Team #39

THIRTY-FIRST ANNUAL
JEFFREY G. MILLER PACE
NATIONAL ENVIRONMENTAL LAW
MOOT COURT COMPETITION

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

CLIMATE HEALTH AND WELFARE NOW,
Plaintiff-Appellee-Cross Appellant,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Defendant-Appellant,

-and-

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

Appeal from the United States District Court for New Union in
No. 66-CV-2019, Judge Romulus N. Remus.

Brief of Appellee, Climate Health and Welfare Now

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES:

FEDERAL RULES OF APPELLATE PROCEDURE:

FEDRAL RULES OF CIVIL PROCEDURE:

OTHER:

STATEMENT OF JURISDICTION

Appellee hereby files its brief in accordance with Federal Rule of Appellate Procedure 28. This case involves an appeal following the issuance of the Order of the United States District Court for the District of New Union, granting Climate Health and Welfare Now's motion for summary judgment and granting Coal, Oil, and Gas Association's (hereinafter "COGA") motion for summary judgment in part. R. at 1. The district court had proper subject matter jurisdiction to hear the case under the Clean Air Act (hereinafter "CAA") section 304, 42 U.S.C. § 7604. The United States Court of Appeals for the Twelfth Circuit has proper jurisdiction to hear appeals from any final decision of the United States District Court for the District of New Union. 28 U.S.C § 1291 (2018).

STATEMENT OF ISSUES

I. Did the District Court have jurisdiction over CHAWN's unreasonable delay claim under CAA § 304(a) where the rule sought would be a rule of nationwide applicability subject to review exclusively in the DC Circuit under CAA § 307(b)?

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

III. Did EPA's failure to either deny or affirm the plaintiffs petition to list greenhouse gases (hereinafter GHGs) as criteria pollutants constitute and unreasonable delay?

IV. Does the EPA have a nondiscretionary duty to list GHGs as criteria pollutants under section 108 of the Clean Air Act due to the 2009 Endangerment Finding?

STATEMENT OF CASE

I. Factual Background

Appellee Climate Health and Welfare Now (hereinafter referred to as "CHAWN") is an environmental organization that, among others, filed a petition with the United States Environmental Protection Agency (hereinafter referred to as "EPA") on December 2, 2009, shortly after EPA's issuance of a finding of endangerment regarding greenhouse gases ("GHG"). R. at 5.

In 1999, several environmental groups petitioned EPA to make a finding that GHG emissions from automobiles posed a danger to human health and the environment under section 202 of the CAA, 42 U.S.C. §7521 (the 202 Petition). R. at 6. Such a finding under section 202 would trigger EPA regulation of GHG emissions from mobile sources, primarily automobiles. R. at 6. Although the finding of endangerment under section 202 is the same as for listing criteria pollutants under section 108, the 202 Petition did not seek regulation under the National Ambient Air Quality Standards ("NAAQS") program of Title I. R. at 6. EPA denied the petition on September 8, 2003, explaining that, in its view, as a matter of statutory interpretation, the ubiquitous emissions of GHGs did not fit the concept of "air pollutants" subject to CAA regulation. R. at 6. It explained that as a policy matter, regulation addressing global climate change should be conducted pursuant to more specific authorizing legislation and international agreements yet to be adopted, rather than the catch-all air pollution provisions of the 1970 CAA. 68 Fed. Reg. 52,922 (Sept. 8, 2003). R. at 6. Following the Supreme Court's clarification that GHGs are an "air pollutant" to be regulated by the Clean Air Act ("CAA") in *Massachusetts v. EPA*, 549 U.S. 497 (2007), the EPA promulgated a series of greenhouse gas-related rules. R. at 7. In 2009, the EPA promulgated a rule, *Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act* (hereinafter 2009 Endangerment Finding), which found that the emissions of greenhouse gases endanger public health and welfare. 74 Fed. Reg. 66,496 (Dec. 15, 2009). R. at 6. The rule defined as a single "air pollutant" an "aggregate group of six long-lived and directly-emitted greenhouse gases" that are "well mixed" together in the atmosphere and cause global climate change: carbon dioxide, methane, nitrous oxide, hydroflourocarbons, perflourocarbons, and sulfur hexafluoride. *Id.* at 66,536-37. A considerable amount of scientific evidence was analyzed before the EPA was to conclude that emission of

GHGs "contribute to the total greenhouse gas air pollution, and thus to the climate change problem, which is reasonably anticipated to endanger public health and welfare." 74 Fed. Reg. 66,496, 66,499 (Dec. 15, 2009).

