH AND WELFARE NOW

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STATEMENT OF JURISDICTION

Climate Health and Welfare Now (CHAWN) seeks review of the August 15, 2020 final decision of the United States District Court for the District of New Union, No. 66-CV-2019. R. 4. Appeals of final decisions from the district court are appropriately under the jurisdiction of this Court. 28 U.S.C. § 1291 (2018). Federal district courts have jurisdiction over questions of federal law. 28 U.S.C. § 1331. The district court had subject matter jurisdiction, as CHAWN presented a federal question under § 304(a) of the Clean Air Act (CAA), which also authorizes suits to compel unreasonably delayed nondiscretionary agency action. 42 U.S.C. § 7604 (2018). Appellants filed a timely notice of appeal pursuant to Fed. R. App. P. 4 (2020).

STATEMENT OF THE ISSUES

I. Whether the EPA validly concluded, under CAA § 202(a), that elevated levels of GHGs in the atmosphere are reasonably anticipated to endanger public welfare.

II. Whether the EPA validly concluded, under CAA § 202(a), that elevated levels of GHGs in the atmosphere are reasonably anticipated to endanger public health.

III. Whether the 2009 Endangerment Finding, which concluded that GHG emissions endanger both the public health and welfare under CAA § 202(a), triggered EPA's nondiscretionary duty to designate GHGs as a criteria pollutant under CAA § 108(a)(1).

IV. Whether the district court had jurisdiction over CHAWN'S unreasonable delay claim under CAA § 304(a) where the challenge sought to compel the agency to perform a nondiscretionary duty with nationwide applicability.

V. Whether the EPA's ten-year delay to list GHGs as a criteria pollutant under CAA § 108(a) was unreasonable.

STATEMENT OF THE CASE

This case concerns the scope of the United States Environmental Protection Agency's (EPA) discretion to list greenhouse gases (GHGs) as a criteria air pollutant after the EPA found that six long-lived GHGs (carbon dioxide, methane, nitrous oxide, hydroflourocarbons, perflourocarbons, and sulfur hexafluoride), directly emitted from new motor vehicles, contribute

to air pollution reasonably anticipated to endanger public health and welfare. EPA, Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66496, 66536–37 (Dec. 15, 2009) [hereinafter Endangerment Finding].

A. Statutory Background

The Clean Air Act (CAA), 42 U.S.C. §§ 7401 *et seq*., passed in 1970 and amended in 1977 and 1990, serves to "protect and enhance the Nation's air resources . . . to promote the public health and welfare," by encouraging reasonable federal, state, and local governmental actions "for pollution prevention." *Id.* § 7401(b)(1) and (c). The CAA requires the EPA Administrator to set National Ambient Air Quality Standards (NAAQS) to protect the public health and welfare from dangerous mobile and stationary sourced emissions into the ambient air. *Id*. §§ 7409, 7601. Sections 108 and 109, *id.* §§ 7408 and 7409, prescribe the EPA's duty to administer the NAAQS program, which regulates six criteria air pollutants: sulfur dioxide, carbon monoxide, particulate matter, nitrogen dioxide, ground-level ozone, and lead. EPA, *Criteria Air Pollutants*, https://www.epa.gov/criteria-air-pollutants (last visited Nov. 19, 2020).

Congress enacted a harm-based, precautionary approach to cleaning up and preserving the nation's air quality, requiring the EPA to establish, and from time to time revise, an air pollutant list, including "each air pollutant—emissions of which, in his judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health and welfare." 42 U.S.C. § 7408(a)(1)(A). This endangerment provision requires an affirmative endangerment finding before the EPA must promulgate appropriate primary and secondary NAAQS per § 109(a). *Id.* § 7409(a). An affirmative public welfare endangerment finding triggers a process to adopt secondary NAAQS to mitigate the effects of the air pollutant on soils, water, crops, vegetation . . . weather, visibility, and climate, etc. *Id.* §§ 7409(b)(2), 7602(h). An affirmative public health endangerment finding triggers the promulgation of more stringent

primary NAAQS, which when accounting for "an adequate margin of safety," are necessary to protect the health of the public from the effects of the dangerous air pollution. *Id.* § 7409(b)(1).

B. Facts and Procedural History

In 2007, the Supreme Court of the United States held that GHGs were "unquestionably 'agents' of air pollution," as defined in the CAA, and directed the EPA to respond to a pending petition under § 202(a), 42 U.S.C. § 7521(a), the CAA's mobile source endangerment provision. *Massachusetts v. EPA*, 549 U.S. 497, 529 n.26 (2007). On remand, the EPA concluded that GHGs increase ambient global temperatures—affecting food production, coastal flooding, infrastructure, and wildlife, among other climate-related public welfare threats—and cause or contribute to premature death from numerous heat-related public health harms, which are particularly dangerous for sensitive subpopulations. Endangerment Finding at 66498.

In 2009, CHAWN and a host of environmental organizations again petitioned the EPA, asserting the EPA has a nondiscretionary duty to list GHGs as a criteria air pollutant under CAA § 108, 42 U.S.C. § 7408. R. 5. Finally, after ten years and no response from the EPA, CHAWN initiated this action in 2019, filing suit under the CAA's citizen suit provision, § 304(a)(2), 42 U.S.C. § 7604(a)(2), asking the court to find the EPA had failed to fulfill its nondiscretionary duty and compel the EPA to publish a new list of criteria pollutants that includes GHGs. R. 5. Coal Oil and Gas Association (COGA) intervened, alleging regulatory harm to its economic interests should the court rule for the plaintiffs. R. 5. Additionally, COGA asserted a cross-claim against the EPA, challenging the adequacy of the Endangerment Finding's scientific record. R. 5. The district court granted CHAWN's motion for summary judgment in part, dismissing COGA's challenges to the administrative record as applied to the public welfare endangerment finding. R. 10, 13. Additionally, the district court rejected CHAWN's nondiscretionary duty claim under the Court's "date-certain" doctrine. R. 11. In doing so, however, the court sua sponte held that the EPA

unreasonably delayed action on CHAWN's petition, holding that the EPA had a nondiscretionary duty which it unreasonably delayed in neglecting to designate GHGs as a criteria pollutant. Justifying the delay, the EPA argued that other agency activities were of a higher priority; yet the district court rejected these assertions. R. 12–13. The district court also granted COGA's cross motion for summary judgment in part, vacating the Endangerment Finding to the extent that it declares GHGs endanger public health. The EPA declined to defend the public health portion of the agency's decision, siding with COGA in arguing that portion was not legally valid. R 10.

SUMMARY OF THE ARGUMENT

This case asks whether the Endangerment Finding, promulgated under Title II of the CAA, can be reasonably extended to require the EPA to designate GHGs as a criteria pollutant, compelling their regulation under Title I's NAAQS program. The language of CAA § 108(a), legal precedent, and the Act's broader purpose all dictate the answer is yes. To protect the public health and welfare against decidedly dangerous air pollution, this Court should affirm the district court and hold the Endangerment Finding valid with respect to public welfare, but reverse the judgment below with respect to public health; and affirm the lower court's finding that the EPA unreasonably delayed its nondiscretionary duty to designate GHGs as a criteria pollutant.

This Court is compelled to uphold the EPA's Endangerment Finding for GHGs. Congress expressly delegated endangerment finding authority to the Administrator in CAA § 108(a). As the Endangerment Finding was promulgated pursuant to CAA § 307(d)'s extensive rulemaking procedures, both findings represent the EPA's reasoned decisionmaking, and thus should be upheld under *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Recognizing that judicial review of the EPA's resolution of scientific issues is highly deferential, the district court correctly held that the EPA's public welfare endangerment finding is valid. R.

9. As the Supreme Court found in *Massachusetts*, and the D.C. Circuit has reaffirmed, climate science overwhelmingly supports an endangerment finding for GHGs, despite some remaining scientific uncertainty and a somewhat attenuated chain of causation. Moreover, COGA's absurdity and impossibility arguments are irrelevant to endangerment findings; thus, COGA fails to establish the EPA's decision was arbitrary or capricious.

