Team No. 40

Brief for the Environmental Protection Agency

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 the District of New Union in No. 66-CV-2019, Judge Romulus N. Remus.

Brief for Defendant-Appellant United States Environmental Protection Agency.

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Jurisdictional Statement

The District Court for the District of New Union had federal question jurisdiction under 28 U.S.C. § 1331, and this Court has raised *sua sponte* the issue of whether the District Court had jurisdiction over the unreasonable delay claim under the Citizen Suit provision of the Clean Air Act, 42 U.S.C. § 7604(a). Following the issuance of an Order of the District Court granting CHAWN's motion for summary judgment in part and granting COGA's motion in part, CHAWN, COGA, and EPA each filed a timely Notice of Appeal.

Statement of the Issues Presented for Review

1. Did the District Court for the District of New Union have jurisdiction over CHAWN's unreasonable delay claim despite it concerning a rule of nationwide applicability statutorily assigned to the D.C. Circuit Court of Appeals under § 307(b) of the Clean Air Act?
2. Was EPA's 2009 finding that greenhouse gases ("GHGs") endanger public welfare valid, given that GHGs are the primary cause of global warming and related natural disasters?
3. Was EPA's 2009 finding that GHGs endanger public health invalid, given that it contravenes congressional intent?
4. If either endangerment finding is valid, may EPA reasonably assert that it does not have a non-discretionary duty to list GHGs as criteria pollutants under CAA § 108?
5. If EPA does have a non-discretionary duty to list GHGs, is its delay hitherto in doing so unreasonable enough to warrant the extraordinary remedy of mandamus?

Statement of the Case

In 1999, environmental groups petitioned the Environmental Protection Agency ("EPA") to make an "endangerment finding" for greenhouse gases ("GHGs") under § 202 of the Clean Air Act ("CAA"), 42 U.S.C. § 7521. *Climate Health and Welfare Now (CHAWN) v. EPA*, No. 66-CV-2019 at *6 (D.N.U. Aug. 15, 2020). To do so would require the EPA Administrator to find that GHG emissions from new motor vehicles or new motor vehicle engines were "air pollutant[s] . . . which may reasonably be anticipated to endanger public health or welfare." § 7521(a)(1). EPA denied the petition, arguing that GHGs were not air pollutants as defined by the CAA, 68 Fed. Reg. 52,922, 52,925 (Sept. 8, 2003), but the United States Supreme Court disagreed, in the landmark case *Massachusetts v. EPA*, 549 U.S. 497, 528–29 (2007). The majority found that GHGs fit easily within the Act's "sweeping definition of 'air pollutant' [as] '*any* air pollution agent or combination of such agents . . . which is emitted into or otherwise enters the ambient air,'" *id.* (quoting § 7602(g) (emphasis in original)), and ordered EPA to respond to the petition with an endangerment finding. *Massachusetts v. EPA*, 549 U.S. at 534–35. In 2009, the Administrator duly found "that six greenhouse gases taken in combination endanger both the public health and the public welfare of current and future generations." 74 Fed. Reg. 66,496 (Dec. 15, 2009). Relying on the scientific consensus, the Administrator concluded that GHG emissions, by contributing heavily to global warming, would endanger public welfare because of climate-related impacts on agriculture and water supplies, as well as increasing rates of property and economic damage due to storms and rising sea levels. *See id.* at 66,498. The Administrator thus determined that GHG emissions could also endanger public health because of warming-related spikes in heat deaths, as well as a potential increase in insect-borne diseases. *See id.* at 66,497–98.

Spurred by this finding, EPA then moved aggressively to combat climate change with those provisions of the CAA best-equipped to regulate GHG emissions, including establishing standards for new cars and light trucks per § 202; New Source Performance Standards ("NSPS") and Best Available Control Technology ("BACT") standards for major new stationary sources; the Clean Power Plan under § 111(d), which targeted GHG emissions from existing stationary sources; and measures under the Prevention of Significant Deterioration ("PSD") program. *See CHAWN v. EPA*, No. 66-CV-2019 at *7. One option it did not take, however, was to list GHGs as criteria pollutants under § 108. *See id.* Such a listing would have automatically triggered a requirement to set primary and secondary National Ambient Air Quality Standards ("NAAQS") for GHGs, §§ 7408(b), 7409(a)(2), a program that most environmental groups and EPA regard as a poor vehicle for addressing climate change. *See infra* Section V.B. CHAWN nonetheless filed another petition demanding that EPA list GHGs, and when EPA did not do so, commenced litigation in the United States District Court for the District of New Union. *CHAWN v. EPA*, No. 66-CV-2019 at *5. Coal Oil and Gas Association ("COGA"), an organization representing fossil fuel companies, successfully moved to intervene, *see* Fed. R. Civ. P. 24(a), on the basis that the requested relief would damage the market for their products. *Id.* A court order requiring EPA to list GHGs as criteria pollutants under § 108(a) would trigger NAAQS, thereby requiring states to either impose draconian standards on industry, car manufacturers, and even individual citizens—or suffer federal penalties. *See infra* Section V.B. COGA argued that the 2009 endangerment finding was unsupported by the record and contrary to law. *CHAWN v. EPA*, No. 66-CV-2019 at *5.

First the District Court determined that the power vested in the D.C. Circuit by CAA §§ 304, 307(b) to review rules and regulations of nationwide scope was a venue requirement that

had been waived by the parties, and that its own jurisdiction was therefore proper. *Id.* at 2. Then the District Court found that while the endangerment finding was indeed contrary to law with regards to public health, its finding with regards to public welfare remained valid. *Id.* Citing a single Second Circuit case, the Court held that this triggered a nondiscretionary duty on the part of the EPA Administrator to list GHGs as a criteria pollutant under § 108, and that the Administrator's failure to do so within ten years of CHAWN's petition was an unreasonable delay meriting judicial intervention in the agency's decision-making process. *Id.* All three parties appeal this result. *Id.* Appeals courts review a district court's legal conclusions de novo. *Guedes v. Bureau of Alcohol, Tobacco, Firearms and Explosives*, 920 F.3d 1, 10 (D.C. Cir. 2019).

Summary of Argument

The District Court for the District of New Union was wrong to find that the Clean Air Act provisions for judicial review constitute a waivable venue requirement rather than a mandatory jurisdictional requirement. CAA provides that only the D.C. Circuit Court has the power to review actions of nationwide scope or applicability, and likewise specifies that only those courts with the power to review such an action after the fact may compel it in the first instance. The rulemaking requested by CHAWN is one of national scope or applicability because sources in all 50 states emit GHGs, and because GHG levels do not meaningfully vary from region to region. The legislative history of the statute makes clear that this provision was intended to be mandatory, in order to ensure clarity, consistency, and predictability in the implementation of national rules. Circuit courts have maintained this distinction, in deed if not in word, and this Court should follow that precedent by transferring the case to the D.C. Circuit.