Despite the passage of ten years, the EPA has yet to act on the December 2009 petition. R. at 5. On April 1, 2019, Appellee properly served notice of its intention to sue EPA for failure to carry out its asserted mandatory duty to regulate GHGs as criteria pollutants and for unreasonable delay in carrying out its non-discretionary duty to designate GHGs as a criteria pollutant as demanded in the December 15, 2019 petition for rulemaking. R. at 5. EPA also took no action in response to Appellee's notice. R. at 5. On October 15, 2019, Appellee commenced the lawsuit in the United States District Court for the District of New Union, invoking the citizen suit provision of CAA 304(a)(2), 42 U.S.C. 7604(a)(2). R. at 5. Appellee submitted affidavits identifying specific members who have been harmed by the effects of sea level rise and global warming, including owners of real property who have been required to vacate land in coastal areas subject to storm surge flooding, and young adults whose future lives are endangered by the prospect of climate change. R. at 5. The court was satisfied that Appellee sufficiently established Article III standing to commence the lawsuit. Appellee was further held to have satisfied the notice requirements of 42 U.S.C. 7604(b). R. at 6.

II. Procedural History

CHAWN filed a civil suit under section 304 of the Clean Air Act to compel the Administrator of the EPA to list GHGs under as a criteria pollutant according to section 108(a) of the Clean Air Act. R. at 4. Following CHAWN's action, COGA filed a motion to intervene, which the District Court granted on November 30, 2019. R. at 5. COGA and EPA both answered the complaint, and COGA asserted a cross-claim against EPA, seeking a declaration that the 2009

Endangerment Finding is contrary to law. R. at 5. CHAWN submitted multiple affidavits of harm to specific members of their organization by GHGs to provide for standings, and COGA asserts that regulatory limits would severely limit, or completely destroy the market for its products. R. at 5.

Parties cross moved for summary judgment and on August 15, 2020, Judge Remus issued an Order and Decision granting Appellee's motion for summary judgement in part and granting Intervenor's motion in part. R. at. 4. The judgement declared that 1) the Endangerment Finding is valid with respect to an endangerment to public welfare, 2) EPA unreasonably delayed action on responding to Appellee's petition for designation of GHGs as a criteria pollutant, and unreasonably delayed designating GHGs as a criteria pollutant, and 3) that EPA has a non-discretionary duty to designate GHGs as a criteria pollutant. R. at 13. Appellee, Appellant, and Intervenor filed a timely Notice of Appeal, granted by this Court. R. at 2.

SUMMARY OF ARGUMENT

Appellee CHAWN is entitled to bring a claim against EPA under CAA § 304(a) in the District Court to "compel action which is unreasonably delayed." 42 U.S.C. § 7604(a), added by Clean Air Act Amendments of 1990 § 707(f), Pub. L. No. 101-549, 104 Stat. 2745, 26883. Thus, Appellee CHAWN is entitled to bring an action in the District Court to compel EPA's unreasonably delayed action. Further, CAA § 304 provision that "an action to compel agency action referred to in section 7607(d) of this title which is unreasonably delayed may only be filed in a U.S. District Court within the Circuit in which such action would be reviewable" has been held to be a venue requirement. No party in this case has objected to venue in this Court.

The District Court erred in its determination that the 2009 Endangerment finding is invalid with respect to an endangerment to public health because scientific evidence relied on in the

finding has shown health harms resulting from breathing air with ambient concentrations of carbon dioxide. This Court previously held that based on the statutory provisions and the legislative history of the CAA, Congress directed the Administrator to err on the side of caution in making necessary decisions. *Lead Indus. Ass'n, Inc. v. Envtl. Prot. Agency*, 647 F.2d 1130, 1155 (D.C. Cir. 1980). All that is required by the statutory scheme is evidence in the record which substantiates his conclusions about the health effects on which the standards were based. ***Id.*** Congress intended for the Administrator to err on the side of caution with regard to public health, thus EPA and the Court must give effect to the unambiguously expressed intent of Congress. The Endangerment Finding is comprised of various assessment reports and scientific consensus by a multitude of experts. Based on these expert evaluations, EPA determined the assessments represented the best source material to use in deciding whether greenhouse gas emissions may be reasonably anticipated to endanger public health or welfare. 2009 Endangerment Finding, 74 Fed. Reg. 66,510–11.