In terms of the public health endangerment finding, as the district court correctly held below, the EPA's new position is not entitled to deference because the agency cannot reverse its endangerment finding without undertaking the notice-and-comment rulemaking requirements specified in CAA § 307(d). However, the lower court's analysis faltered when it determined that Congress clearly "saw climate impacts of air pollution solely as a matter of public welfare." R. 10. This Court should defer to the EPA's prior interpretation and hold valid its reasonable public health endangerment finding because the CAA does not define "public health," and reference to "effects on . . . climate" in the definition of "welfare" plainly does not encompass the indirect public health effects from GHG-induced air pollution. *See* 42 U.S.C. § 7602. Even if this Court agrees with the district court that the definition is unambiguous, it must uphold the Endangerment Finding because Congress's clear directive to the EPA was to protect the public health by preventing dangerous effects of air pollution, including from unrestrained GHG emissions.

Based on the EPA's affirmative Endangerment Finding, and following the Second Circuit's reasoning in *Natural Resources Defense Council v. Train*, 545 F.2d 320 (2nd Cir. 1976), this Court should affirm the lower court's ruling that the EPA has a nondiscretionary duty to list GHGs as a criteria air pollutant. The CAA's statutory scheme instructs that mobile source emissions implicated by the § 202(a) Endangerment Finding can reasonably be extended to apply to § 108(a)(1)(A) and (B)'s mobile or stationary source emissions. When an air pollutant's

emissions, in the Administrator's judgment, cause or contribute to air pollution that is reasonably anticipated to endanger public health or welfare; the air pollutant comes from numerous or diverse mobile or stationary sources; and NAAQS criteria have not yet been issued, then the Administrator must designate that pollutant as a criteria pollutant. 42 U.S.C. § 7608(a)(1)(A)–(C).

In response to this Court's jurisdictional question raised sua sponte, the district court correctly held that CAA § 307(b)(1), directing disputes over rules of national applicability to the D.C. Circuit, is an ordinary venue provision. The CAA's language is not clearly jurisdictional and the context of § 307(b)(1) within the whole of § 307 further lacks the congressional guidance necessary to find a statutory requirement jurisdictional. Additionally, legislative history explicitly demonstrates congressional intent that § 307(b)(1)'s where-to-file provision is a venue rule. Because the EPA failed to object to improper venue under § 307, the district court properly ruled that the EPA unreasonably delayed action on CHAWN's petition under § 304.

Pursuant to the EPA's statutory duty under § 108, the EPA's ten-year delay stretched the "rule of reason" beyond its limits in violation of § 304. Even recognizing the agency's additional activities, the clear balance of the *TRAC* factors favors compelling agency action. In light of the EPA's own assessment of the dangers that GHGs pose to human health and welfare, this Court must compel the EPA to rule-make under § 108 to mitigate climate change's adverse effects.

STANDARDS OF REVIEW

This Court reviews the district court's grant of summary judgment de novo. *McGinnis v. Am. Home Mortg. Servicing, Inc.*, 817 F.3d 1241, 1251 (11th Cir. 2016). A district court's summary judgment order must be upheld if the record discloses "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett,* 477 U.S. 317, 327 (1986).

Administrative actions under the CAA are reviewed under the same standards set forth in the Administrative Procedure Act (APA). 5 U.S.C. § 551 *et seq*.; *Western States Petro. Ass'n v. EPA*, 87 F.3d 280, 283 (9th Cir. 1996). Under the APA, courts must "hold unlawful and set aside" agency action or conclusions "found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "in excess of statutory jurisdiction." 5 U.S.C. § 706(2). Agency action is arbitrary and capricious when the agency relies on factors Congress did not intend it to consider, entirely fails to consider an important aspect of the problem, or offers "an explanation for its decision that runs counter to the evidence before the agency." *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

ARGUMENT

I. The public health and welfare endangerment findings are a valid result of the EPA's reasoned decisionmaking, supported by the vast administrative record, and entitled to *Chevron* deference.

This Court should uphold the Endangerment Finding because Congress expressly delegated authority under CAA § 108(a) to the EPA Administrator and the agency's determination is reasonable in respect to both public health and public welfare given the extensive and highly technical scientific record. Courts afford agency interpretations of statutes "*Chevron* deference." *See United States v. Mead Corp.*, 533 U.S. 218, 227–28 (2001). Under the Supreme Court's two-step analysis in *Chevron*, a reviewing court must first decide whether the statute at issue communicates Congress's clear intent, and if so, it must give effect to the unambiguously expressed intent of Congress. 467 U.S. at 842–44. However, where the statute is silent or ambiguous, Congress has delegated legislative authority to the agency; and when the agency has promulgated a decision through administrative rulemaking procedures, the court should not substitute its judgment for the agency's, as long as the agency's determination is

reasonable. *Id.* Further, the Supreme Court has "long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." *Id*. at 844. The court must give an "extreme degree of deference to the agency when it is evaluating scientific data within its technical expertise," reviewing the agency's action to "ensure that the EPA has examined the relevant data and has articulated an adequate explanation for its action." *Am. Farm Bureau Fed'n v. EPA*, 559 F.3d 512, 519 (D.C. Cir. 2009).

Pursuant to § 108(a), the Administrator must publish and revise a list of air pollutants with emissions that "in his judgment" cause or contribute to dangerous air pollution. 42 U.S.C. § 7408(a). After following the rulemaking procedures outlined in § 307(d), 42 U.S.C. § 7607(d), "compelling" scientific evidence impelled the EPA to conclude that "greenhouse gases in the atmosphere may reasonably be anticipated both to endanger public health and to endanger public welfare." Endangerment Finding at 66497. The question for this Court is whether the Endangerment Finding was rational based on the record before it, not whether it might reach a different conclusion. *Coal. for Resp. Regul., Inc. v. EPA*, 684 F.3d 102, 120 (D.C. Cir. 2012). Thus, because both findings represent the EPA's reasoned decisionmaking, they must be upheld.

A. COGA's challenges to the administrative record should fail because the EPA considered all relevant factors and an extensive scientific record to reasonably conclude GHG-induced air pollution endangers the public health and welfare.

1. Climate science supports the Endangerment Finding even though the scope and causation of harm to public health and welfare may be somewhat attenuated.

The district court rightfully dismissed COGA's challenge to the adequacy of the Endangerment Finding's scientific record, which the D.C. Circuit also upheld in *Coalition for Responsible Regulation*, 684 F.3d at 120. In *Coalition*, the court concluded that a "substantial" administrative record supported the Endangerment Finding, the finding was consistent with the scope and causation approved by the Supreme Court in *Massachusetts*, and it reasonably reflected

the congressional purpose, plain text, and structure of the CAA. *Id.* at 117, 120. The court relied on the Supreme Court's holding in *Massachusetts* ("some residual uncertainty" did not excuse EPA's decision to decline to regulate GHGs), to find that "[c]learly, then, EPA may issue an endangerment finding even while the scientific record still contains at least 'some residual uncertainty.'" *Id.* at 122 (internal citations omitted). The court explicitly rejected a challenge from industry groups that claimed GHGs could not be regulated because they do not "cause elevated ground-level concentrations in ambient air people breathe." *Id.* at 138. Conversely, the court stated, "the purported distinction between greenhouse gases and 'traditional' air pollutants 'finds no support in the text of the statute.'") *Id.* (quoting *Massachusetts*, 549 U.S. at 529 n.26).

Likewise, the court's well-established logic in *Ethyl Corporation v. EPA* is instructive, 541 F.2d 1 (D.C. Cir. 1976) (en banc) (upholding the scope of the EPA's power under the CAA to regulate to protect the health of the public from uncertain and "somewhat attenuated" effects of lead particulate emissions from automobiles):

> [T]o regulate under [§] 202 the Administrator must find that emission of the air pollutant is likely to cause or contribute to dangerous air pollution. [The likely to contribute language] is important, for not all air pollutants contribute to dangerous air pollution and, more importantly, not all dangerous air pollution is caused by air pollutants that are, themselves, dangerous. Thus hydrocarbons, whose emission is regulated by [§] 202, are *not themselves always dangerous*, but are properly regulated because they react in sunlight to form smog, which is dangerous. . . . [§] 202 allows for the regulation of such apparently innocent pollutants, *which indirectly cause dangerous pollution*.