If the Court nevertheless proceeds to consider the other issues, the District Court's holding that the 2009 Endangerment Finding is valid with respect to public welfare should be affirmed. The statutory definition of "welfare" explicitly lists impacts to climate as an example of effects the Administrator must consider in making an endangerment finding, and the scientific consensus is clear—GHGs undoubtedly do impact the climate, to a degree that threatens human welfare. The Administrator need not wait until the science can also predict the precise timing, severity, and extent of these impacts before making a finding, because the precautionary principle incorporated by the CAA allows for preventive action even when facing a degree of uncertainty.

This Court should also affirm the District Court's holding that EPA's new position—that the 2009 Endangerment Finding is invalid with respect to public health—is accurate. Under the appropriate standard of deference, EPA's new position should be afforded respect because it brings the agency in line with clear congressional intent to consider second-order effects like those to climate under the rubric of public welfare.

The District Court's finding that EPA had a non-discretionary duty to list GHGs as a criteria pollutant should be reversed. When statutory authorization of agency rulemaking is framed ambiguously, courts must defer to a reasonable agency interpretation. Plain reading, legislative history, and the structure of the CAA all indicate that it is reasonable to interpret the statute as not conferring a non-discretionary duty in CAA § 108. Furthermore, the district court's solitary justification for finding otherwise—the decades-old out-of-circuit case *NRDC v. Train*—is no longer good law.

Even if EPA did have a non-discretionary duty to list GHGs as a criteria pollutant, the District Court's judgment that its delay in doing so has been unreasonable—thus meriting the

extraordinary remedy of mandamus—should be reversed. The District Court was wrong to find the length of delay alone dispositive when courts have instead used a six-factor weighing test to determine whether a delay has been unreasonable. The question should be remanded for proper application of the test. But even if this Court finds that the test was applied in full, the conclusion reached was still incorrect. All of the factors weigh against a finding of unreasonable delay here, most notably the key factor—whether the agency's delay is governed by a "rule of reason." Tackling climate change is a problem of dizzying difficulty and magnitude, which will take many years of science, politics, and hard work. Rather than impose their own solutions, courts should give EPA's experts the time they need.

Argument

I. THE DISTRICT COURT DID NOT HAVE JURISDICTION OVER CHAWN'S UNREASONABLE DELAY CLAIM.

The District Court for the District of New Union did not have jurisdiction over CHAWN's unreasonable delay claim. The listing of GHGs as a criteria pollutant would trigger a rulemaking of nationwide scope and applicability, and thus would be subject to review exclusively in the D.C. Circuit Court of Appeals. 42 U.S.C. § 7607(b)(1). If deemed unreasonably delayed, agency action may only be compelled by the court with the power to review such action. *Id.* § 7604(a). Because the redress sought by CHAWN is the compelled listing of GHGs, its claim may only be heard by the D.C. Circuit.

A. Only the D.C. Circuit Has the Power to Review EPA Rules and Regulations of Nationwide Scope or Effect.

When a nationally applicable rule or regulation promulgated pursuant to the CAA is at issue, only the D.C. Circuit has the congressionally delegated power of review. Although the

statute does not specify whether this power of review is merely a venue requirement, and therefore waivable, or a mandatory jurisdictional requirement, the legislative history and case precedent strongly suggest that the requirement is in fact jurisdictional.

The citizen suit provision of the CAA provides that any person may bring a civil action against the Administrator where there is an alleged failure to perform a non-discretionary duty, 42 U.S.C. § 7604(a)(2), and that the federal district courts have jurisdiction to compel such action if it is unreasonably delayed. *Id.* § 7604(a). However, when petitions to review implicate any nationally applicable regulations or final actions taken by the Administrator, they "may be filed *only* in the United States Court of Appeals for the District of Columbia." *Id.* § 7607(b)(1) (emphasis added).

Legislative history shows unambiguous intent to impart power of review of nationally applicable actions to a single court, for consistency of construction and application. The House of Representatives contemplated that, if the Administrator took any action based on a determination of nationwide scope or effect—including scope or effect beyond a single judicial circuit—then the "exclusive venue for review" would be the D.C. Circuit. H.R. Rep. No. 95–294, at 323–24 (1977). Here, although Congress uses the word "venue" to refer to the D.C. Circuit as the location of review, it is clear in context that the intent was for the D.C. Circuit to have sole *jurisdiction* over challenges arising under the CAA when those challenges had the potential to create impacts throughout the nation. The statute itself calls for a different, and distinct, implementation strategy than "venue" alone would imply—that petitions for review of Administrator actions with nationwide scope or effect *only* be heard by the D.C. Circuit. Clearly, were this a waivable venue requirement, potent administrability issues would arise: "12 circuit courts could rule on issues arising from a single, national EPA rule, utterly defeating the statute's

obvious aim of centralizing judicial review of national rules in the D.C. Circuit." *S. Ill. Power Coop. v. EPA*, 863 F.3d 666, 673 (7th Cir. 2017). In part to avoid complex factual and line-drawing problems, the D.C. Circuit found, early in the days after the CAA was passed, that its chambers were the proper location for review of regulations regarding the permissibility of dispersion techniques—despite the fact that the affected plants were arguably bounded within limited geographic areas—because the regulations themselves had the potential to span the entire nation. *NRDC v. Thomas*, 838 F.2d 1224, 1249 (D.C. Cir. 1988) ("We believe the clause governing 'nationally applicable regulations' provides *jurisdiction* over both the direct challenge to the regulations and the petition for reconsideration.") (emphasis added).

Since then, in practice, whenever a circuit court has encountered an EPA rule or regulation that is truly national in scope, the court has concluded that the case ought to be heard by the D.C. Circuit. *See, e.g.*, *S. Ill. Power Coop.*, 863 F.3d at 670–71 (transferring a petition for review of a rule designating a nonattainment area for sulfur dioxide NAAQS from the Seventh Circuit to the D.C. Circuit after concluding that the NAAQS are national in scope); *ATK Launch Sys., Inc. v. EPA*, 651 F.3d 1194, 1197 (10th Cir. 2011) (transferring consideration of petitions to the D.C. Circuit after reasoning that "the language of the Clean Air Act provision makes clear that this court must analyze whether the regulation itself is nationally applicable"). By contrast, whenever another circuit court has found that transfer to the D.C. Circuit is not appropriate, it has been because the rule or regulation in question was only locally or regionally applicable. In *State of New York v. EPA*, for instance, although Judge Posner wrote for the court that it was "not usurpative" for a federal court of appeals to assert jurisdiction over a case that it would clearly have been authorized to adjudicate had the effects been felt in a different part of the country, that statement may be regarded as dictum, since the case dealt with a petition to review

an order of the EPA with only regional applicability—the alleged impacts were in a cluster of states bordering Lake Michigan. 133 F.3d 987, 990 (7th Cir. 1998). It was further conceded that, if the requirement were accepted to be jurisdictional rather than venue-based, the determination of whether an action is regional or local "should depend on the location of the persons or enterprises that the action regulates rather than on where the effects of the action are felt." *Id.* at 990. *See also Texas v. EPA*, 706 Fed.Appx. 159, 163–65 (5th Cir. 2017) (finding transfer to D.C. unwarranted when the challenged Supplement was only locally or regionally applicable).