Alternatively, even if GHGs are only an endangerment to public welfare, EPA has failed to act "as expeditiously as practicable" to regulate them. Under 7402(a)(2)(B), a secondary national ambient air quality standard shall be the date by which attainment can be achieved as expeditiously as practicable after the date such area was designated nonattainment. The Supreme Court in *Massachusetts v. EPA* established that because the CAA requires EPA to establish motor-vehicle emission standards for any air pollutant which may reasonably be anticipated to endanger public health or welfare, the Court held that EPA had a "statutory obligation" to regulate harmful greenhouse gases. 549 U.S. 497 (2007). As a result, EPA breached its statutory obligation by completely ignoring Appellee's petition and failing to act to regulate GHGs.

The EPA has unreasonably delayed granting or denying the petition filed by CHAWN and other environmental groups after the promulgation of the 2009 Endangerment Finding. Agencies have some discretion when answering petitions but delays of this magnitude of time are unreasonable. The EPA additionally has a nondiscretionary duty to list GHGs as criteria pollutants due to the 2009 Endangerment Finding. The 2009 Endangerment Finding has created a nondiscretionary duty to list GHGs as a criteria pollutant as it has helped the EPA to meet the requirements of section 108(a)(1)(A) and (B).

Appellee respectfully requests that the Twelfth Circuit Court of Appeals reverse the district court's decision that EPA's finding of endangerment to public health is invalid, reverse the lower court's decision that the Administrator and EPA do not have a discretionary duty to designate GHGs as a criteria pollutant. Further, the Appellee respectfully requests that this Court uphold the findings that the Administrator and EPA have unreasonably delayed responding to CHAWN's petition, and have unreasonably delayed designating GHGs as a criteria pollutant.

STANDARD OF REVIEW

This case concerns the district court's grant of summary judgment, which is a question of law. An appellate court reviews the grant of summary judgment de novo, applying the same legal standard as a district court. *E.g., Pierce v. Underwood*, 487 U.S. 552, 557-58 (1988). The standard for review of the district court's grant of summary judgment is clear: in reviewing the propriety of a summary judgment, the Court will determine whether there was any issue of fact pertinent to the ruling and, if not, whether the substantive law was correctly applied. Thus, to be upheld, the summary judgment under review must withstand scrutiny on both its factual and legal foundations. *Am. Postal Workers Union v. United States Postal Serv.*, 707 F.2d 548, 553 (D.C. Cir. 1983). An appellate court may uphold a district court's grant of summary judgment if, viewing the evidence

in the light most favorable to the moving party, it finds no genuine issues of material fact and, absent such issues, the appellate court determines that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *James Madison Ltd. by Hecht v. Ludwig*, 82 F.3d 1085, 1096 (D.C. Cir. 1996) (internal citations omitted).

ARGUMENT

I. The District Court properly exercised jurisdiction over CHAWN's unreasonable delay claim under the Clean Air Act § 304(a).

This Court raises *sua sponte* the issue of whether the District Court had jurisdiction to hear CHAWN's unreasonable delay claim. Under CAA § 304(a), 42 U.S.C. § 7604, the District Court clearly has jurisdiction over CHAWN's claim. CAA § 304 provides, in relevant part, that any person may commence a civil action on his own behalf against the Administrator where there is an alleged failure of the Administrator to perform any act or duty under this Act which is not discretionary with the Administrator. ***Id.*** Further, the district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an emission standard or limitation, or such an order, or to order the Administrator to perform such act or duty. *Id.* at § 7604(a). In 1990, Congress amended 304 to authorize District Courts to "compel action which is unreasonably delayed." 42 U.S.C. § 7604(a), added by Clean Air Act Amendments of 1990 § 707(f), Pub. L. No. 101-549, 104 Stat. 2745, 26883. Thus, Appellee CHAWN is entitled to bring an action in the District Court to compel EPA's unreasonably delayed action.