Id. at 16 n.27 (citations omitted) (emphasis added). Critically, as the Supreme Court stated in *Massachusetts*, Congress expressly approved this chain of causation when, in 1977, it amended §§ 202(a)(1) and 108(a) to expand the required endangerment finding from "which endangers" to "which may reasonably be anticipated to endanger" public health or welfare. 549 U.S. at 506 n.7 ("the Clean Air Act 'and common sense . . . demand regulatory action to prevent harm, even if the regulator is less than certain that harm is otherwise inevitable'"); *see, e.g., Upper Blackstone*

Water Pollution Abatement Dist. v. EPA, 690 F.3d 9, 23 (1st Cir. 2012); *see also Miami-Dade Cty. v. EPA*, 529 F.3d 1049, 1063 (11th Cir. 2008).

Finally, the CAA's complex statutory structure compels this Court to uphold the agency's reasonable Endangerment Finding despite some scientific uncertainty because the EPA followed the extensive procedures designed to illicit the agency's fully-informed decision, after thorough public participation. *Silver v. New York Stock Exchange*, 373 U.S. 341, 366 (1963) ("the affording of procedural safeguards, which by their nature serve to illuminate the underlying facts, in itself often operates to prevent erroneous decisions on the merits from occurring"); *see Ethyl Corp.*, 541 F.2d at 66 (Bazelon, C.J., concurring) ("[I]n cases of great technological complexity, the best way for courts to guard against unreasonable or erroneous administrative decisions is . . . to establish a decision-making process that assures a reasoned decision that can be held up to the scrutiny of the scientific community and the public.").

As applied here, while GHGs are not themselves always dangerous, they are properly regulated under the NAAQS program because, like hydrocarbons, elevated levels of GHGs in the atmosphere contribute to smog, atmospheric allergen concentrations, and food and water-borne pathogens, which the EPA found likely to cause premature death and heat-related health dangers, especially among sensitive subpopulations. Endangerment Finding at 66524–25. Further, it is widely accepted that anthropogenic emissions of GHGs increase ambient global temperatures, affecting food production, coastal flooding, infrastructure, and wildlife, among other climate-related welfare effects. *Id*. Much like COGA's hollow challenges here, the argument that GHGs cannot be regulated under the CAA because of uncertain science and an attenuated chain of causation has failed time and time again in front of this nation's highest courts. Instead of allowing itself to be distracted by these irrelevant arguments, this Court should properly defer to

the EPA's lawful endangerment determination because its reasoning is sound and supported by the extensive scientific record developed within the safeguards of the rulemaking process.

2. COGA's absurd policy and impossibility arguments are without merit because neither factor is relevant to an endangerment finding inquiry.

The district court correctly found that COGA's absurdity and impossibility challenges to the Endangerment Finding was without merit under the Supreme Court's decision in *Massachusetts*, which held that "policy judgments" and the EPA's "laundry list of reasons not to regulate" had "nothing to do with" whether GHG emissions threaten public health or welfare. 549 U.S. at 533–34. Following this well-established rule, the D.C. Circuit likewise held that endangerment findings "require a 'scientific judgment' about the potential risks [GHG] emissions pose to public health or welfare—not policy discussions." *Coal. for Resp. Regul.*, 684 F.3d at 117–18 (quoting *Massachusetts*, 549 U.S. at 534); *see also Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 465–66 (2001). After all, the "starting point for interpreting a statute is the language of the statute itself," *Consumer Prod. Safety Comm'n v. GTE Sylvania*, 447 U.S. 102, 108 (1980), and the EPA's inquiry under § 108(a)(1) is only to adjudge whether GHGs "cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7408(a)(1). Endangerment is the Administrator's sole consideration.

Noting express language regarding costs of compliance and technological availability in §§ 202(a), parts (1) and (2), in *Coalition*, the court found that Congress unambiguously specified when factors like the cost of compliance and other policy concerns should weigh into regulatory decisionmaking.[1] 684 F.3d at 118. Moreover, the court held these factors irrelevant to an

[1] CAA § 108(b)(1) specifies that after listing a pollutant, the EPA may consider the cost of installation and operation. 42 U.S.C. § 7408(b)(1). Additionally, § 109(d)(2)(C) requires an independent scientific review committee to "advise the Administrator of any adverse public health, welfare, social, economic, or energy effects which may result from various strategies for attainment and maintenance of such national ambient air quality standards." *Id.* § 7409(d)(2)(C).

endangerment finding, even "if the degree of regulation triggered might at a later stage be characterized as 'absurd.'" *Id.* at 119. As the EPA logically declared in the Endangerment Finding, such policy and absurd result inquiries "muddle the rather straightforward scientific judgment about whether there may be endangerment by throwing the potential impact of responding to the danger into the initial question." Endangerment Finding at 66515.

In sum, COGA's arguments cannot be squared with § 108(a)(1)'s plain language, which asks a narrow question about endangerment.

B. This Court must uphold the public health endangerment finding because the EPA's reasonable interpretation of the term "public health," which Congress did not define in the CAA, includes indirect health effects of climate change.

Though the district court found clear congressional intent regarding impacts to "climate" in the definition of "welfare," it incorrectly dismissed the EPA's lawful public health endangerment finding. Because Congress omitted a public health definition in the CAA, and §302(h)'s definition of "effects on welfare" does not reference indirect health effects, this Court should find that the statute is ambiguous, and as the agency delegated with its administration, the EPA's original interpretation should control. 42 U.S.C. § 7602(h); *see Chevron*, 467 U.S. at 843–44. In the Endangerment Finding, the EPA explained that "to make an endangerment finding based only on either public health or public welfare would be too narrow of a reflection of the breadth and scope of the risks and impacts associated with GHGs and the climate change problem." EPA's Response to Public Comments on the Proposed Endangerment Finding, Vol. 9, 21 (April 24, 2009), https://www.epa.gov/sites/production/files/201805/documents/rtc_volume_9.pdf [EPA Response to Public Comments]. The EPA's approach was a result of its reasonable determination that "[t]he legislative history of the 1970 amendments does not compel a conclusion one way or the other on how indirect health effects are to be considered." *Id.*

Contrary to the district court's interpretation, Congress's decision not to define the term "public health" in the CAA left a gap of discretion for the agency to interpret. By substituting its own construction for the agency's reasonable interpretation, the district court "overstepped the bounds of proper judicial supervision." *Ethyl Corp.*, 541 F.2d at 68 (J. Leventhal concurring). The EPA's well-supported conclusion that GHG emissions are reasonably anticipated to endanger the health of the public is not only reasonable under *Chevron*, but that finding is reinforced by the statute's grand purpose, complex structure, and almost 50 years of CAA precedent.

1. EPA cannot reverse its public health endangerment finding without following the rulemaking requirements specified in CAA § 307(d).

As the district court held below, the agency's decision to not defend the public health endangerment finding is an amendment to a legislative rule, and therefore invalid because the EPA did not follow the CAA's required notice-and-comment procedures to legitimize its reversal. R. 10. Congress gave agencies the power to issue legislative rules with binding legal effects only through use of notice-and-comment procedures. Richard J. Pierce, Jr., *Distinguishing Legislative Rules from Interpretative Rules*, 52 ADMIN. L. REV. 547, 552 (2000). Section 1 of the APA mandates that agencies use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance. *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 101 (2015); *Am. Mining Congress v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1109 (D.C. Cir. 1993) ("An amendment to a legislative rule must itself be legislative."). Moreover, an agency's "convenient litigating position" or "post hoc rationalization[n] advanced to defend past agency action against attack" is not entitled to deference. *Kisor v. Wilkie*, 139 S.Ct. 2400, 2417 (2019).

A straightforward reading of the statutory text makes clear that administrative rulemaking under the CAA requires extensive procedural safeguards that the EPA followed when it promulgated the original Endangerment Finding for GHGs. CAA § 307(d) requires:

> Notice of proposed rulemaking shall be published in the Federal Register . . . accompanied by a statement of its basis and purpose and shall specify the period available for public comment. . . . The statement of basis and purpose shall include a summary of—
>
> (A) the factual data on which the proposed rule is based;
>
> (B) the methodology used in obtaining the data and in analyzing the data; and
>
> (C) the major legal interpretations and policy considerations underlying the proposed rule.

42 U.S.C. § 7607(d)(3). The statement must "set forth or summarize and provide a reference to any pertinent findings, recommendations, and comments by the Scientific Review Committee . . . and the National Academy of Sciences, and . . . if the proposal differs in any important respect from any of these recommendations, an explanation of the reasons for such differences." *Id.* The EPA ignored these safeguards when it changed course with respect to the public health endangerment finding at the onset of this litigation. Thus, the agency's new position is illegitimate as it "wholly failed to provide . . . interested parties . . . opportunity to comment," *Nat. Res. Def. Council v. Wheeler*, 955 F.3d 68, 85 (D.C. Cir. 2020), and it is "entitled to no more deference than the interpretation of any party." *Bregsal v. Brock*, 843 F.2d 1163, 1168 (9th Cir. 1987).

