Team No. 41

CA. 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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

SUPREME COURT

UNITED STATES COURTS OF APPEALS

COURT OF CLAIMS

FEDERAL DISTRICT COURT

FEDERAL STATUTES

FEDERAL ADMINISTRATIVE & EXECUTIVE MATERIALS

LEGISLATIVE HISTORY

OTHER AUTHORITIES

JURISDICTIONAL STATEMENT

This case comes before this Court on appeal from a final order of the United States District Court for the District of New Union. Federal district courts have original jurisdiction to hear actions arising under the citizen suit provision of the Clean Air Act, 42 U.S.C. § 7604, and federal question jurisdiction under 28 U.S.C. § 1331. The United States Court of Appeals for the Twelfth Circuit has jurisdiction under 28 U.S.C. § 1291 to hear appeals from any final decision of a district court below. On August 15, 2020, the district court entered its final judgment granting partial summary judgment on both plaintiff's and intervenor's motions. All parties filed a timely Notice of Appeal. Record ("R.") at 2–3.[1]

STATEMENT OF THE ISSUES

1. Did the district court have jurisdiction over CHAWN's unreasonable delay claim under CAA section 304(a) where the rule sought would be a rule of nationwide applicability subject to review exclusively in the D.C. Circuit under CAA section 307(b)?
2. Under the applicable "arbitrary and capricious" standard of review, is EPA's 2009 Endangerment Finding valid with respect to endangerment of public welfare, where substantial evidence provides a rational basis for EPA's conclusion?
3. Is EPA's 2009 Endangerment Finding valid with respect to endangerment of public health, even though the Act's plain text and relevant legislative history indicate Congressional intent that EPA evaluate climatic impacts under public welfare, and that EPA consider public health and welfare impacts separately?
4. Considering the absence of a date-certain statutory deadline and the ambiguous statutory language concerning EPA's discretion to list criteria pollutants, does EPA have a non-

[1] EPA cites to Record as "R. at [page number]" with the first page of the Circuit Court's Order serving as page number one.

discretionary duty to designate GHGs under CAA section 108 based on EPA's 2009 Endangerment Finding?

5. Given the unlikeliness of meaningful regulation of GHGs under the NAAQS program and corresponding, substantial regulatory burdens on EPA, is EPA's ten-year delay listing GHGs as a criteria pollutant under CAA section 108(a) unreasonable?

STATEMENT OF THE CASE

I. Facts

In 1999 a coalition of environmental groups filed a petition (the "202 Petition") with the Environmental Protection Agency (EPA) requesting that the agency make a finding that greenhouse gas (GHG) emissions from mobile sources endanger public health and welfare under section 202 of the Clean Air Act (CAA or Act), 42 U.S.C. § 7521. R. at 5. That 'Endangerment Finding' would require EPA to regulate GHGs from mobile sources. 42 U.S.C. § 7521. The 202 Petition did not seek regulation of GHGs under the National Ambient Air Quality Standards (NAAQS) program, despite identical listing criteria under section 108 of the Act. *Id.*; 42 U.S.C. § 7408. EPA denied the 202 Petition in 2003, stating that GHGs were not "air pollutants" within the meaning of the Act, and that as a policy matter it would be unwise to regulate GHGs at that time. R. at 5. Litigation ensued, and in *Massachusetts v. EPA*, the Supreme Court held that GHGs were "air pollutants" under the Act and that EPA had to make an Endangerment Finding or demonstrate that the scientific uncertainty surrounding the impacts of GHGs was too profound to do so. 549 U.S. 497, 527–29, 533–35 (2007).

In 2009 EPA issued an Endangerment Finding concluding that GHG emissions from mobile sources endangered both public health and welfare. Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66496, 66510 (Dec. 15, 2009) [hereinafter 2009 Endangerment Finding]. EPA found that

GHG-associated global warming endangered public health by, *inter alia*, worsening ozone pollution, increasing heat-related deaths, and proliferating insect-borne diseases. *Id*. at 66524. Additionally, EPA found that GHGs endangered public welfare by reducing agricultural productivity, limiting water supplies, and increasing property and economic damage from storms and rising sea levels. *Id*. at 66531. In the years following the 2009 Endangerment Finding, EPA initiated numerous regulations aimed at limiting domestic GHG emissions.[2]