CAA § 304 further provides that "an action to compel agency action referred to in section 7607(d) of this title which is unreasonably delayed may only be filed in a U.S. District Court within the Circuit in which such action would be reviewable under section 7607(b) of this title. 42 U.S.C. § 7607(b) provides that regulations of a nationwide application must be reviewed in the Court of Appeals for the District of Columbia Circuit. This Court previously held that this is a venue

requirement, not a jurisdictional requirement, and is therefore waived if not asserted by the defendant. *Tex. Mun. Power Agency v. EPA*, 89 F.3d 858, 862 (D.C. Cir. 1996). EPA did not object to venue in this Court, thus any objection to venue has been waived.

II. The District Court erred in its determination that the 2009 Endangerment finding is invalid with respect to an endangerment to public health. However, even if GHGs are only an endangerment to public welfare, EPA has not acted "as expeditiously as practicable" to regulate them.

Under CAA § 202(a), EPA is required to make two separate determinations: 1) whether air pollution can reasonably be anticipated to endanger public health or welfare, and 2) whether emissions of any air pollutant from new motor vehicles or engines cause or contribute to this air pollution. 42 U.S.C. § 7521. In *Massachusetts v. EPA*, the Supreme Court held that EPA's grounds for deciding whether greenhouse gas emissions from motor vehicles should be regulated must relate to whether an air pollutant causes or contributes to air pollution that can reasonably be anticipated to endanger public health or welfare. 549 U.S. at 532-33.

Further, the Court ruled that, under the clear terms of the Clean Air Act, EPA can avoid taking further action **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. *Massachusetts,* 549 U.S. at 533. These questions require a "scientific judgment" about the potential risks greenhouse gas emissions pose to public health or welfare—not policy discussions. *Id*. at 534. "Endanger" is not a standard prone to factual proof alone; danger is a risk, and so must be decided by assessment of risks as well as by proof of facts. *Ethyl Corp. v. EPA*, 541 F.2d 1, 24 (D.C. Cir. 1976). It is not the United States Court of Appeals for the District of Columbia Circuit's job to referee battles among experts; the court's is only to evaluate the rationality of the agency's decision. *Mississippi v. E.P.A.*, 744 F.3d 1334, 1348 (D.C. Cir. 2013).

Questions of statutory interpretation are governed by the Chevron two-step analysis: First, if the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). However, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. EPA's original interpretation, reflected in the Endangerment Finding can be analyzed via the above standard, as the Endangerment Finding was subject to notice and comment rulemaking.

In its 2009 Endangerment Finding, the EPA determined that "greenhouse gases in the atmosphere may reasonably be anticipated both to endanger public health and public welfare. 2009 Endangerment Finding, 74 Fed. Reg. 66,497. The administrator shall within 30 days after the date of enactment of the Clean Air Amendments of 1970 publish, and shall from time to time thereafter revise, a list which includes each air pollutant—emissions of 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 (2018). EPA noted that scientific evidence clearly indicates that atmospheric levels of the six greenhouse gases are at unprecedented elevated levels due to human activities. 2009 Endangerment Finding, 74 Fed. Reg. 66,496. The Administrator determined that the body of scientific evidence compellingly supports this finding. *Id.* The Endangerment Finding relied on major assessments by the U.S. Global Climate Research Program ("USGCRP"), the Intergovernmental Panel on Climate Change ("IPCC"), and the National Research Council ("NRC") to serve as the primary scientific basis supporting the Administrator's endangerment finding. *Id.*

The Administrator reached this determination by considering both observed and projected effects of greenhouse gases in the atmosphere, their effect on climate, and the public health and welfare risks and impacts associated with such climate change. *Id.* The Administrator's assessment focused on public health and public welfare impacts within the United States. *Id.* She also examined the evidence with respect to impacts in other world regions, and she concluded that these impacts strengthen the case for endangerment to public health and welfare because impacts in other world regions can in turn adversely affect the United States. *Id.*