2. The district court misinterpreted the plain text of the CAA when it erroneously determined that Congress saw indirect climate-related health impacts solely as a matter of public welfare.

A textual analysis of § 302(h), and a plain reading of the CAA's sweeping definition of "[a]ll language referring to effects on welfare," forecloses the district court's interpretation that Congress sought to limit climate-related health effects within the concept of welfare. Congress did not define public health, nor did it include any reference to "health" in the "effects on welfare" definition. *See* 42 U.S.C. § 7602. Thus, the EPA's reasonable interpretation of the breath and scope of "public health" to include indirect effects is reasonable given the preventative purpose of the Act and nearly 50 years of CAA precedent that supports an attenuated chain of causation.

The CAA's definition of "effects on welfare" refers to effects including, *but not limited to*, "effects on soils, water, crops, vegetation, man-made materials, animals, wildlife, weather, visibility, and climate, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and well-being." *Id.* § 7602(h). Unlike "welfare," the term "health" is not defined in the CAA. *See generally id*. § 7602; however, in *Whitman*, the Court broadly defined the term "public health" as "the health of the public." 531 U.S. at 466. The EPA has traditionally drawn the line between health and welfare effects by considering the effect that the air pollution has on people: "If the effect on people is to their health, we have considered it an issue of public health. If the effect on people is to their interest in matters other than health, we have considered it public welfare." Endangerment Finding at 66527. When examining effects on public health, the EPA looks to the cumulative effects of factors like "morbidity, such as impairment of lung function, aggravation of respiratory and cardiovascular disease, and other acute and chronic health effects, as well as mortality," *id.* at 66510, accounting for "both [the] likelihood and severity of adverse effects," including potential adverse health effects to vulnerable subpopulations. *Id.* at 66506; *see also* EPA, *NAAQS Table*, available at https://www.epa.gov/criteria-air-pollutants/naaqs-table (Nov. 19, 2020).

Tasked with deciphering constantly evolving scientific knowledge, assessing potential harm, weighing risks, and making projections about the effects of GHGs, the EPA concluded:

> [T]he scientific record on GHGs and associated climate change before the Administrator supports the finding that there is endangerment to both public health (e.g., sickness and death due to heat-related effects, exacerbation of tropospheric ozone, and the increased frequency and severity of extreme weather events) and public welfare (e.g., risks to food production, forestry, water resources and infrastructure).

EPA Response to Public Comments at 21. Further, in rejecting claims from public commenters that indirect health effects are not public health effects under the CAA, the EPA logically

concluded that "[i]f Congress intended indirect health effects to be treated as welfare effects, the definition in § 302(h) could have easily been amended to include this concept." *Id*. at 20. Instead, the welfare definition's list of "overlapping, illustrative terms" like "climate" was likely "intended to enlarge, rather than to confine, the scope of the agency's power to regulate particular sources in order to effectuate the policies of the Act." *Chevron*, 467 U.S. at 862 (CAA § 302(j) "simply does not compel any given interpretation of the term 'source'" and "the meaning of a word must be ascertained in the context of achieving particular objectives.").

Of course, "Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman*, 531 U.S. at 468. However, the district court latched onto the word "climate" in the statute's elaborate "welfare" definition and decided it must also encompass public health effects related to GHG-induced climate change—this is plainly wrong, and would be the equivalent of hiding an elephant in a mousehole. Therefore, because the plain language of the statute is silent as to the definition of public health, the Court must defer to the EPA's reasonable interpretation of the breadth and scope of the term's ordinary meaning to encompass indirect adverse effects to the public health, but are certainly likely to endanger the health of the public, particularly the health of sensitive groups. Moreover, if Congress intended to regulate climate change's indirect health effects in the same manner as environmental and economic effects endangering the public welfare, it would have included that express language in the text of the Act.

3. The CAA's broad mandate and a straightforward application of the canons of statutory construction confirm that Congress intended the EPA to list both direct and indirect harms to public health as criteria pollutants under § 108(a).

To interpret § 108 to exclude regulation of indirect health effects to humans is inconsistent with the CAA's express language, and would ultimately "defeat the purpose of the Act by allowing EPA to shirk its duty to combat air pollution." *Ctr. for Biological Diversity v.*

EPA, 794 F. Supp. 2d 151, 159–60 (D.C. Cir. 2011). Section 108(a) requires the EPA decide whether a particular "air pollutant"—here, GHGs—"may reasonably be anticipated to endanger public health," and whether GHGs emissions from numerous or diverse mobile or statutory sources cause *or contribute to* that endangerment. 42 U.S.C. § 7408(a)(1)(A) (emphasis added); *Coal. for Resp. Regul.*, 684 F.3d at 117. Congress's addition of the phrase "or contributes to" clearly contemplates both the direct and indirect health hazards of air pollution that is reasonably anticipated to endanger public health. However, a court's duty is "to construe statutes, not isolated provisions," *Graham Cty. Soil and Water Conserv. Dist. v. U.S. ex. rel Wilson*, 559 U.S. 280, 290 (2010), and the CAA's overarching preventative goals, its larger framework, and the legal precedent interpreting the CAA also overwhelmingly support this conclusion.

The public health endangerment finding's validity is bolstered by the statute's purpose and legislative history. The CAA charges the EPA with the duty to lead the national effort to protect the public's health and welfare from the negative effects of air pollution "brought about by urbanization, industrial development, and the increas[ed] use of motor vehicles," which "has resulted in mounting dangers." 42 U.S.C. § 7401(a)(2) and (4). The 1970 CAA amendments were considered a "drastic remedy to what was perceived as a serious and otherwise uncheckable problem of air pollution." *Union Elec. Co. v. EPA*, 427 U.S. 246, 256 (1976). Statements from one of the CAA's sponsors, Senator Edmund S. Muskie, clarified that Congress knew the extent of this ambitious, and likely difficult, path ahead:

> This legislation will be a test of our commitment and a test of our faith: in our institutions, in our capacity to find answers to difficult economic and technological problems, and in the ability of American citizens to rise to the challenge of ending the threat of air pollution.

116 CONG. REC. 32,900 (Sept. 21, 1970) (statement of Sen. Muskie), *reprinted in* COMM. ON PUB. WORKS, 1 A LEGIS. HIST. OF THE CLEAN AIR ACT AMENDS. OF 1970, at 223 (1974).

To effectuate this grand vision, Congress embraced the precautionary principle in the CAA, "allowing the EPA to regulate to prevent potentially grave harms, even in the face of uncertainty about the scope and causation of those harms." *Ethyl Corp.*, 541 F.2d at 28; 42 U.S.C. § 7401(c) ("A primary goal of this chapter is to encourage or otherwise promote reasonable . . . governmental actions . . . for pollution prevention."). In 1977, Congress confirmed the *Ethyl* court's characterization of this bold environmental law when it amended §§ 202(a)(1) and 108(a)(1) to "demand regulatory action to prevent harm, even if the regulator is less than certain that harm is otherwise inevitable." *Massachusetts*, 549 U.S. at 506 n.7. Recognizing the broad scope of the problem of air pollution and its multifarious effects, Congress granted the EPA with ample discretion to pinpoint problems and coordinate with states and tribes to determine where, when, and how to effectively regulate air pollution—even when regulations alone could not entirely cure a problem. *See id.* at 526 ("The risk of catastrophic harm, though remote, is nevertheless real. . . . That risk would be reduced to some extent if petitioners received the relief they seek.").

Buttressed by the legislative history to the 1977 CAA amendments, the EPA's Endangerment Finding for GHGs is a manifestation of Congress's will to protect the public health from America's affluent and industrialized lifestyle. Promoting this strong policy, in 1977, Senator Muskie explained, "testimony on the health question over the last seven years over and over again has made the point that there is no such thing as a threshold for health effects." 123 CONG. REC. 18,460 (June 10, 1977) (statement of Sen. Muskie), *reprinted in* COMM. ON PUB. WORKS, 3 A LEGIS. HIST. OF THE CLEAN AIR ACT AMENDS. OF 1977, 1027, 1030 (1978).