Despite offering, in *Tex. Mun. Power Agency v. EPA*, that § 7607(b)(1) is a matter of venue rather than jurisdiction and that *Thomas*' jurisdictional assumption was dictum, 89 F.3d 858, 867 (D.C. Cir. 1996), the D.C. Circuit itself has hewed closely to the inverse side of this "exclusive venue" requirement: When an EPA rule or regulation is *not* of nationwide scope or effect, the D.C. Circuit is *not* the proper location for review. *See, e.g.*, *Sierra Club v. EPA*, 926 F.3d 844, 849 (D.C. Cir. 2019) (venue in the D.C. Circuit not proper when the order in question denied a petition for objection to a single permit, for a single plant, in a single state); *Am. Rd. & Transp. Builders Ass'n v. EPA*, 705 F.3d 453, 456 (D.C. Cir. 2013) (challenge to EPA's approval of California's revised State Implementation Plan ("SIP") must be brought in the Ninth Circuit and not the D.C. Circuit, because the rulemaking was not nationally applicable, and EPA declined to find that it otherwise had nationwide scope or effect).

The designation of GHGs as a criteria pollutant would require SIPs from every state, because there are so many sources of GHGs throughout the United States—the epitome of a rule with nationwide scope. The listing of GHGs would trigger the mandatory promulgation of NAAQS, which are based upon the atmospheric concentration of a pollutant, rather than emission levels; as all parties recognized below, GHG concentrations are relatively constant

throughout the world. *CHAWN v. EPA*, 66-CV-2019 at *9. Should the listing of GHGs be subject to review in courts other than the D.C. Circuit, complex line-drawing and factual problems would inevitably spring up—the very same problems that *NRDC v. Thomas* sought to avoid. One can easily imagine a challenge to the listing being upheld in the Fifth Circuit and dismissed in the Ninth, resulting in judicial and administrative chaos. Congress sought to avoid precisely this outcome by vesting the power of review solely with the D.C. Circuit.

B. Only the D.C. Circuit Has the Power to Compel EPA to Make New Rules and Regulations of Nationwide Scope or Effect.

To the extent that CHAWN's suit is brought to compel a rulemaking, rather than to seek review of an extant rule or regulation, the District Court likewise lacks jurisdiction. The power to compel an agency action referred to in CAA § 307(b) lies only with the district courts within a circuit in which such an action would be reviewable. *See* 42 U.S.C. § 7604(a).[1] Because any rulemaking to designate GHGs as a criteria pollutant would be of nationwide scope, *see supra* Section I.A., the power to review a petition for such a rulemaking lies solely with the D.C. Circuit. It follows that the power to compel that rulemaking would also lie solely with the D.C. Circuit. The District Court's finding that parties waived any objection to venue and that it retained the power to hear the case should be reversed, and the case should be transferred to the D.C. Circuit.

II. EVEN IF REVIEW IN THIS CIRCUIT IS PROPER, THE COURT SHOULD FIND THAT THE 2009 ENDANGERMENT FINDING IS VALID WITH RESPECT TO PUBLIC WELFARE.

Now that GHGs are recognized as an air pollutant, *see Massachusetts v. EPA*, 549 U.S. at 497, the text of the statute—as well as the overwhelming consensus of the scientific record—

[1] The text of § 304(a) specifically notes that this power is the "*jurisdiction* to compel … agency action unreasonably delayed." 42 U.S.C. § 7604(a) (emphasis added).

support the finding that GHGs endanger public welfare. To the extent that the impacts of GHG emissions on welfare are speculative or forthcoming, as opposed to already present, the precautionary principle embodied by the Act nevertheless supports the Endangerment Finding's validity.

A. The Statute Includes Climate Considerations Under the Umbrella of Public "Welfare."

EPA was well within its mandate to conclude that GHG emissions pose a danger to public welfare. As the text of the CAA unambiguously confirms, impacts upon climate caused by air pollutants are within its scope. The 2009 Endangerment Finding, 74 Fed. Reg. 66,496, was promulgated in accordance with the Administrator's responsibility to prescribe standards applicable to air pollutants emitted from new motor vehicles when those emissions "cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7408(a)(1). Language within the Act referring to effects on welfare includes "effects on soils, water, crops . . . weather, visibility, *and climate* . . . whether caused by transformation, conversion, or combination with other air pollutants." 42 U.S.C. § 7602(h) (emphasis added). After GHGs were recognized as "air pollutants" subject to potential regulation under the Act, *see Massachusetts v. EPA*, 549 U.S. at 497, EPA was directed to determine whether their emission posed a danger to public welfare, thereby requiring, in part, consideration of impacts upon the climate. *See CHAWN v. EPA*, 66-CV-2019 at *6.

Prior challenges to the Endangerment Finding have been rejected. *Coalition for Responsible Regulation v. EPA* found that EPA's interpretation of CAA § 202(a)(1) to require only science-based judgments, not policy concerns or regulatory consequences, was neither arbitrary nor capricious. 684 F.3d 102, 118 (D.C. Cir. 2012) ("policy concerns [are] not part of the calculus for the determination of the endangerment finding in the first instance . . . . The

statute speaks in terms of endangerment, not in terms of policy, and EPA has complied with the statute."). Although portions of *Coalition for Responsible Regulation* were later reversed by *Utility Air Regulation Group v. EPA*, the Endangerment Finding itself was not discarded, nor were the scientific findings upon which it was based. *See generally* 573 U.S. 302 (2014).

COGA alleges that, because atmospheric GHG concentrations are relatively constant regardless of location, it is beyond the power of any one state—or even the United States as a whole—to reduce GHG levels enough to eliminate the risk of climate change. *CHAWN v. EPA*, 66-CV-2019 at *9. COGA argues that these "absurd results" stemming from the Endangerment Finding—that states would suffer consequences for matters outside their control—had not previously been considered in court. *See id.* Although this argument is ostensibly novel in substance, in form it is merely another inadmissible policy consideration—and therefore makes no difference to EPA's calculus regarding whether endangerment exists in the first place.