It is clear in the 2009 Endangerment Finding that GHGs are an endangerment to public health as it enumerates health impacts resulting from breathing air with ambient concentrations of GHGs. The Endangerment Finding emphasizes that the primary greenhouse gases of concern that are directly emitted by human activities include carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride. 2009 Endangerment Finding, 74 Fed. Reg. 66,496. With regard to health impacts, the Endangerment Finding declares that elevated carbon dioxide concentrations and climate changes can lead to changes in aeroallergens that could increase the potential for allergenic illnesses. *Id.* Additionally, evidence on pathogen borne disease vectors provides directional support for an endangerment finding. *Id.* Although the Finding does not place primary weight on these factors, it does place weight places on the fact that certain groups, including children, the elderly, and the poor, are most vulnerable to climate-related health effects. *Id.* This Court previously held that based on the statutory provisions and the legislative history of the CAA, Congress directed the Administrator to err on the side of caution in making the necessary decisions. *Lead Indus. Ass'n, Inc. v. Envtl. Prot. Agency*, 647 F.2d 1130, 1155 (D.C. Cir. 1980). The Court should refrain from putting a gloss on Congress' scheme by requiring the Administrator to show that there is a medical consensus that the effects on which the standards

were based are "clearly harmful to health." *Id.* All that is required by the statutory scheme is evidence in the record which substantiates his conclusions about the health effects on which the standards were based. *Id.* As established in *Chevron*, here, Congress intended for the Administrator to err on the side of caution with regard to public health, thus EPA and the Court must give effect to the unambiguously expressed intent of Congress. The Endangerment Finding is comprised of various assessment reports and scientific consensus by a multitude of experts. Based on these expert evaluations, EPA determined the assessments represented the best source material to use in deciding whether greenhouse gas emissions may be reasonably anticipated to endanger public health or welfare. 2009 Endangerment Finding, 74 Fed. Reg. 66,510–11. It then reviewed those reports along with comments relevant to the scientific considerations involved to determine whether the evidence warranted an endangerment finding for greenhouse gases as it was required to do under the Supreme Court's mandate in *Massachusetts v. EPA.* Therefore, scientific judgement supports the finding of endangerment to public health.

Moreover, Courts have previously elected not to overturn the precedent created in the 2019 Endangerment Finding. The D.C. Circuit Court rejected a challenge to the 2009 Endangerment Finding in 2010 in *Coalition for Responsible Regulation v. EPA.* 684 F.3d 102 (D.C. Cir. 2012). This Court should not lightly disturb a precedent holding as a matter of nationally established regulatory policy. *See* 42 U.S.C. § 7607(b).

Should the Court find that GHGs are not an endangerment to the public health as per 42 U.S.C. § 7408, GHGs remain a threat to public welfare and are therefore subject to regulation. According to 42 U.S.C. § 7521, EPA need only determine that air pollution can reasonably be anticipated to endanger public health **or** welfare. Thus, only one determination is required to trigger regulation. Congress specifically included impacts of "climate" in the definition of

"welfare," so there is clear Congressional invent for this conclusion. CAA § 302(h), 42 U.S.C. § 7602. Under 42 U.S.C. § 7402(a)(2)(A) a ten-year deadline for achieving attainment applies to primary NAAQS. With regards to secondary NAAQS, a secondary national ambient air quality standard shall be the date by which attainment can be achieved as expeditiously as practicable after the date such area was designated nonattainment under section 7407(d) of this title. *Id.* at § 7402(a)(2)(B).

In order to demonstrate expeditiousness, a source should show that it progressed from the time the applicable regulations were adopted to the present with no significant periods of inaction. *Navistar Int'l Transp. Corp. v. U.S. E.P.A.*, 941 F.2d 1339, 1347 (6th Cir. 1991) (holding that the EPA did not act arbitrarily when it found that a heavy truck company failed to demonstrate expeditiousness over a 7-year period). Although this holding from the Sixth Circuit isn't binding authority on this Court, it is clear that "as expeditiously as possible" is not an unlimited timeframe. Here, EPA has no progress to show, as it has taken no action to regulate GHGs. EPA's decade-long delay is not as expeditious as practicable and thus also violates the standard for secondary NAAQS. *Massachusetts v. EPA* provides that because the CAA requires EPA to establish motor-vehicle emission standards for "any air pollutant ... which may reasonably be anticipated to endanger public health or welfare," the Court held that EPA had a "statutory obligation" to regulate harmful greenhouse gases. 549 U.S. at 53. EPA cannot argue that it meets its statutory obligation by completely ignoring Appellee's petition and failing to act to regulate GHGs.