Accordingly, Congress's intent to prevent adverse health effects of dangerous air pollution means that Congress intended the CAA to enable the EPA to regulate climate change-

related health harms. As courts "cannot interpret federal statutes to negate their own stated purposes," *King v. Burwell*, 576 U.S. 473, 493 (2015), this Court must give effect to the specific intention of Congress and uphold the EPA's reasonable public health endangerment finding.

4. Courts have long interpreted the CAA to encompass regulations that aim to protect the health of the public from indirect and uncertain effects of air pollution.

In light of the expansive concept of endangerment, which is "composed of reciprocal elements of risk and harm," courts have consistently read the CAA's broad statutory language to include indirect effects on public health. *Ethyl Corp.*, 541 F.2d at 18; *see, e.g., Upper Blackstone*, 690 F.3d at 24; *see also Miami-Dade Cty.*, 529 F.3d at 1063. The D.C. Circuit applied *Ethyl*'s logic to find that lime-manufacturing plants contributed to air pollution, which threatened public health because of the sheer quantity of dust generated by the plants, even though the limestone industry argued the innocuousness or even benign effect of lime emissions. *Nat. Lime Ass'n v. EPA*, 627 F.2d 416, 431 n.48 (D.C. Cir. 1980). Moreover, in *American Lung Association v. EPA*, the court agreed in dicta that physical effects experienced by some asthmatics from exposure to short-term, high-level bursts of sulfur dioxide could be a public health problem, despite localized, infrequent emissions. 134 F.3d 388, 391–93 (D.C. Cir. 1998).

Likewise, in *American Petroleum Institute v. Costle*, the court considered challenges to the EPA's ozone standards, ultimately finding the Administrator had reached a reasoned decision "even given the acknowledged uncertainties" in the supporting studies. 665 F.2d 1176, 1185 (D.C. Cir. 1981). Weighing the scientific uncertainties against the Administrator's obligation to protect public health by an adequate margin of safety, the court held that the EPA "need not regulate only the known dangers to health but may err on the side of overprotection." *Id*. at 1186 (citing *Env't Def. Fund v. EPA*, 598 F.2d 62, 80–81 (D.C. Cir. 1978) ("Despite the problems

associated with estimating the scale of incompletely understood dangers, Congress required EPA to set standards that would protect against them.").

While confirming that the Administrator's conclusions must be supported by the record, and that "he may not engage in *sheer guesswork*," the *Costle* court's analysis described an attenuated chain of causation and anticipated health effects, especially to sensitive populations, similar to the Endangerment Finding at issue here. The court understood that "[a]s with other photochemical oxidants, ozone is not emitted directly into the air, but is produced by complex chemical reactions between organic compounds (precursors) and nitrogen oxides in the presence of sunlight." *Id*. at 1181. Like GHGs, ozone precursors occur naturally, but are "in large measure manmade," contributing to smog. *Id*.; *see generally* Endangerment Finding at 66499. Referencing "some studies," the court found that ozone endangers public health because it "irritates the respiratory system and causes coughing, wheezing, chest tightness, and headaches . . . can aggravate asthma, bronchitis, and emphysema," and may even "reduce resistance to infection and alter blood chemistry or chromosome structure." *Costle*, 665 F.2d at 1181.

Many of these same findings are represented in the EPA's public health endangerment finding, which states that increased GHG concentrations are expected to increase regional ozone pollution, "with associated risks in respiratory illness and premature death." Endangerment Finding at 66525. After "weighing the risks, assessing potential harm, and making reasonable projections," the Administrator concluded there are "serious health risks as a result of climate change." *Id.* at 66505–06. Since the causal connection between manmade GHGs and global warming is well-established, *Massachusetts*, 549 U.S. at 508–10, the GHG chain of causation is no more attenuated than for ozone, sulfur dioxide, or lime particulate.

In conclusion, because the CAA does not define "public health," the statute's ambiguity requires this Court to defer to the EPA's reasonable interpretation that indirect health effects from climate change endanger the health of the public. Furthermore, courts have consistently interpreted the CAA and its precautionary principles to permit regulations that aim to protect the public from indirect and uncertain health effects. Therefore, this Court should reverse the district court's erroneous determination that Congress saw indirect climate-related health impacts solely as a matter of public welfare and uphold the Endangerment Finding in respect to public health.

II. Following the Second Circuit's reasoning in *Train*, the Administrator's affirmative § 202(a) Endangerment Finding triggered the EPA's nondiscretionary duty to list GHGs as a criteria air pollutant subject to the NAAQS program.

Having concluded the validity of the Administrator's determination that GHGs from numerous or diverse stationary or mobile sources are reasonably anticipated to endanger the public welfare, the district court correctly held that the EPA must designate GHGs as a criteria air pollutant under § 108(a)(1)'s straightforward three-part test. The Administrator has a nondiscretionary duty to list an air pollutant if it meets the criteria set forth in § 108(a)(1), parts (A)–(C). The statute requires listing if an air pollutant's emissions, in the Administrator's judgment, cause or contribute to air pollution that is reasonably anticipated to endanger public health or welfare; the air pollutant is the result of numerous or diverse mobile or stationary sources; and the air pollutant is one for which air quality criteria have not yet been issued, and therefore not yet regulated. 42 U.S.C. § 7608(a)(1)(A)–(C). The Second Circuit's longstanding analysis in *Natural Resources Defense Council v. Train*, 545 F.2d at 325 (holding the EPA had a nondiscretionary duty to list a criteria pollutant once the requirements of § 108(a)(1)(A)–(B) are met), remains strong persuasive authority, and like the district court held below, this Court should join the Second and D.C. circuit courts that have faced this issue and follow with *Train*'s sound reasoning. *See, e.g., Zook v. McCarthy*, 52 F. Supp. 3d 69 (D.C. Cir. 2014).

Because the operative language in §108(a)(1) demands the same substantive requirements as a mobile source endangerment finding under § 202(a), the 2009 Endangerment Finding also satisfies the endangerment provision in § 108(a)(1)(A). While the text of § 108(a)(1) expressly includes the emission of any air pollutant under "numerous or diverse mobile or stationary sources," 42 U.S.C. § 7408(a)(1), and § 202(a)(1) only specifies that the air pollutant's emissions must be from "any class or classes of new motor vehicle or new motor vehicle engines," 42 U.S.C. § 7521(a)(1), this difference reflects Title I's purpose to prevent and control air pollution by setting ambient air quality criteria, generally, and Title II, Part A's endeavor to enact emission standards specifically for new motor vehicles. §§ 7401(b), 7521.

A plain reading of these sections within the CAA's larger statutory scheme instructs that mobile source emissions implicated by a § 202(a)(1) endangerment finding can be reasonably extended to apply to § 108(a)(1)(A) and (B)'s mobile or stationary source emissions because correlation and overlap among different CAA provisions circumscribe the EPA's flexibility to regulate sources that implicate one another. Nathan Richardson, *Greenhouse Gas Regulation Under the Clean Air Act*, 29 STAND. EVTL. L.J. 283, 289–91 (2010). After finding that mobile source GHG emissions endanger public health and welfare, the EPA could not reasonably conclude that GHG emissions from both mobile and stationary sources somehow pose no threat. An endangerment finding under § 202 plainly triggers the same finding under § 108.

Further, as the Second Circuit held in *Train*, the additional language in § 108(a)(1)(C) does not create another step before triggering the Administrator's nondiscretionary duty, or alter the mandatory nature of the duty to list. 545 F.2d at 328. Accordingly, the EPA's valid GHG mobile source Endangerment Finding also satisfied the threshold endangerment provision in § 108(a)(1) and clearly triggered the Administrator's nondiscretionary duty to list GHGs.

A. Section 108(a)(1)'s statutory construction, buffered by prior judicial interpretation and legislative history, establishes clear criteria outlining the EPA Administrator's nondiscretionary duty to designate GHGs as a criteria pollutant.

As the Second Circuit and D.C. Circuit have held, the plain language of § 108(a)(1) and clear congressional intent compel this Court to find that the EPA must list an air pollutant once it determines the pollutant is both: (1) likely to endanger public health or welfare, and (2) is emitted from numerous or diverse stationary or mobile sources, as long as the EPA has not already issued air quality criteria for the pollutant. 42 U.S.C. § 7408(a)(1). The statute requires the EPA to affirmatively find endangerment under § 108(a)(1)(A) and determine the emission source satisfies the requirements of part (B) before it triggers a nondiscretionary duty to list. *Zook*, 52 F. Supp. 3d at 74 (declining to find a nondiscretionary duty absent an affirmative endangerment finding for specific pollutants emitted from animal feeding operations); *Env't Def. Fund v. Thomas*, 870 F.2d 892, 899 (2nd Cir. 1989) ("Knowledge . . . of the pollutant's adverse effects does not constitute the endangerment determination necessary to trigger the duty to list.").