Shortly EPA issued its 2009 Endangerment Finding, a coalition of environmental organizations, including Climate Health and Welfare Now (CHAWN), filed a petition with EPA requesting the agency list GHGs as a criteria pollutant under section 108(a) and issue primary and secondary NAAQS. 42 U.S.C. § 7408.[3] R. at 4. Under the NAAQS program, EPA must establish ambient concentration limits for designated criteria pollutants at levels requisite to protect public health and welfare. 42 U.S.C. § 7408. Once NAAQS are issued, states must submit a State Implementation Plan (SIP) demonstrating how they will achieve compliance with EPA's standards within ten years. CAA § 172(a)(2)(A); 42 U.S.C. § 7502(a)(2)(A). Failure to meet compliance deadlines is punishable by rescission of federal highway funding or direct EPA regulation of a state's emissions. CAA § 110(c)(1), 42 U.S.C. § 7410(c)(1); CAA § 179(a), (b)(1), 42 U.S.C. § 7509(a), (b)(1).

EPA did not respond to CHAWN's petition and has not invoked its authority to designate GHGs . R. at 4, 6. On April 1, 2019, CHAWN properly served EPA notice of its intent to sue for failure to carry out its allegedly mandatory duty to regulate GHGs under section 108(a) and for

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[2] *See, e.g.*, Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,510 (Oct. 23, 2015).

[3] Ctr. for Biological Diversity e al., *Petition for to Establish National Pollution Limits for Greenhouse Gases Pursuant to the Clean Air Act* (Dec. 9, 2009).

"unreasonable delay in carrying out its non-discretionary duty to designate GHGs as a criteria pollutant as demanded in the petition for rulemaking." R. at 4.

II. Procedural History

On October 15, 2019, CHAWN commenced a CAA section 304(a) citizen suit against EPA. *Id.* CHAWN asserts EPA failed to carry out a mandatory duty under section 108(a) to regulate GHGs and that EPA unreasonably delayed designating GHGs as requested in CHAWN's 2009 petition. *Id.* COGA intervened in the proceedings pursuant to Fed. R. Civ. P. 24(a), filing a cross-claim against EPA seeking a declaration that the 2009 Endangerment Finding is unsupported by the record and contrary to law. *Id.*

After briefing the issues, CHAWN and COGA filed cross motions for summary judgment. R. at 2. The district court granted partial summary judgment on CHAWN and COGA's motions. R. at 3. On CHAWN's motion, the court concluded that EPA's 2009 Endangerment Finding is valid with respect to public welfare, that EPA unreasonably delayed designating GHGs in response to CHAWN's petition, and that EPA had a non-discretionary duty to designate GHGs as a criteria pollutant. R. at 12–13. Accordingly, the court ordered EPA to publish notice of a proposed rule designating GHGs as a criteria pollutant within 90 days, and to publish a final rule designating GHGs as a criteria pollutant within 180 days following publication of the notice of proposed rulemaking. *Id.* On COGA's motion, the court held that EPA's determination that GHGs endanger public health was contrary to law, and thus vacated the Endangerment Finding to the extent that it declared GHGs endanger public health. R. at 13. After the District Court's order, CHAWN, COGA, and EPA each filed a timely Notice of Appeal. R. at 1. The consolidated appeal now sits before the United States Court of Appeals for the Twelfth Circuit.

STANDARD OF REVIEW

Circuit courts review *de novo* a district court's grant of summary judgment. *Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin*., 452 F.3d 798, 805 (D.C. Cir. 2006). A party is entitled to summary judgment "only if there is no genuine issue of material fact and judgment in the movant's favor is proper as a matter of law." *Id.* Circuit courts consider questions of subject matter jurisdiction *de novo*, as jurisdiction may "never be waived or forfeited" and jurisdiction may be raised at "any point in the litigation." *Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012).

SUMMARY OF THE ARGUMENT

First, the New Union District Court did not have jurisdiction to resolve CHAWN's section 304(a) unreasonable delay claim. CAA section 304(a) provides that jurisdiction over unreasonable delay claims is informed by the venue requirements of section 307(b). Specifically, plaintiffs must bring such claims in the district court located in the circuit where a challenge to the final action could be brought under 307(b). 33 U.S.C. § 7604(a). Because the requested action is nationally applicable, under section 307(b), venue for a challenge to EPA's final action would reside in the D.C. Circuit. 33 U.S.C § 7607(b). Therefore, under section 304(a), jurisdiction to hear CHAWN's unreasonable delay claim rests solely in the D.C. District Court.