For the above reasons, this Court should reject the lower court's interpretation of the Endangerment Finding's endangerment to public health, or alternatively find that if greenhouse gases are classified as secondary NAAQS, that EPA has not attempted to achieve attainment as expeditiously as practicable.

III. EPA's ten-year delay in taking action to list GHGs as criteria pollutants under Section 108(a) of the Clean Air Act is unreasonable.

The EPA's ten-year delay in acting to list GHGs as criteria pollutants under section 108 of the Clean Air Act is unreasonably delayed because the EPA's reasoning supporting the postponement is outweighed by the concerns of certainty, endangerment, and prejudice to the public. Section 108 states that the EPA Administrator "shall from time to time revise, a list which includes air pollutant emissions of 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 (2018). Section 304 of the Clean Air Act gives district courts the jurisdiction to "to compel … agency action unreasonably delayed, except that an action to compel agency action referred to in section 7607(b)…." 42 U.S.C. § 7604 (2018). The D.C. Circuit looks to precedential factors combined and synthesized in *Telecommunications Research and Action Center v. Federal Communication Commission* (*TRAC*) to determine unreasonable delays of agency action. In *TRAC*, the Federal Communication Commission ("FCC") did not act on a petition field and instead issued a notice of inquiry. The FCC took no further action on the petition or with the notice of inquiry, and five years passed before the plaintiffs filed their complaint against the FCC. 750 F.2d 70, 73 (D.C. Cir. 1984). The court did not test if there was a delay, due to the FCC initiation of action, but provided a combination of D.C. Circuit precedent. The six-factor test noted in *TRAC* helps in weighing "whether the agency's delay is so egregious as to warrant mandamus." *Id.* at 79. The factors synthesized depicted by *TRAC* consist of:

> 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.'

Id. 750 F.2d at 80, (citations omitted). The "rule of reason" to a time limit for an agency decision is implied due to the realization that "excessive delay saps the public confidence in an agency's ability to discharge its responsibilities and creates uncertainty for the parties, who must incorporate the potential effect of possible agency decision-making into future plans." *Potomac Elec. Power Co. v. I.C.C.*, 702 F.2d 1026, 1034 (D.C. Cir.), *supplemented*, 705 F.2d 1343 (D.C. Cir. 1983). The first is of most importance to some courts, and the second relates to the first. *See Martin v. O'Rourke*, 891 F.3d 1338, 1345 (Fed. Cir. 2018). The second factor looks to the language of the governing statute. *Id.*

The Tenth Circuit notes that *TRAC* did not involve a mandatory deadline nor did the cases synthesized in the depicted factors and was instead focused on a "reasonable time" as generally mandated in the Administrative Procedure Act. *Forest Guardians v. Babbitt*, 164 F.3d 1261, 1273 (10th Cir. 1998), *opinion amended and superseded on denial of reh'g*, 174 F.3d 1178 (10th Cir. 1999). In *Center for Biological Diversity v. EPA*, the EPA determined that additional studies were necessary to clear up uncertainties after its rulemaking process to set a secondary national ambient air quality standard for air pollutants. 749 F.3d 1079, 1080 (D.C. Cir. 2014). The plaintiffs claimed that the failure to issue a new rule violated the Clean Air Act. *Id*. The court gave deference to the EPA's scientific expertise and judgment and held that the uncertainties and need for further studies were justifiable reasons to delay promulgation of a new rule. *Id.* at 1089.

Utilizing factors presented in the precedent case of the D.C. Circuit, *TRAC*, as guidance, the Court should determine that the EPA has unreasonably delayed taking action on the petition to designate GHGs as criteria pollutants. Here, the issue of unreasonable delay revolves around the

EPA's refusal to list GHGs as criteria pollutants after the agency found emissions of greenhouse gases endangers public health and welfare. R. at 5. Section 108 of the Clean Air Act reads that the Administrator "shall from time to time" add pollutants to their criteria pollutant list. This "time to time" does not provide a specific timetable. Instead, the language ties the time to list with whether the Administrator of the EPA has determined a pollutant to be a type of danger to the public health and welfare. The policy behind the rule of reason calls for a response from agencies to give certainty and decision-making abilities to parties and the public. The rule of reason should instead find the 10-year delay as unreasonable, as it creates uncertainty.