Notably, an endangerment provision is a threshold requirement found in multiple CAA provisions. *See* 42 U.S.C. §§ 7408(a)(1) (air quality criteria), 7411(b)(1)(A) (performance standards for new stationary sources), 7521(a)(1) (motor vehicle emission standards), 7545(c)(1) (mobile fuel additives), and 7571(a)(2)(A) (aircraft emission standards). These threshold provisions broadly require the Administrator to affirmatively establish that an air pollutant's emissions "cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare." *See id.* §§ 7408(a)(1), 7411(b)(1)(A), 7521(a)(1), 7545(c)(1), and 7571(a)(2)(A). Endangerment provisions in §§ 108 and 202, specifically, simultaneously act as threshold requirements and regulatory triggers because the mandatory language framing these endangerment provisions compels the EPA to act—if the EPA makes a positive endangerment finding, it has a nondiscretionary duty to regulate. *Zook*, 52 F. Supp. at 74; *see, e.g.*, §§

7408(a)(1) ("the Administrator shall . . . list") and 7521(a)(1) ("[t]he Administrator shall . . . prescribe"); *but cf., e.g.*, 7545(c)(1) ("[t]he Administrator may . . . control or prohibit").

The Second Circuit examined the language of §108(a) in *Train*, a citizen suit to compel the Administrator to list lead as a criteria pollutant. 545 F.2d at 322–23. The Second Circuit rejected the EPA's argument that § 108(a)(1)(C) added a third, completely discretionary step to the Administrator's listing obligation for criteria pollutants, finding instead that the additional language in § 108(a)(1)(C)—"but for which he plans to issue air quality criteria under this section"—does not change the mandatory nature of the duty to list. *Id*. at 328. The Court looked to Congress's plain directive and use of the word "shall" in the statutory text, finding that a nondiscretionary duty served congressional intent to "eliminate, not perpetuate, opportunity for administrative foot dragging." *Id*. A third discretionary step, the court reasoned, "is contrary to the structure of the Act as a whole" and would render the "shall" language in § 108 "mere surplusage" such that it "would vitiate the public policy underlying . . . the Act." *Id.* at 324–25.

Following the Second Circuit's reasoning, the D.C. Circuit affirmed *Train*'s holding 38 years later in *Zook* when it held that the EPA's nondiscretionary duty to list a specific pollutant does not exist unless and until the agency first makes an endangerment finding as to that pollutant. 52 F. Supp. at 74. While the court refused to order the EPA to list pollutants from animal feeding operations, the holding was squarely based on the threshold fact that no affirmative endangerment finding had been made. *Id.* at 75. Lacking an identifiable enforceable obligation that the EPA failed to perform, the court dismissed plaintiffs' claims. *Id*.

Here, first, the Supreme Court settled the question of whether GHGs can be regulated as an air pollutant under the CAA in *Massachusetts*, 549 U.S. at 532. Next, the EPA found that GHG emissions result from numerous and diverse mobile and stationary sources, easily satisfying the

source requirement under § 108(a)(1)(B). Endangerment Finding at 66499 ("transportation sources are responsible for 23 percent of total annual U.S. [GHG] emissions, making this source the second largest in the [U.S.] behind electricity generation"). Further, since the EPA's criteria pollutant list includes only ozone, particulate matter, carbon monoxide, sulfur dioxide, nitrogen dioxide, and lead, GHGs are not listed, satisfying § 108(a)(1)(C). *Criteria Air Pollutants*, *supra* Statement of the Case, §A. Finally, because of the identical operative language between §§ 108(a)(1)(A) and 202(a)(1), the § 202(a) Endangerment Finding establishes the EPA's affirmative determination that GHG emissions cause or contribute to air pollution that may reasonably be anticipated to endanger public health and welfare. Endangerment Finding at 66516.

Therefore, because the EPA lawfully and affirmatively determined that GHGs, which emit from numerous and diverse mobile and stationary sources, are reasonably anticipated to endanger public health and welfare, and those emissions have not yet been regulated as criteria pollutants, then logically, as the district court held, all elements of the § 108(a)(1) endangerment framework have been met, prompting the Administrator's clear nondiscretionary duty to list.

B. The Second Circuit's holding in *Train*, which compelled the EPA to list lead as a criteria pollutant based on a prior endangerment determination, is still good law and applies here.

This Court should follow *Train*'s holding that the EPA has a nondiscretionary duty to list GHGs as a criteria pollutant under § 108(a)(1) because, contrary to the EPA's straw man argument challenging its procedural reliability, *Train* continues to be cited across jurisdictions. *See, e.g., Zook v. McCarthy*, 52 F. Supp. at 74; *Env't Def. Fund*, 870 F.2d at 899–900; *New York v. Thomas*, 613 F. Supp. 1472, 1486 (D.C. Cir. 1985) ("sections employing the word 'shall' in the Clean Air Act signify mandatory duties."); *Nat. Res. Def. Council v. Thomas*, 689 F. Supp. 246, 253 (S.D.N.Y 1988) ("The Second Circuit's decision in . . . *Train* is sound authority for the mandatory nature of § 112(b)(1)(A)'s duty to list."). Although the Second Circuit decided *Train*

eight years before the Supreme Court decided *Chevron*, 467 U.S. 837, nothing in *Chevron* overturns the statutory questions that *Train* fully resolved.

In *Train*, the Second Circuit rejected EPA's claim of total discretion to decline to designate criteria pollutants as inconsistent with the overall structure and goals of the CAA. 545 F.2d at 324–35. In the EPA's Advance Notice of Proposed Rulemaking: Regulating Greenhouse Gas Emissions Under the Clean Air Act, the agency suggested that it might be entitled to *Chevron* deference were it to formally interpret § 108(a)(1) as providing the agency broad discretion whether or not to regulate a dangerous air pollutant. 73 Fed. Reg. 44354, 44477 n.229 (July 30, 2008). Yet, the EPA fails to recognize that *Chevron* does not apply where Congress has expressed its clear intent in the unambiguous text of the statute. *Chevron*, 467 U.S. at 842–43.

Even if this Court were to find the statute's meaning somewhat ambiguous, traditional statutory interpretation requires courts to follow clearly expressed congressional intent. *Id*. The Second Circuit's *Chevron*-like analysis relied on these foundational principles to resolve the ambiguity surrounding § 108(a)(1)(C). *Train*, 545 F.2d at 327 ("While the literal language of [§] 108(a)(1)(C) is somewhat ambiguous, this ambiguity is resolved when this section is placed in the context of the Act as a whole and in its legislative history."). Moreover, the agency's reading of § 108(a), to provide the EPA with unlimited discretion is not "reasonable" or "permissible" under *Chevron*. The EPA cannot say that GHGs do not endanger public health or welfare without offering a "reasonable explanation . . . as to why." *Massachusetts*, 549 U.S. at 533. The EPA's explanation for declining to regulate simply does not "amount to a reasoned justification." *Id*.

Thus, the EPA's baseless attempt to weaken *Train*'s logic falters on both of *Chevron*'s two steps; therefore, this Court should apply *Train*'s reasoning and uphold the lower court's finding of the EPA's nondiscretionary duty to list GHGs as a criteria air pollutant under § 108.

III. The district court had proper jurisdiction over CHAWN's unreasonable delay claim under CAA § 304(a) as CAA § 307(b), which provides that the D.C. Circuit court has exclusive power to review rules of nationwide applicability, is a venue provision.

The district court correctly determined that CAA § 307(b)(1)'s circuit-specific filing requirement ("venue provision") is not a jurisdictional provision but a venue rule, and thus was waived when the EPA failed to object.[2] Fed. R. Civ. P. 12(h)(1); 42 U.S.C. § 7607(b). As a matter the Supreme Court has not yet directly addressed, the circuit courts' analysis is persuasive precedent, and notably, the circuit courts have largely reached a consensus—§ 307(b)(1)'s where-to-file rules are a venue requirement. *Texas Mun. Power Agency v. EPA*, 89 F.3d 858, 866–67 (D.C. Cir. 1996); *New York v. EPA*, 133 F.3d 987, 900 (7th Cir. 1998); *Clean Water Action Council of Ne. Wis. v. EPA*, 765 F.3d 749, 751 (7th Cir. 2014).