Utility Air incorporated a form of absurd-results reasoning to find that stationary sources may not be required to obtain a PSD or Title V permit on the basis of its GHG emissions alone, because GHGs are emitted in quantities so far beyond other regulated air pollutants that such a requirement would be both unadministrable and beyond the scope of EPA's congressionally-designated authority. *See* 573 U.S. at 320. In essence, the Court found that EPA's actions *after* making an endangerment finding—the regulatory requirements imposed by the agency—could permissibly be informed by policy, a door left open in *Massachusetts v. EPA*. *See* 549 U.S. at 534–35. COGA is asking this Court to do something entirely distinct: to find that policy may be a basis for recognizing or rejecting endangerment itself. Such a conclusion is entirely forestalled by both the statutory text and the relevant precedent.

B. The Precautionary Principle Embodied by the Statute Justifies the Endangerment Finding as to Welfare Regardless of Any Uncertainty.

The scientific record relied upon by EPA in formulating the Endangerment Finding is sufficient to withstand rational basis review; any uncertainties as to the precise effects of GHG emissions upon the climate are not sufficient to overcome the countervailing interest in precautionary measures incorporated in the CAA. Courts usually subject agency decisions based on scientific evidence to rational basis review, recognizing that deference is warranted when evaluations are within the agency's technical expertise. *See Coal. for Responsible Regul.*, 684 F.3d at 120 (citing *Am. Farm Bureau Fed'n v. EPA*, 559 F.3d 512, 519 (D.C. Cir. 2009). Such deference is particularly appropriate "when dealing with a statutory scheme as unwieldy and science-driven as the Clean Air Act." *Appalachian Power Co. v. EPA*, 135 F.3d 791, 801–02 (D.C. Cir. 1998). Here, the Act's statutory directive for the Administrator to regulate air pollutants that "may reasonably be anticipated to endanger public health or welfare," 42 U.S.C. § 7408(a)(1), allows for some uncertainty in the precise character of endangerment. *See Ethyl Corp. v. EPA*, 541 F.2d 1, 13 (D.C. Cir. 1976) (finding that because "endanger" means something less than actual harm, "[a] statute allowing for regulation in the face of danger is, necessarily, a precautionary statute").

Since EPA's Endangerment Finding, the links between GHG emissions, anthropogenic climate change, and adverse impacts on the Earth have only become clearer. *See, e.g.*, *Juliana v. United States*, 947 F.3d 1159, 1166 (9th Cir. 2020) (recognizing, *inter alia*, that the evidentiary record compiled by plaintiffs "leaves little basis for denying that climate change is occurring at an increasingly rapid pace," and that "[c]opious expert evidence establishes that [the atmospheric carbon concentration] stems from fossil fuel combustion and will wreak havoc on the Earth's climate if unchecked"). To accept the assertion that there is still enough uncertainty on this front

to deem EPA's decision arbitrary or capricious would require rejecting the overwhelming consensus of the entire scientific community. And insofar as there is any doubt as to the exact impact of GHG emissions upon public welfare, the precautionary principle means that EPA is not prevented from nonetheless making an endangerment finding. The CAA "demand[s] regulatory action to prevent harm, even if the regulator is less than certain that harm is otherwise inevitable." *Ethyl Corp.*, 541 F.2d at 25.

Given the customary deference afforded to agency decisions that are grounded in a scientific record, the extensive support that this record clearly provides, and the flexibility afforded by the precautionary principle to cover any lingering uncertainty, the District Court's finding as to the validity of the Endangerment Finding with respect to public welfare should be affirmed.

III. THE COURT SHOULD FIND THAT THE 2009 ENDANGERMENT FINDING IS NOT VALID WITH RESPECT TO PUBLIC HEALTH BECAUSE IT CONTRAVENES CONGRESSIONAL INTENT.

Although EPA did not engage in a new round of notice and comment to reach its current interpretation, that the Endangerment Finding is invalid with respect to the endangerment of public health, its position should nonetheless be afforded deference because it gives effect to the specific intention of Congress. Under the plain terms of the Act, the effects of GHGs simply do not belong under the consideration of public health, and to consider them as such would be an impermissible deviation from the statute and its purpose.

EPA's current position should be afforded respect under the deferential judiciary review framework of *Skidmore v. Swift & Co.* When the agency is not exercising congressionally-delegated authority by, for example, engaging in formal adjudication or informal rulemaking, but rather is making other interpretive choices, such as issuing policy statements or promulgating

guidance documents, the court is not required to defer to the agency, but must only determine whether or not its position is supported.[2] *See U.S. v. Mead Corp.*, 533 U.S. 213, 234 (2001) ("[An] agency's interpretation may merit some deference whatever its form, given the 'specialized experience and broader investigations and information' available to the agency") (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 139 (1944)). When the agency has reversed prior policy with very little warning, and (as in this case) without an additional round of notice and comment, more lenient standards of deference do not apply. *See CHAWN v. EPA*, 66-CV-2019 at *10. However, the Court may nonetheless decide that deference to the new agency position is warranted. Under *Skidmore*, the weight a court accords to an administrative judgment "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore*, 323 U.S. at 140. Crucially, the Administrator is not barred from changing position after coming to believe that the agency's original view was based upon an incorrect legal interpretation. *See Env't. Integrity Project v. EPA*, 969 F.3d 529, 544 (5th Cir. 2020) (citing *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993)). Although *Skidmore* deference depends in part on an agency's consistency, when the agency's current view "closely fits the design of the statute as a whole," it weighs against the Court's rejection. *Good Samaritan Hosp.*, 508 U.S. at 418 (internal citations omitted). The Court must simply inquire into the persuasive power of the agency's new position. Deference is usually warranted when the evaluations in question are within the agency's technical expertise, as determinations of the effects and necessary regulation of air pollution are unquestionably within

[2] The court is not required to engage in the familiar *Chevron* two-step investigation into statutory ambiguity unless and until it determines that *Chevron* deference should be considered at all. See *U.S. v. Mead Corp.*, 533 U.S. 213, 234 (2001).

EPA's expertise here. *See Coal. for Responsible Regul.*, 684 F.3d at 120 (citing *Am. Farm Bureau*, 559 F.3d at 519).