The Court is allowed to consider effects of ordering the EPA to take action when there is a higher or competing priority in place. EPA believes the rule of reason and higher priority activities, of deregulation, should shield them from any unreasonableness regarding their delay, claiming listing GHGs as criteria pollutants would require additional review and resolution of policy and scientific issues and that delaying the action is important for the agency's policy to reduce burdens on business and economic actions. R. at 12. The EPA has been sitting on this petition for 10 years, but the deregulatory policy is relatively new. Unlike the EPA's determinations in *Center for Biological Diversity v. EPA*, the 2009 Endangerment Finding has not been overruled by case law nor has the agency itself sought any type of rulemaking to rescind the finding, even though an overarching rollback policy is currently being promoted. R. at 7, 8. The EPA has also had 10 years to conduct research and new studies to help answer the petition. If the 2009 Endangerment Finding was built on lacking evidence, the EPA has had 10 years to rescind, amend, and create a new scientific record regarding the rule.

Nature and the interests of COGA may be taken into account by the court. COGA has said that a rule of this sort would take away their business. Though this may harm COGA, it is

outweighed by the immense adverse effects GHGs have on public health and welfare. Less tolerance is given to regulations with health and welfare of humans at stake. Though GHG emissions regulations may tank COGA and other like businesses, COGA will have different opportunities, but continuation of GHGs emissions harms cannot be stepped back and rerouted as plainly. There are also other remedies for COGA to be made whole, but GHGs emission harms may take millennia to fix. Additionally, the interests of CHAWN that were prejudiced by the delay extend to the public as a whole. The harm in delaying reaches more than the plaintiffs. The 2009 Endanger Finding determined that GHGs endanger the public health and welfare, and in delaying a response to their petition, the EPA is disregarding the nature and extent of the interests prejudiced by delay.

IV. The EPA has a non-discretionary duty to designate GHGs as a criteria pollutant under Section 108 of the Clean Air Act due to the 2009 Endangerment Finding.

The EPA has a non-discretionary duty to list GHGs as a criteria pollutant because the 2009 Endangerment Finding provides the requisite determinations as depicted in section 108(1)(a)(A) and (B). Agencies are given nondiscretionary and discretionary duties through statutes. Agencies refusals to commence rule promulgations are afforded a limited judicial review. *Massachusetts*, 549 U.S. 497, 527. Review is narrow, and agencies have broad discretion to carry out responsibilities specifically delegated by statute. *Chevron*, 467 U.S. at 842-845. EPA must support all reasons for action or in-action with statutes. *Massachusetts*, 549 U.S. at 535.

Congress enacted the Clean Air Act to "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population…." 42 U.S.C. § 7401 (2018). Section 108 of the Clean Air Act requires the Administrator of the EPA to list criteria pollutants. 42 U.S.C. § 7408 (2018). Section 108 reads as follows:

> (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) emissions of which, in his judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare;
>
> (B) the presence of which in the ambient air results from numerous or diverse mobile or stationary sources; and
>
> (C) for which air quality criteria had not been issued before December 31, 1970 but for which he plans to issue air quality criteria under this section.

42 U.S.C. § 7408 (2018). Section 108(a)(1)(C) does not relieve the EPA and the Administrator from the nondiscretionary duty to list criteria pollutants that may endanger public health or welfare.