To determine whether 307(b)(1)'s venue provision is jurisdictional, the Supreme Court developed a "readily administrable bright line" test. *Sebelius v. Auburn Reg'l. Med. Ctr.,* 568 U.S. 145, 153 (2013). Unless Congress has spoken clearly, courts must construe statutory provisions as non-jurisdictional. *Id*. That being said, Congress does not need to "incant magic words in order to speak clearly." *Id*. Instead, where Congress has not spoken explicitly, courts must determine whether Congress intended a particular requirement to be jurisdictional by analyzing congressional intent "as shown through [a statute's] text, context,[3] and relevant historical treatment." *Utah v. EPA*, 765 F.3d 1257, 1258–59 (10th Cir. 2014).

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[2] CAA § 304 provides "an action to compel agency action referred to in [§] 7607(b) . . . which is unreasonably delayed may only be filed in a United States District Court within the circuit in which such action would be reviewable under [§] 7607(b)." 42 U.S.C. § 7604(a). Section 7607(b) in turn provides that regulations of nationwide applicability are reviewable only by the D.C. Circuit. 42 U.S.C. § 7607(b). As NAAQS determinations apply nationwide, if CAA § 307(b) were jurisdictional, the court would be obligated to dismiss this action.

[3] The interpretation of § 307(b)(1)'s filing deadline has resulted in a circuit split. *Utah v. EPA*, 765 F.3d at 1258 (Tenth Circuit found filing deadline is jurisdictional); *Clean Water Action Council of Ne. Wis. v. EPA*, 765 F.3d at 751 (Seventh Circuit found filing deadline is not jurisdictional). In *Sebelius*, *Amicus* argued that proximity to a jurisdictional provision

A. The text of § 307(b)(1) and congressional use of the term "venue" in the legislative history support a finding that § 307(b)(1) is a venue requirement.

Section 307 is titled "Administrative proceedings and judicial review," and subsection (b), where § 307's venue provision is found, fails to explicitly call into question the court's jurisdiction. Compared with other statutory provisions that are clearly jurisdictional in nature, the titling of § 307, and the lack of specific jurisdictional language, suggests that Congress did not intend for § 307(b)'s venue provision to be jurisdictional. *See, e.g.,* 28 U.S.C. § 1295 (titled "Jurisdiction of the United States Court of Appeals for the Federal Circuit"). Still, although Congress did not "incant magic words," under *Sebelius*, this Court is required to further analyze the context of § 307(b)(1). 568 U.S. at 153.

The language of CAA § 307(b)(1) identifies two avenues for judicial review of a petition. "The [CAA] provides that petitions to review actions by the EPA that are 'nationally applicable' shall be filed in the D.C. Circuit and actions that are 'locally or regionally applicable' in the regional circuits." *New York v. EPA*, 133 F.3d at 990. This Court must decide whether this delegation gives rise to a jurisdictional requirement, and if not, whether there can be a waiver of these requirements. Congress—had it intended to—could have "incant[ed] magic words" or otherwise made clear its intent for § 307(b)(1) to be jurisdictional. *Sebelius*, 568 U.S. at 153. Congress did just that when it enacted 28 U.S.C. § 1295(a)(3), which provides that "[t]he United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction of an appeal from a final decision of the United States Court of Federal Claims." However, Congress used no such language here to evince a clear intent that § 307(b)(1) be jurisdictional, and as such § 307(b)(1) is a venue provision.

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demonstrates congressional intent that other provisions are also jurisdictional; however, the Court held a "requirement . . . does not become jurisdictional simply because it is placed in a section of a statute that also contains jurisdictional provisions." 568 U.S. at 155.

The legislative history of the CAA further demonstrates that Congress did not clearly intend for § 307(b)(1)'s venue provision to be jurisdictional. *Texas Mun.*, 89 F.3d at 867 (Section 307(b)(1) is a venue provision based on "its unequivocal characterization in the legislative history as a venue provision."). When Congress amended the CAA in 1977, the House Interstate and Foreign Commerce Committee sought clarification as to § 307, indicating it "intended to clarify some questions relating to *venue* for review of rules or orders under the act." H.R. Rep. NO. 95–294, at 318, 322 (1977) (emphasis added). In particular, when discussing the EPA Administrator's power to transfer disputes of national implication to the D.C. Circuit, the Committee declared that "exclusive *venue* for review is in the U.S. Court of Appeals for the District of Columbia." *Id.* at 324 (emphasis added). The Committee further remarked that it was "in large measure approving the portion of the Administrative Conference of the United States recommendation section 305.76-4(a), that deals with *venue*." *Id.* (emphasis added).

In short, Congress's use of the term "venue" in § 307(b)(1) and its use of unambiguous language during its debate on the 1977 amendments suggests it intended § 307(b)(1)'s venue provision to be just that, a provision specifying proper venue.

B. The context of § 307(b)(1) within the overall preventative goals and structure of the CAA demonstrate that § 307(b)(1)'s venue rules are not jurisdictional.

Section 307(b)(1)'s venue provision, viewed in the context of § 307 in its entirety, further demonstrates Congress's intent that § 307(b)(1)'s venue provision should be "read as prescribing the choice among circuits and not the power of a particular federal circuit court to hear a claim." *Texas Mun*., 89 F.3d at 867. Specifically, the EPA's power to direct, and redirect, certain petitions to the D.C. Circuit demonstrates that Congress did not intend for § 307(b)(1)'s venue provision to be jurisdictional. Section 307(b)(1) provides in pertinent part that:

> Notwithstanding the preceding sentence [directing locally or regionally applicable petitions to the appropriate circuit court,] a petition for review of any action referred to in such sentence may be filed only in the United States Court of Appeals for the District of Columbia if such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination.

42 U.S.C. § 7607(b)(1).

Viewed in the context of the whole of § 307, and considering the fact that "only Congress may determine a lower federal court's subject-matter jurisdiction," if Congress meant for § 307(b)(1) to be jurisdictional, the EPA's ability to choose where to litigate certain disputes under the above provision would be inconsistent with the CAA. U.S. Const., art. III, § 1; *see Kontrick v. Ryan*, 540 U.S. 443 (2004). Since Congress clearly intended the EPA have a say as to where certain cases should be filed, and Congress alone may determine a court's subject matter jurisdiction, § 307(b)(1)'s venue provision is not jurisdictional and thus subject to waiver. *Texas Mun.*, 89 F.3d at 867 ("Since parties may normally consent to be sued in a court that would otherwise be an improper venue, EPA's failure to object waives the issue").

Moreover, the Supreme Court's historical treatment of venue rules strengthens the district court's conclusion that § 307(b)(1)'s venue provision is not jurisdictional. "When a long line of this Court's decisions left undisturbed by Congress has treated a similar requirement as jurisdictional, we will presume that Congress intended to follow that course." *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 436 (2011) (internal citations and quotations omitted). "[I]t is not usurpative for one federal court of appeals to assert jurisdiction (because of absence of objection) over a case that it would have been authorized to adjudicate if only the effects of the order sought to be reviewed had been felt in one part of the country rather than another." *New York v. EPA*, 133 F.3d at 990. Accordingly, 307(b)(1)'s venue provision is non-jurisdictional and can be waived.

IV. The balance of the *TRAC* factors show that the EPA unreasonably delayed action to fulfill its nondiscretionary duty to list GHGs as a criteria pollutant under § 108.

The EPA's ten-year delay in listing GHGs under § 108 is unreasonable because the agency's lackluster excuses and competing policy-driven priorities fail to overcome the clear threat that GHGs pose to public health and welfare. In 1990, Congress amended CAA § 304, authorizing district courts to "compel agency action which is unreasonably delayed." 42 U.S.C. § 7604(a); Pub. L. No. 101-549, 104 Stat. 2574, 26883. In line with unreasonable delay claims under the APA, CAA § 304 indicates a "congressional view that agencies should act within reasonable time frames" and that courts "play an important role in compelling agency action that has been improperly withheld or unreasonably delayed." *Telecomms. Rsch. and Action Ctr. v. Fed. Commc'ns Comm'n* ("*TRAC*"), 750 F.2d 70, 77 (D.C. Cir. 1984).