EPA's new position brings the agency back into conformity with the plain meaning of the statute. The key definitional issue here—whether effects to climate may fall under the definition of effects to public health—is squarely addressed by the statute. Congress clearly intended that second-order impacts from air pollutants, like the effects of GHGs by way of the greenhouse effect, be considered under the rubric of public welfare, not under public health. As noted above, the Act specifies that language referring to effects on welfare includes, *inter alia*, effects on the climate. *See* 42 U.S.C. § 7602(h). By contrast, although not explicitly defined within the statute, impacts on health have been understood to mean only the direct impacts on the human body caused by exposure to the pollutants in question. *See, e.g.*, *Ethyl Corp.*, 541 F.2d at 8. That case considered a finding by the Administrator that leaded gasoline posed a danger to public health because the resultant emissions increased the atmospheric concentration of lead; since the human body is capable of absorbing lead from the ambient air, and a high concentration of lead in the body is toxic, a greater concentration of airborne lead threatened likewise increased incidence of the sicknesses associated with lead poisoning. *Id.* Courts have duly categorized direct effects on the human body as effects on "public health," and second-order effects on the environment as effects on "public welfare." *Compare Mississippi v. EPA*, 744 F.3d 1334, 1340, 1345 (D.C. Cir. 2013) (EPA permissibly revised primary NAAQS for ozone downward because human exposure studies showing respiratory effects, and epidemiological studies showing increased hospital admissions and mortality, indicated that the prior NAAQS were "insufficiently protective of public health") *with Ctr. for Biological Diversity v. EPA*, 749 F.3d 1079 (D.C. Cir. 2014) (EPA's decision not to set new secondary NAAQS for sulfur and nitrogen oxides was justified because

the compounds' effects on surface waters and ecosystems varied so widely that, based on existing data, the agency could not make a reasoned judgment as to what standard would be requisite to protect the public welfare).

Here, CHAWN asks for those categories to be combined, reasoning that the chain of causation running from GHG emissions to effects on health such as heat-related deaths and insect-borne diseases is sufficient to consider these as direct bodily impacts from the pollutants. *See CHAWN v. EPA*, 66-CV-2019 at *7. This reasoning does not hold up under the plain meaning of the statute, which does not permit consideration of indirect effects when making a finding of impact on public health. Even though *Ethyl Corp.* allowed that cumulative impacts on health could be considered when regulating an air pollutant, that court was contemplating the direct impacts of lead when considered cumulatively with *other sources of lead*. *See* 541 F.2d at 30–31. Regardless of source, it was the lead itself which, when concentrated in the blood, caused adverse health effects—anemia, intestinal cramps, even death. *Id.* at 8. By contrast, there is a discrete, intermediary step between GHG emissions and every health impact that CHAWN asserts. Emissions threaten coastal communities, because the greenhouse effect causes glaciers to melt, which in turn causes sea levels to rise and endanger property and livelihoods. Due to that greenhouse effect, pathogen-carrying animals and insects will likely find more territory hospitable, potentially increasing the spread of disease. Heat waves of increasing frequency and intensity may lead to more sickness and death due to heat stroke. Each of these examples poses a real threat—but in each, there is at least one interpolating step between emission and result; none is *directly* caused by GHGs entering the human body. The issue is not that these GHG emissions raise humans' direct exposure to, for example, CO_2 to an intolerable level. If so, that would be directly analogous to the airborne lead emissions in *Ethyl Corp.* that were found to endanger

human health when in combination with extant environmental exposure to lead. Rather, CO_2 and other GHG emissions in effect create circumstances where entirely different kinds of threats—water scarcity, natural disasters, animal-borne viruses and disease, food shortages—are intensified and made more frequent. This exacerbation is serious, but it does not constitute a direct effect on the human body. As such, it can and should be understood as a danger to human *welfare* (*see supra*, Section II) rather than to human *health*. To insist otherwise would be to make the statutory distinction nonsensical. Impacts that Congress included under the umbrella of "welfare"—impacts on water, crops, and property, *see* 42 U.S.C. § 7602(h)—could, via similar reasoning, also be considered impacts on health. The direst end result of negative impacts to crops, for instance, is starvation, which would clearly be an impact on public health. Yet Congress specified that such impacts ought to be considered in the category of "welfare," and it should not be presumed to have made such a distinction superfluously. *See Alaska Dept. of Env't Conservation v. EPA*, 540 U.S. 461, 489 n.13 (2004) (noting that a core principle of statutory construction is that, whenever possible, no section should be construed to be extraneous or void). The harms threatened by GHG emissions, although real and recognized, are too attenuated to be fairly read into the statutory meaning of "public health." The Act understands threats to public health to cover impacts on the human body directly caused by exposure to an air pollutant, rather than covering the second-order risks and harms understood to be traceable to GHG emissions.

Affording respect to EPA's expertise with regard to the evaluation of scientific evidence, and recognizing that the plain text of the statute more clearly compels its current position, the District Court's finding as to the invalidity of the Endangerment Finding with respect to public health should be affirmed.

IV. EPA DOES NOT HAVE A NON-DISCRETIONARY DUTY TO LIST GHGS AS CRITERIA POLLUTANTS UNDER CLEAN AIR ACT § 108

Section 108 confers rulemaking authority upon EPA to list air pollutants for which it will issue air quality criteria. However, the statute is ambiguous as to whether EPA has a non-discretionary duty to list a pollutant once it has made an endangerment finding for it. EPA interprets the provision to not include such a duty. All it must do is show this interpretation is reasonable, because courts are required to defer to reasonable agency interpretations of ambiguous statutes. A plain reading of the text, and examination of both the legislative history and the structure of the CAA indicate that EPA's interpretation sits squarely within the bounds of reasonableness. Furthermore, the solitary case to the contrary is no longer good law, and regardless, is not binding on this Circuit.

A. EPA's Interpretation of § 108 Is Reasonable and Therefore Entitled to Deference under *Chevron v. NRDC*.

When Congress delegates authority to an agency to make rules carrying the force of law, and that agency interprets a statute in the exercise of that authority, the agency's interpretation must be given judicial deference. *See Mead*, 533 U.S. at 226–27; *Chevron v. NRDC*, 467 U.S. 837 (1984). If the statute is in any way ambiguous, and the implementing agency's interpretation is reasonable, then a court must accept this construction of the statute—even if the agency's reading differs from what the court believes is the best statutory interpretation. *Chevron*, 467 U.S. at 843–44. The only "question for the court is whether the agency's answer is based on a permissible construction of the statute," *id.* at 843, "in light of the text, nature, and purpose of the statute." *Mead*, 533 U.S. at 229. A construction is permissible, and thus reasonable, unless it is "arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. 837, 845.