Second, under the arbitrary and capricious standard of review, this Court should uphold the 2009 Endangerment Finding with respect to public welfare because EPA had a rational basis for its conclusions, as the D.C. Circuit recognized in *Coalition for Responsible Regulation v. EPA*, 684 F.3d 102 (D.C. Cir. 2012), *aff'd in part, rev'd in part sub nom Util. Air Regul. Grp. v. EPA*, 573 U.S. 302 (2014).[4] The plain text of the Act provides that an Endangerment Finding is a

[4] The Supreme Court in *Utility Air* granted certiorari only to consider the validity of EPA's determination that its motor-vehicle GHG regulations automatically triggered permitting

purely scientific judgment and that EPA therefore cannot consider policy impacts of making the finding. In addition, any relevant lingering scientific uncertainty is not so profound as to preclude EPA from exercising its reasoned judgment, especially given the Act's precautionary nature.

Third, this Court should invalidate the 2009 Endangerment Finding with respect to public health because it is unsupported by the statute's plain language, legislative history, and EPA practice. The text and legislative history of the Act indicate that Congress intended EPA to consider climatic effects when evaluating endangerment to public welfare, not public health. Because the Act requires EPA to evaluate public health and public welfare separately, EPA may not consider indirect effects to public welfare as effects on the public health. Additionally, EPA has never relied solely on indirect health effects as the basis for an Endangerment Finding and, notably, in a previous finding considered climate change as solely impacting public welfare.

Fourth, EPA does not have a non-discretionary duty to list GHGs under section 108(a). The date-certain doctrine requires Congress to establish a clear deadline for agency action for an enforceable non-discretionary duty to lie. No such deadline exists here, nor can one reasonably be inferred from the Act's text. Further, EPA's issuance of the 2009 Endangerment Finding did not give rise to a duty to list GHGs because, under section 108(a)(1)(C), EPA retains full discretion whether to designate a pollutant. Both CHAWN and the district court rely heavily on *NRDC v. Train*, 545 F.2d 320 (2d Cir. 1976), in support of the conclusion that a mandatory duty exists. However, upon consideration of the legislative history and text of section 108(a) it is evident that *Train* was wrongly decided, or at least involved facts distinguishable from those here. Moreover, the Second Circuit decided *Train* before *Chevron v. NRDC*, when the Supreme Court announced the test for deference to agency interpretations of ambiguous statutes. 467 U.S.

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requirements for stationary sources emitting GHGs. The Court denied certiorari to consider challenges to the Endangerment Finding.

837 (1984). Under the *Chevron* framework *Train* is no longer good law, because the statute is ambiguous and EPA's interpretation of section 108(a) is reasonable.

Fifth, even if this Court finds that EPA has a non-discretionary duty to list GHGs, EPA's delay is not so unreasonable as to warrant the extraordinary remedy of mandamus. Courts must apply an exceptionally deferential standard of review to necessarily case-specific determinations of unreasonable delay. Under the widely accepted standard as set forth by the D.C. Circuit in *Telecomm. Rsch. & Action Ctr. v. FCC* (*TRAC*), 750 F.2d 70, 79 (D.C. Cir. 1984), EPA's ten-year delay satisfies the 'rule of reason': there is a reasonable basis for delay, and relevant additional considerations together counsel against a finding of unreasonableness. Finally, the facts here fall outside those in the narrow classes of cases where courts have found mandamus warranted, and there is no adequate alternative basis for reordering EPA's priorities.

ARGUMENT

I. The District Court did not have jurisdiction over CHAWN's unreasonable delay claim because under section 304(a), jurisdiction over delayed agency actions that are nationally applicable rests solely in the District Court for the District of Columbia.

A. District court jurisdiction for unreasonable delay claims under section 304(a) is contingent on compliance with the venue requirements of section 307(b).