The first stage of judicial inquiry into an unreasonable delay claim requires consideration of whether the agency's delay is so egregious as to warrant a writ of mandamus. *TRAC*, 750 F.2d at 79; *In re Nat. Res. Def. Council* ("*NRDC*"), 956 F.3d 1134, 1138 (9th Cir. 2020) (A writ of mandamus is an "extraordinary remedy justified only in exceptional circumstances."). In determining if agency delay has been sufficiently egregious to warrant mandamus, courts consider the following six *TRAC* factors:

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

TRAC, 750 F.2d at 79–80 (citations and internal quotation marks omitted).

Applying the above factors to the EPA's ten-year delay to take any action in response to CHAWN's petition to list GHGs as a criteria pollutant pursuant to § 108, the factors weighs heavily in favor of mandamus. While there is no evidence of impropriety[4] on the part of the EPA, and the EPA lacks a statutory timetable for rule making, the question of GHG regulation is among the greatest environmental issues of this generation, and further delay may make the issue of climate change irremediable. The agency's delay violates the rule of reason, as complex policy issues and competing economic priorities among other EPA activities do not outweigh the agency's statutory mandate to protect human health and welfare nor justify the EPA's ten-year delay. In light of the EPA's complete lack of inaction over the past decade and the existential threat of unregulated GHG emissions to public health and welfare, no other agency action is of a higher, competing priority than EPA's efforts to control emissions that contribute to climate change. Thus, the EPA's delay defies the rule of reason and is de facto unreasonable.

A. The EPA's ten-year delay in regulating GHGs under § 108 of the CAA is egregious because the agency's complete inaction violates the "rule of reason."

The district court properly rejected the EPA's arguments that complex policy and scientific hurdles justify its ten-year delay in taking any action toward regulating GHGs. R. 12. In determining whether agency inaction has defied the rule of reason and thus egregious enough to warrant a writ of mandamus, "[t]here is no per se rule as to how long is too long to wait for agency action." *In re Core Commc'ns*, 531 F.3d 849, 855 (D.C. Cir. 2008) (quoting *In re Am. Rivers & Idaho Rivers United* ("*Am. Rivers*"), 372 F.3d 413, 419 (D.C. Cir. 2004)). The six *TRAC* factors provide meaningful and uniform guidance in assessing the highly fact-specific inquiry of whether an agency has acted reasonably. *TRAC*, 750 F.2d at 79–80. The first factor—

[4] The sixth *TRAC* factor merits little discussion as "the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed," *TRAC*, 750 F.2d at 79–80. CHAWN makes no allegations of impropriety on the part of the EPA.

the rule of reason—is most important for determining agency action unreasonably delayed. *In re Cmty. Voice*, 878 F.3d 779, 786 (9th Cir. 2017) (citing *Core Commc'ns*, 531 F.3d at 855).

Applying the *TRAC* factors to compel agency action, the D.C. Circuit and the Ninth Circuit have uniformly concluded that "a reasonable time for agency action is typically counted in weeks or months, not years." *Am. Rivers*, 372 F.3d at 419, 782 (holding that a "six-year-plus delay is nothing less than egregious"); *see also Core Commc'ns*, 531 F.3d at 857 (six-year delay unreasonable). Moreover, the Ninth Circuit has unanimously held that the rule of reason "tipped sharply in favor of [petitioners]" where, after eight years, the EPA did not issue a final response to an administrative petition. *In re Pesticide Action Network N. Am.,* 798 F.3d 809, 814 (9th Cir. 2015) (internal quotations omitted); *see also Cmty. Voice,* 878 F.3d at 787 (The "EPA fails to identify a single case where a court has upheld an eight-year delay as reasonable.").

While multi-year delays are not per se unreasonable, courts consider whether the agency has taken some steps to rule-make, including holding public meetings, accepting comments, or issuing reports on the issue. *See Sierra Club v. Thomas*, 828 F.2d 783 (D.C. Cir. 1987) (overruled on other grounds) (three-year delay in determining whether to regulate strip mining was reasonable, noting that "absent a precise statutory timetable or other factors counseling expeditious action, an agency's control over the timetable of a rulemaking procedure is entitled to considerable deference"); *contra Cmty. Voice*, 878 F.3d at 783. ("[We] found egregious delay even though the "EPA appears to have done some work.").

Here, the district court correctly held that the EPA acted egregiously by failing to list GHGs under § 108 in response to CHAWN's ten-year-old petition for rulemaking, which was filed shortly before the EPA promulgated its Endangerment Finding. The EPA's complete

inaction to address GHGs under § 108(a)(1) defies the rule of reason; thus, its nondiscretionary action is unreasonably delayed.

B. The last five TRAC factors weigh heavily in favor of mandamus because interests prejudiced by delay, like indisputable high stakes to human health, are significant.

In addition to the rule of reason, the third and fifth *TRAC* factors—the interests prejudiced by delay and whether human health and welfare are at stake—overwhelmingly support mandamus because the EPA's deregulatory priorities under Executive Order 13771 are an inadequate excuse for avoiding its congressional mandate to protect human health and welfare.[5] 82 C.F.R. § 9339 (2017). "When an agency is charged with the administration of a statutory scheme whose paramount concern is protection of the public health, the pace of agency decision making must account for this statutory concern." *Pub. Health Citizen Rsch. Grp. v. Food & Drug Admin.* ("*PHCRG*") 740 F.2d 21, 34 (D.C. Cir. 1984) Importantly, the reasonableness of any delay "must be judged in the context of the statute which authorizes the agency's action." *PCHRG v. Auchter*, 702 F.2d 1150, 1158 n. 30 (D.C. Cir. 1983) (internal quotations omitted).

In *NRDC*, the Ninth Circuit rejected the EPA's argument that because the EPA "regulates almost entirely in the realm of human health and welfare, any acceleration of action on NRDC's petition would delay other agency actions of a higher or competing priority that also have impacts on human health." 956 F.3d at 1141. Instead, the court focused on the considerable length of the EPA's delay, the absence of a reasonable timetable, and the potential harm to human health when it compelled the EPA to rule-make. *Id.*; *see also Pesticide Action Network,* 798 F.3d at 814 ("In view of the EPA's own assessment of the dangers to human health posed by GHGs the EPA offers 'no acceptable justification for the considerable human health interests prejudiced by the delay.'").

[5] Executive Order 13771 required agencies to repeal two existing rules for each new rule promulgated while ensuring the implementation cost for each new regulation is less than or equal to zero dollars. 82 C.F.R. § 9339 (2017).

Though § 108(a) provides no statutory deadline requiring the EPA to designate new criteria pollutants within a specific timetable, 42 U.S.C. § 7408(a)(1) ("the Administrator . . . shall from time to time . . . revise, a list"), the lack of a statutory timetable does not excuse an agency's delay, and the absence of a "date certain" does not mean that Congress has not spoken as to the priority for addressing this issue. As illustrated in this brief's § I(B)(3) *supra*, the CAA embraces the precautionary principle, "demand[ing] regulatory action to prevent harm," even in the face of uncertainty. *Massachusetts*, 549 U.S. at 506. Thus, because the EPA unequivocally determined that GHGs pose a serious risk to human health and welfare, the EPA's swift action is essential to address climate change.

The EPA's ten-year delay in listing GHGs under § 108(a) "has stretched the 'rule of reason' beyond its limits." *Pesticide Action Network*, 798 F.3d at 814. "Even assuming that [the] EPA has numerous competing priorities under the fourth factor, and has acted in good faith under the sixth factor, the clear balance of the TRAC factors favors issuance of the writ." *Cmty. Voice*, 878 F.3d at 787. The EPA should therefore be compelled to rule-make under CAA § 304 to address the very real, and world-altering threat that is climate change.

CONCLUSION

The stakes to human health and welfare are indisputable and the EPA should be able to drag its feet no further. This Court should affirm the district court's jurisdiction over CHAWN's unreasonable delay claim under § 304(a); affirm the district court's holdings on the second, fourth, and fifth issues; and reverse and remand on the third issue. CHAWN seeks a court order to compel the EPA to publish notice of a proposed rule designating GHGs as a criteria pollutant within 90 days of entry of its order, and to publish a final rule designating GHGs as a criteria pollutant within 180 days following publication of the notice of proposed rulemaking.