Courts have generally found that a duty only becomes "non-discretionary under the CAA if it is 'clear-cut,'" *Sierra Club v. Wheeler*, 956 F.3d 612, 616 (D.C. Cir. 2020) (quoting *Sierra Club v. Thomas*, 828 F.2d 783, 791 (D.C. Cir. 1987)), that is, "readily ascertainable from the statute allegedly giving rise to the duty." *WildEarth Guardians v. McCarthy*, 772 F.3d 1179, 1182 (9th Cir. 2014). A court must be able to "identify a 'specific, unequivocal command' from the text of the statute at issue." *Id.* (quoting *Our Children's Earth Found. v. EPA*, 527 F.3d 842, 851 (9th Cir. 2008)). "In the absence of [such] a clear statutory mandate, [courts] decline to impose such a duty on the Administrator." *City of Seabrook v. Costle*, 659 F.2d 1371, 1374 (5th Cir. 1981).

Section 108 bears the imprimatur of Congressional authorization to engage in the process of rulemaking—the air quality standards it sets carry the force of law. If the statute is ambiguous, *Chevron* deference controls. All EPA must do is 1) show that there is not an unambiguous "specific, unequivocal command" in § 108 to list pollutants for which an endangerment finding has been made, *Our Children's Earth Found.*, 527 F.3d at 851, and 2) that its interpretation of the statute—that there is no such command—is reasonable "in light of the text, nature, and purpose of the statute." *Mead*, 533 U.S. at 229.

i. EPA's interpretation is supported by a plain reading of the text.

Section 108(a)(1) reads in relevant part:

> . . . 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 has 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(a)(1) (emphases added).

"Shall" often has a mandatory sense. *See Shall*, *Dictionary.com*, https://www.dictionary.com/browse/shall?s=t (defining it as "(in laws, directives, etc.) must; is or are obliged to"). However, the Supreme Court has recently suggested "shall" language need not indicate a mandatory duty, depending on the context or history of its usage. *See Town of Castle Rock, Colo. v. Gonzalez*, 545 U.S. 748, 758–59 (2005) (finding that a statute providing that police "shall use" every reasonable means to enforce a restraining order only conferred discretionary duties on the police because police discretion traditionally coexisted with similar seemingly mandatory language, enforcement was not always possible, and rest of the statute provided for alternatives).

If "shall" is meant in this sense, then there is no ambiguity in the statute to resolve: It clearly indicates that the Administrator has discretion because he does not need to list criteria pollutants unless he "plans" to do so, § 108(a)(1)(C). But if "shall" is interpreted as mandatory—and thus conferring a nondiscretionary duty—then ambiguity does arise from the tension between the "shall" and the explicit grant of discretion in § 108(a)(1)(C). This plain reading finds that the Administrator must list dangerous pollutants from multiple sources unless he doesn't plan to—so, does he have a nondiscretionary duty to or not? It should come as no surprise that the only court to address this question described the provision—charitably—as "somewhat ambiguous." *NRDC. v. Train*, 545 F.2d 320, 327 (2d Cir. 1976). We are inescapably in *Chevron* territory.

By far the most reasonable ways to read the text are either simply that the mandatory sense of "shall" is not triggered until all three requirements (A)–(C) are met, or that "shall" is meant here in the discretionary sense of *Castle Rock*. These are the only realistic ways to harmonize the textual clash: the inclusion of § 108(a)(1)(C)'s explicit grant of discretion simply doesn't allow for any other reading. The *Train* court's attempt to resolve the ambiguity was to suggest that § 108(a)(1)(C) was only intended to apply to pollutants on EPA's initial list and not on revisions post-1970. 545 F.2d at 325. But leaving aside the fact that this still hardly meets the definition of a non-discretionary duty as an "unequivocal command," the obvious problem with the court's interpretation is that it butchers the plain language of the statute. *Train* seems to suggest that the Administrator shall list pollutants which endanger the public and come from multiple sources, *or* shall list pollutants for which the Administrator had planned to issue criteria before 1970. But that's not what the plain language of the statute says—"and" is clearly conjunctive, naturally suggesting all three provisions are required for a listing. By getting hung up on "shall," the *Train* court reads "and" completely out of the statute and bends its plain meaning out of all recognition.

EPA's textual interpretation is bolstered by the absence of a third requirement like § 108(a)(1)(C) in similar sections of the CAA. For example, § 202—demarcating the authority of the Administrator to prescribe emission standards for new motor vehicles—contains no such explicit grant of discretion to the Administrator once an endangerment finding has been made. 42 U.S.C. § 7521(a)(1).[3] EPA agrees that this provision unambiguously confers a non-discretionary

[3] The provision reads "The Administrator shall by regulation prescribe (and from time to time prescribe) . . . standards applicable to the emission of any air pollutant [from new motor vehicles] . . . 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. § 7521(a)(1). Note the absence of a third requirement.

duty upon it. 73 Fed. Reg. 44,354, 44,367 (July 30, 2008). To read § 108 as functionally identical would render § 108(a)(1)(C) as surplusage. EPA interprets Congress' deliberate inclusion of § 108(a)(1)(C) in § 108 as an indication that it did not intend to confer a non-discretionary duty upon EPA in this particular part of the CAA. Since a plain reading shows this interpretation is obviously not "arbitrary, capricious, or manifestly contrary to the statute," *Chevron*, 467 U.S. at 845, this Court must defer to it.

ii. EPA's interpretation is supported by the legislative history of the CAA.

The Senate Report on the CAA, while making clear that the then-Secretary was required to publish the initial list of pollutants after enactment, says regarding subsequent revisions of the type in question here that "others *may* be added to this group as knowledge increases," "he *can* add to this list periodically," and most suggestively of all, "if the Secretary subsequently should find that there are other pollution agents for which the ambient air quality standards procedure is appropriate, he *could* list those agents." S. Rep. No. 91-1196 (1970) (emphases added). This permissive language reasonably implies that the Senate intended to confer discretion to EPA in making subsequent additions to the list, consistent with the plain meaning of § 108 discussed above. The court in *Train* did identify mandatory language in the legislative record, but crucially, this language only pertained to the *initial* listing of pollutants thirty days after December 31, 1970, and not to subsequent revisions to the list, which as the Senate report indicates, were viewed as having different requirements. *See id.*

Additionally, there is the telling fact that in 1977, when Congress was amending the CAA in the immediate wake of the *Train* decision, it could have chosen to incorporate the holding of *Train* into the statute—thus removing all the ambiguity—but did not do so. Although it is always risky to read intent into silence, Congress *did* at that time incorporate the D.C. Circuit's holding

in *Ethyl Corp.* directly into the statute. *See* 541 F.2d at 28 (finding that EPA can regulate even in scientific uncertainty); Clean Air Act Amendments of 1977, Pub. L. No. 95-95 § 401, 91 Stat. 790 (1977); *see also* Craig N. Oren, *When Must EPA Set Ambient Air Quality Standards? Looking Back at NRDC v. Train*, 30 UCLA J. Envt'l. L. & Pol'y 157, 170 (2012) ("Congress knew well how to amend a statute to approve a judicial decision, which suggests that [the *Train* decision] might not have commanded a majority in Congress.").

iii. EPA's interpretation is supported by the structure of the CAA.