As courts of limited jurisdiction, both this court and the district court must, before considering the merits of CHAWN's unreasonable delay claim, determine whether there is jurisdiction to hear that claim. *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010) ("Courts have an independent obligation to determine whether subject-matter jurisdiction exists, even when no party challenges it."). Under the Act, two independent statutory provisions, sections 304(a) and 307(b), govern the scope of federal jurisdiction for citizen suits and challenges to final agency actions respectively. 33 U.S.C. §§ 7604(a), § 7607(b). Depending on the nature of the claim, federal jurisdiction resides exclusively in *either* the district courts or the courts of appeals. Under

this concurrent-jurisdictional regime, section 304(a) requires unreasonable delay claims be brought in the district courts—specifically, a court in the circuit where the claim could have been brought to challenge the action under section 307(b). 33 U.S.C. § 7604(a). Because under section 307(b), a challenge to EPA's issuance of NAAQS would need to be brought in the D.C. Circuit, jurisdiction under 304(a) rests solely in the District Court for the District of Columbia. Thus, the New Union District Court did not have jurisdiction to hear CHAWN's claim for unreasonable delay in the designation of GHGs as a criteria pollutant.

Section 304(a) provides that the "district courts of United States shall have jurisdiction to compel . . . agency action unreasonably delayed, *except* that an action to compel agency action referred to in section [307(b)] of this title . . . may *only* be filed in a United States District Court within the Circuit in which such action would be reviewable under section [307(b)]." 33 U.S.C. § 7604(a) (emphasis added). Section 307(b) defines the limits of both jurisdiction and venue for petitions challenging final agency actions. *Sierra Club v. EPA*, 955 F.3d 56, 61 (D.C. Cir. 2020) (citing *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 593 (1980)). Under section 307(b), jurisdiction over challenges to final actions is vested solely in U.S. courts of appeals, while venue is determined by the geographic nature of the contested action. 33 U.S.C. § 7607(b); *Sierra Club v. EPA*, 955 F.3d at 61. If EPA's action is "nationally applicable," a suit "may be filed only in the United States Court of Appeals for the District of Columbia." 33 U.S.C. § 7607(b)(1). However, if a challenged action is "locally or regionally applicable," petitions "may be filed only in the United States Court of Appeals for the appropriate circuit." *Id.*

Under section 304(a), Congress developed a mechanism by which jurisdiction is informed by section 307(b)'s venue requirements. In this dispute, had EPA taken a final action and listed GHGs as a criteria pollutant under section 108(a)(1) and subsequently issued primary

and secondary NAAQS pursuant to § 109(a), venue for any challenges would rest exclusively in the U.S. Court of Appeals for the District of Columbia because NAAQS are national in scope. 33 U.S.C. § 7607(b)(1); *see also Tex. Mun. Power Agency v. EPA*, 89 F.3d 858, 867 (D.C. Cir. 1996) (noting that the purpose of section 307(b) is to place nationally significant decisions in the D.C. Circuit, while localized controversies remain in affected regions). Because under section 307(b) venue would be proper in the D.C. Court of Appeals, jurisdiction to hear a claim for unreasonable delay is limited to the district courts of the circuit in which a challenge to the final action could be brought—in this case, the District Court for the District of Columbia. Therefore, the district court should have dismissed the case for lack of subject matter jurisdiction.

B. Unlike section 307(b)'s venue requirements, jurisdiction under section 304(a) for claims of unreasonable delay cannot be waived.

Section 307(b)'s requirement that petitioners bring challenges to national actions in the Court of Appeals for the D.C. Circuit informs this Court's jurisdictional analysis under section 304(a). Under section 304(a), citizens may sue to compel non-discretionary agency action unreasonably delayed, but must bring suit in the district court of the circuit in which venue would be proper for challenging a final action under section 307(b). 33 U.S.C § 7604(a). Because NAAQS are national in scope, the D.C. Circuit is the proper forum under section 307(b), and jurisdiction under section 304(a) therefore rests in the D.C. District Court. As such, the New Union District Court had no authority to resolve CHAWN's claim. Although section 304(a) confers the district courts with jurisdiction to compel agency action unreasonably delayed, Congress limited the scope of jurisdiction, predicating it on whether the claims are brought in the proper district court under section 307(b). *Id*.