The language of section 108 is not discretionary. In *Natural Resource Deference Council v. Train* (*Train),* the EPA appealed the district court decision to requirement the Administrator of the EPA to list lead as a criteria pollutant. 545 F.2d 320, 322 (2d Cir. 1976). In *Train*, the 2nd Circuit discussed the 1970 CAA amendments and resolved ambiguities of Section 108(a)(1)(c). Section 108(a)(1)(c) which governed in *Train* continues to govern today utilizing the same statutory language. *See* Train, 545 F.2d at 322; 42 U.S.C. § 7408 (2018). The court reviewed the structure and legislative history of the Clean Air Act. Section 108 was read with the entirety of the Clean Air Act, and the Circuit determined that "[t]he deliberate inclusion of a specific timetable for the attainment of ambient air quality standards incorporated by Congress in [sections 108-110] would become an exercise in futility if the Administrator could avoid listing pollutants simply by choosing not to issue air quality criteria." *Id*. at 327. The EPA contended that the language of 108(a)(1)(c) was an additional criteria to be met and afforded the EPA the discretion to list a criteria pollutant, even if section 108(a)(1)(A) and 108(a)(1)(B) were met. *Id.* at 325. The Second Circuit found no merits in this, and reasoned that the language "but for which he plans to issue air quality criteria under this section" was specifically pertaining to the initial list of criteria pollutants

as required by the statute and did not bear weight on the Administrators requirement to list from time to time. *Id.* at 325. The court also described that the "shall" language of section 108(a)(1) provides a mandatory action to list. *Id.* at 324-325. The 2nd Circuit held that if the conditions of Section 108(a)(1)(A) and (B) are met, listing of the pollutant is mandatory. *Id*. at 328.

Train was determined before the 1990 amendments to the Clean Air Act, but the language interpreted remains intact. *See generally* 42 U.S.C. § 7408 (2018). More recently, the Unites States District Court for the District of Columbia reviewed the nondiscretionary duty of section 108(a). In *Zook v. McCarthy*, the plaintiffs wished to compel the EPA Administrator to list AFO pollutants under section 108(a). 52 F. Supp. 3d 69, 73 (D.D.C. 2014), *aff'd sub* nom. *Zook v. Envtl. Prot. Agency*, 611 F. App'x 725 (D.C. Cir. 2015). The court noted that the "nondiscretionary duty to list a specific pollutant does not exist unless and until EPA first makes policy determinations as to that pollutant." *Id.* at 74. Section 108(a)(1)(A) leaves the finding of endangerment itself up to the discretion of the EPA Administrator. *Id.* The EPA Administrator had not made a prior determination as to whether the AFO pollutants satisfied the criteria of section 108(a)(1)(A) and (B), thus no discretionary duty existed to mandate the listing of AFOs at criteria pollutants. *Id.* at 74; *see generally Massachusetts*, 549 U.S. at 533.

This case differs factually from Zook. Section 108(a)(1)(A) requires pollutants to be listed that have "emissions of which, [in the judgement of the Administrator of the EPA], cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare." This prong is satisfied by the 2009 Endangerment Rule. The EPA has promulgated a formal rule describing how GHGs can together endanger the public health and welfare of citizens. 2009 Endangerment Finding, 74 Fed. Reg. 66,496 (Dec.15, 2009). The findings in the rule were based on consideration of public comment and scientific evidence analysis. *Id.* Though the rule

was promulgated under the authority of section 202 of the CAA, it still speaks to the same endangerment to public health and welfare that is depicted in section 108 of the CAA. *See* R. at 8; *compare* 42 U.S.C. § 7408(a) (2018) *with* 42 U.S.C. § 7521(a). The 2009 Endangerment Finding also depicts "the presence of which in the ambient air results from numerous or diverse mobile or stationary sources" depicted in section 108(a)(1)(B). *See* 2009 Endangerment Finding, 74 Fed. Reg. 66,496, 66499 (Dec.15, 2009). The promulgation of the 2009 Endangerment Finding and language of section 108(a) provide that the Administrator of the EPA has a nondiscretionary duty to list GHGs as criteria pollutants.

CONCLUSION

Upon the foregoing, Appellee Climate Health and Welfare Now respectfully requests that this Appellate Court reverse the lower court's decision that EPA's finding of endangerment to public health is invalid, reverse the lower court's decision that the Administrator and EPA do not have a discretionary duty to designate GHGs as a criteria pollutant, and uphold the findings that the Administrator and EPA have unreasonably delayed responding to CHAWN's petition, and have unreasonably delayed designating GHGs as a criteria pollutant.

Respectfully submitted this 21st day of November, 2020,

Attorneys for the Appellee, Climate Health and Welfare Now