Several other sections of the CAA imply that the Administrator has discretion in § 108, or at the very least, make finding an "unequivocal command" in the section highly implausible. Section 111 allows states to "submit to the Administrator a plan which . . . establishes standards of performance for any existing source for any air pollutant . . . for which air quality criteria have not been issued or which is not included on a list published under section [108(a)] of this title." 42 U.S.C. § 7411(d)(1). This language suggests that the NSPS anticipate and provide for air pollutants for which there *has* been an endangerment finding but which are *not* listed under § 108—which could only be true if the Administrator had discretion over whether to list them under § 108.

This flexibility is also on display in § 122, which provides that the Administrator, when he makes an endangerment finding regarding radioactive pollutants, "shall simultaneously with such determination include such substance in the list published under section [108(a)(1)] *or* [112(b)(1)(A)] of this title." 42 U.S.C. § 7422(a) (emphasis added). If the Administrator had no discretion under § 108, and was thus required to list a pollutant once he made an endangerment finding, this would flatly contradict the language of § 122, which explicitly gives the Administrator the option of regulating via § 108 or § 112 once he has made an endangerment

finding for radioactive pollutants. *Id.* The only way to make the two sections harmonize is to accept that the Administrator must have some discretion in listing pollutants in § 108 once he has made an endangerment finding.

Finding a non-discretionary duty here would also undermine EPA's mission pursuant to the CAA—to "choose among and/or tailor the CAA's authorities to implement a regulatory program that makes sense for GHGs, given the unique challenges and opportunities that regulating them would present." 73 Fed. Reg. 44,354, 44,478–79 (July 30, 2008). To require EPA to list GHGs as criteria pollutants would foreclose other, better options. For example, once GHGs were listed under § 108, EPA would not be allowed to regulate them under the Hazardous Air Pollutants provisions of § 112, 42 U.S.C. § 7412 (b)(2),[4] which may very well be a superior program for addressing greenhouse emissions. The same preclusion may exist in § 111(d),[5] which was the cornerstone of the Clean Power Plan, the crown jewel of the Obama Administration's efforts to tackle climate change. That entire initiative might have been struck down in court if EPA was required to list GHGs under § 108—and any Biden Administration revival might yet suffer that fate if CHAWN gets its way here. Congress designed the CAA to give EPA a range of options when considering air pollutants that pose different threats and challenges. It is reasonable to think that Congress would not deliberately subvert this entire framework by inserting a nondiscretionary roadblock in § 108.

[4] The provision reads "No air pollutant which is listed under section [108(a)] of this title may be added to the list under this section." 42 U.S.C. 7412(b)(2).
[5] The provision reads "The Administrator shall prescribe regulations . . . for which air quality criteria have not been issued or which is not included on a list published under section [108(a)] of this title." 42 U.S.C. § 7411(d)(1).

B. The Only Case Law to the Contrary Does Not Survive *Chevron*.

The only case law on this subject, *Train* was a Second Circuit decision, and thus has no binding authority on this Court. Even if considered for its persuasive authority, *Train* is no longer good law because of the Supreme Court's subsequent decision in *Chevron*. When analyzing judicial holdings on agency interpretations made before *Chevron*, the Court has advised that these holdings only remain good law if "the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005). The *Train* court itself admitted that the "language of § 108(a)(1)(C) is somewhat ambiguous." 545 F.2d at 327. Pre-*Chevron*, the court was entitled to supply what it regarded as a more accurate interpretation than the EPA provided, but because that interpretation was based on statutory ambiguity, its holding is no longer good law. *See Brand X*, 545 U.S. at 982. *Train* simply has no bearing on the outcome of this case, and the district court should never have followed it so blindly.

V. EVEN IF EPA DOES HAVE A NON-DISCRETIONARY DUTY TO LIST GHGS, THE DISTRICT COURT WAS WRONG TO FIND THAT IT HAD UNREASONABLY DELAYED IN DOING SO

This question should be remanded to the district court for proper consideration because, although claiming to follow D.C. Circuit precedent in *Telecommunications Research & Action Center v. F.C.C.* (*TRAC*), 750 F.2d 70, 80 (D.C. Cir. 1984), the court then failed to properly apply that court's mandate to weigh six factors that bear on unreasonable delay claims, instead finding that a ten-year delay was presumptively unreasonable. Even if the district court did adequately consider the question, however, it still came to the wrong conclusion. A weighing of the *TRAC* factors demonstrates that even if EPA does have a non-discretionary duty to designate

GHGs as a criteria pollutant, it has not unreasonably delayed in taking ten years to determine how.

To establish a claim of unreasonable delay, petitioners must show that they have "a right the denial of which we would have jurisdiction to review upon final agency action but the integrity of which might be irreversibly compromised by the time such review would occur." *Sierra Club v. Thomas*, 828 F.2d at 796. "To qualify as unreasonable, the agency's delay would have to be 'so egregious as to warrant mandamus,'" *Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 554 (D.C. Cir. 2015) (quoting *Sierra Club v. Thomas*, 828 F.2d at 797), a writ whose "extraordinary and intrusive nature, which risks infringing on the authority and discretion of the executive branch," *American Hosp. Ass'n v. Burwell*, 812 F.3d 183, 192 (D.C. Cir. 2016), makes it a truly "extraordinary remedy." *In re Int'l Chem. Workers Union*, 958 F.2d 1144, 1149 (D.C. Cir. 1992). Courts consider whether to impose mandamus by weighing the *TRAC* factors. *In re Public Emps. for Env't Responsibility*, 957 F.3d 267, 273 (D.C. Cir. 2020).

A. This Question Must Be Remanded for Full Consideration Under the Relevant Judicially-Mandated Test.

Of the *TRAC* factors, the most important is the "rule of reason. That issue cannot be decided in the abstract, by reference to some number of months or years beyond which agency inaction is presumed to be unlawful." *Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094, 1102 (D.C. Cir. 2003). Yet this is precisely what the district court did when, without providing any actual consideration of any of the factors besides (3),[6] it announced, "Delays of over eight to ten years have uniformly been held to be unreasonable by courts applying the *TRAC* factors." *CHAWN v. EPA*, No. 66-CV-2019, at *13. But not only do courts applying the factors

[6] "(3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake." *TRAC*, 750 F.2d at 80.

regularly find delays of many years to be reasonable,[7] this kind of pronouncement is precisely what D.C. Circuit precedent in *Mashpee Wampanoag* forbids—making the decision "in the abstract, by reference to some number of months or years beyond which agency inaction is presumed to be unlawful." 336 F.3d at 1102. Instead, like in that case, this question must be remanded to the district court so that it can weigh the factors properly. Such an extraordinary remedy as mandamus merits more time and due consideration.