This dispute does not raise merely a question of venue, which may be waived if left unchallenged. *See Tex. Mun. Power*, 89 F.3d at 865–67 (holding that section 307(b)(1) is merely

a venue provision); *New York v. EPA*, 133 F.3d 987, 990 (7th Cir. 1998) (recognizing that objections to venue are waivable if not raised). The district court mistakenly relied on the above decisions, wherein courts resolved claims brought under section 307(b) for final agency actions and *not* for unreasonable delay. Therefore, the court's analysis of venue is limited to section 307(b), and not the questions of jurisdiction and venue under section 304(a). This distinction is narrow, yet dispositive, because in the section 307(b) context courts have relied on the "less than clear" language found in the provision to develop concurrent but "not coterminous" systems for resolving both jurisdictional and venue inquiries. *See Tex. Mun. Power*, 89 F.3d at 867; *Dalton Trucking, Inc. v. EPA*, 808 F.3d 875, 879 (D.C. Cir. 2015) (noting that the despite the phrases "subject matter jurisdiction" and "venue" not appearing in the text of section 307(b), relevant Supreme Court precedent, legislative history, and the text of the provision make clear it governs both jurisdiction and venue).

Unlike section 307(b), section 304 is considerably more precise in distinguishing between its requirements for jurisdiction and venue, because Congress established separate subsections to address issues of jurisdiction (section 304(a)) and venue (section 304(c)). This statutory division reveals why the district court did not have authority to adjudicate CHAWN's unreasonable delay claim. While section 304(a) stipulates that district courts "shall have jurisdiction" over unreasonable delay claims, the provision conditions courts' jurisdictional authority, limiting it to situations where the case is brought to the district court in the circuit where venue would be proper under section 307(b). In contrast with section 307(b), there is no room to read venue requirements into the aptly titled "Jurisdiction" provision of section 304(a), because the statute's plain language limits the subsection's contents solely to the issue of jurisdiction.

This conclusion is bolstered by section 304(c)'s title: "Venue" and its text, describing the proper district court based on geographic scope to bring a citizen suit. The intersection of these statutory provisions makes clear that not only has CHAWN brought its unreasonable delay claim in the wrong venue under section 307(c), as the D.C. District Court is proper, but, more importantly CHAWN brought that claim in a court that has no jurisdiction to decide the case under the requirements of section 304(a), which incorporates by reference section 307(b). Unlike the issue of improper venue which may be waived, subject matter jurisdiction is a threshold determination that must be resolved before turning to the merits of the claims, *Hertz Corp.*, 559 U.S. at 94, and that requirement has not been met under the plain language of the Act.

II. The 2009 Endangerment Finding is valid for public welfare because substantial evidence provides a rational basis for EPA's conclusion.

Courts may only overturn an Endangerment Finding if it is: (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional rights; (3) in excess of statutory jurisdiction; or (4) without observance of procedure required by law. *Coal. for Responsible Regul*, 684 F.3d at 118–22 (citing CAA § 307(d)(9); 42 U.S.C. § 7607). COGA's challenge to EPA's conclusion that GHGs are "reasonably anticipated to endanger public welfare" is reviewed under an arbitrary and capricious or abuse of discretion standard. *Coal. for Responsible Regul.*, 684 F.3d at 116 (reviewing EPA's 2009 Endangerment Finding under an arbitrary and capricious or abuse of discretion standard). The arbitrary and capricious standard of review is highly deferential and presumes the validity of agency action. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971). The function of judicial review under this standard is to merely ensure that agency decisions are based on a consideration of relevant factors. *Id*. at 416. A reviewing court must therefore uphold an agency's decision if it has a rational basis. *Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc.*, 419 U.S. 281, 290 (1974)

Under this highly deferential standard of review, this Court should uphold the 2009 Endangerment Finding with respect to public welfare because EPA had a rational basis for its conclusions supported by the text and past EPA practice. Given the substantial evidentiary record, EPA's conclusions are valid, even in the face of policy considerations and potential lingering scientific uncertainty.