B. Even If the District Court Did Adequately Apply the Test, Ten Years Is Still Not an Unreasonable Delay When Considering a Question of This Difficulty and Magnitude.

The *TRAC* factors are:

> (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 80.

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[7] *See, e.g.*, *Gonzalez v. Cissna*, 364 F. Supp. 3d 579, 586 (E.D.N.C. 2019) (multiple plaintiffs, some of whom had been waiting 5–6 years); *W. Rangeland Conservation Ass'n v. Zinke*, 265 F. Supp. 3d 1267, 1297 (D. Utah 2017) (6–10 years); *Bemba v. Holder*, 930 F. Supp. 2d 1022, 1030 (E.D. Mo. 2013) (6 years); *TRAC* itself, 750 F.2d at 80 (5 years).

Courts have consistently held the "rule of reason" to be by far the most important factor. *Mashpee Wampanoag*, 336 F.3d at 1102. This requires courts to consider "the complexity of the task at hand, the significance (and permanence) of the outcome, and the resources available to the agency." *Id.* Courts have also counselled against applying mandamus when to do so would "probably require the agency to make major changes to its operations and priorities." *Burwell*, 812 F.3d at 192.

Analysis of the factors makes plain that a ten-year delay is not unreasonable in these circumstances, beginning with the "rule of reason." Solving climate change is possibly the most difficult, complex question facing any branch of the federal government today, and the significance and permanence of the outcome are titanic. More specifically, setting NAAQS for GHGs is a uniquely problematic, almost impossible task. First there is the difficulty of calculating the correct level of the NAAQS—which legally cannot be more nor less stringent than necessary for protecting public health or welfare, *Whitman v. Am. Trucking Assocs.*, 531 U.S. 457, 473 (2001)—a process which requires years of scientific study and analysis. The effects of climate change also occur over hundreds of years; in order to produce standards of the accuracy necessary to comply with law, the EPA would be required to peer centuries into the future to determine the precise effects of these pollutants on human welfare, a process which requires yet more scientific study. Next, because concentrations of GHGs are uniform globally, every single state in the Union would be in nonattainment, and unable to produce a SIP bringing themselves into attainment as required by the Act. This would automatically trigger the Act's aggressive penalties against the states, forcing them to shut down vast swathes of industry—and still not be in attainment (which would require massive international coordination). 73 Fed. Reg. 44,354, 44,478-79 (July 30, 2008). And at every stage of the NAAQS process, prolonged and

vicious litigation would kick in, further delaying, confusing, and casting public opprobrium on the EPA's efforts to combat climate change.

Given these difficulties, multiple commentators have suggested that "promulgating NAAQS for GHGs could easily take a decade," *Hearing on Regulation of Greenhouses Gases Under the Clean Air Act: Hearing Before the S. Comm. on Environment and Public Works*, 110th Cong. 9 (2008) (testimony of the Hon. Mary D. Nichols, Chairman, Cal. Air Resources Bd.); *see also* Craig N. Oren, *Is the Clean Air Act at a Crossroads?*, 40 Envt'l. L. 1231, 1246 (2010) (reporting that an expert calculated that implementing NAAQS for GHGs "would take a decade of controversy"). Most mainstream environmental groups oppose using NAAQS to regulate climate change, because it is simply too difficult, unwieldy, and reputation-damaging, while some industry practitioners have tried to push the notion precisely because it is so unattractive. *See Hearing on Regulation of Greenhouses Gases*, 110th Cong. 13 (2008) (testimony of Jason Burnett, Former Assoc. Deputy Administrator, EPA) ("Given all of these downsides, it should not be a surprise that very few individuals or groups support a NAAQS for greenhouse gases."); *see also* Inimai M. Chettiar & Jason A. Schwartz, *The Road Ahead: EPA's Options and Obligations for Regulating Greenhouse Gases*, Inst. for Policy Integrity 36, n. 282 (2009) ("Most environmentalists and EPA analysts contend that [§ 108] does grant discretion, presumably because . . . of the difficulties of applying NAAQS to greenhouse gases . . . . Most industry analysts argue EPA has no discretion on listing, presumably because they want to demonstrate the horrible consequences of using the Clean Air Act to regulate greenhouse gases."). None of this is to say that achieving NAAQS for GHGs is impossible—this is not an "absurd results" argument. It is only to show that solving this problem will take many years of

careful consideration—ten is probably at the lower estimate—and that forcing the EPA to rush the process could have potentially disastrous consequences for the fight against climate change.

Other *TRAC* factors also militate in EPA's favor. As the district court noted, there is no date-certain deadline in the statute. *CHAWN v. EPA*, No. 66-CV-2019, at *11; *see also Sierra Club v. Thomas*, 828 F.2d at 791 ("A duty of timeliness must categorically mandat[e] that all specified action be taken by a date-certain deadline.") (internal quotations omitted). The language of § 108(a) also suggests the Administrator need only revise the list "from time to time," § 7402 (a)(1). Clearly, therefore, the second *TRAC* factor weighs heavily in the agency's favor—even if Congress did give EPA a non-discretionary duty, it was not accompanied by any sense of urgency. Factors (4) and (5) also weigh in EPA's favor because finding unreasonable delay here would "probably require the agency to make major changes to its operations and priorities," *Burwell*, 812 F.3d at 192, interfering with the Agency's attempts to solve the problems of climate change through more realistic, practical measures (including other programs in the CAA such as the NSPS and PSD). The only *TRAC* factor which seems to weigh in favor of a finding of delay is (3)—because human welfare is at stake. However, it will probably be better for human welfare in the long term if EPA is given the time it needs to get this issue right, rather than to rush unplanned NAAQS through and potentially do more damage than good to welfare in the long-term. Therefore, all the *TRAC* factors weigh against the Court substituting its judgment for the expertise of the executive branch here. EPA is better equipped than the judiciary to address the existential threat of climate change: it must be allowed to plot what it regards as the best course without interference.

Conclusion

For the foregoing reasons, EPA asks this Court to affirm the District Court's judgments that the 2009 Endangerment Finding is valid with respect to an endangerment of public welfare and invalid with respect to an endangerment of public health. EPA further asks this Court to find that there is no non-discretionary duty to list GHGs in CAA § 108. EPA further asks this Court to transfer CHAWN's petition for rulemaking to the D.C. Circuit Court, or in the alternative to remand it to the District Court for a full hearing on whether EPA has unreasonably delayed in designating GHGs as a criteria pollutant, or in the alternative to find that it has not unreasonably delayed in making that designation.