An Endangerment Finding is a purely scientific judgment and may be valid irrespective of absurd policy results. *Coal. for Responsible Regul., Inc*., 684 F.3d at 118. In *Coalition*, the D.C. Circuit upheld the validity of the 2009 Endangerment Finding, finding EPA's conclusion that climate change threatened public welfare to be rational and not arbitrary or capricious. *Id*. The *Coalition* court dismissed the argument that EPA was required to consider the potentially absurd policy implications of making an endangerment finding. *Id*. The D.C. Circuit emphasized the Supreme Court's holding that EPA must ground its "reasons for action or inaction" in making the endangerment finding "in the statute." *Id*. at 118 (citing *Mass. v. EPA*, 549 U.S. at 501). Further, the court noted that the statute refers only to endangerment, and never policy. *Id*.[5] The court concluded that policy judgments, like the consideration of absurd regulatory impacts, have nothing to do with whether greenhouse gases contribute to climate change, or whether that contribution endangers public welfare. *Id*.

Lingering scientific uncertainty does not invalidate an Endangerment Finding if the statute is precautionary in nature. *Id*. at 121. If a statute is "precautionary" and "designed to protect the public health," and the relevant evidence is "difficult to come by, uncertain, or

[5] Section 202(a)(1) provides that "(1) [EPA] shall by regulation prescribe (and from time to time revise) in accordance with the provisions of this section, standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, *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) (emphasis added).

conflicting because it is on the frontiers of scientific knowledge," EPA need not provide "rigorous step-by-step proof of cause and effect." *Id*. at 121 (citing *Ethyl Corp. v. EPA*, 541 F.2d 1, 28 (D.C. Cir. 1976)). The *Coalition* court noted that section 202(a)(1) did not restrict EPA to remedial action—it required EPA to make a precautionary, forward-looking judgment about the risks of air pollutants—thus affirming the Act's "precautionary and preventative orientation." *Id*. at 122. Based on this understanding of the CAA's objectives, the D.C. Circuit reasoned that requiring EPA to eliminate all scientific uncertainty before making an Endangerment Finding "would effectively prevent EPA from doing the job Congress gave it." *Id.*[6]

Additionally, Supreme Court precedent and EPA's substantial scientific evidence supports the validity of the 2009 Endangerment Finding despite some scientific uncertainty. *Coal. for Responsible Regul*., 684 F.3d at 122. In *Massachusetts v. EPA*, the Supreme Court concluded that to avoid regulating emissions of GHGs under a theory of scientific uncertainty, EPA would need to show "uncertainty . . . so profound that it precludes EPA from making a reasoned judgment as to whether greenhouse gases contribute to global warming." 549 U.S. at 534 (2007). The *Coalition* court applied this test to the 2009 Endangerment Finding. 684 F.3d at 122. The D.C. Circuit found that EPA relied on three substantial lines of evidence for the 2009 Endangerment Finding: (1) a "basic physical understanding" of the impacts of various natural and manmade changes on the climate system; (2) historical evidence of past climate change; and (3) computer-based climate models. *Id*. at 121. Given the substantial evidence amassed by EPA, the court determined the scientific uncertainty was not profound enough to reject the Endangerment Finding. *Id*. at 122.

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[6] *See also Lead Indus. Ass'n, Inc. v. EPA*, 647 F.2d 1130, 1155 (D.C. Cir. 1980) ("[R]equiring EPA to wait until it can conclusively demonstrate that a particular effect is adverse to health before it acts is inconsistent with both the Act's precautionary and preventive orientation and the nature of [EPA]'s statutory responsibilities.").

The 2009 Endangerment Finding is based on substantial evidence, and thus is valid despite some lingering scientific uncertainty and potential absurd policy results. The text of the Act and the previously unsuccessful challenges to the 2009 Endangerment Finding demonstrate that COGA's arguments to the contrary are without merit. The text governing endangerment findings for criteria pollutants in section 108(a)(1)(A) is nearly identical to the text of section 202(a)(1).[7] Like the plain language of section 202(a)(1), the text of section 108(a)(1)(A) requires EPA to answer only two questions: (1) whether "air pollution," in this case greenhouse gases, "may reasonably be anticipated to endanger public health or welfare"; and (2) whether emissions from sources under the NAAQS program "cause, or contribute to" that endangerment. 42 U.S.C. 7408(a)(1). As the *Coalition* court made clear, this provision leaves no room for the consideration of policy impacts. While absurd regulatory impacts may play a role in EPA's future policy decisions, those impacts have no bearing on whether greenhouse gases contribute to the endangerment of public welfare. In addition, the small amount of lingering scientific uncertainty does not render the 2009 Endangerment Finding invalid. There has been no showing of profound uncertainty in this case. EPA's findings are based on substantial scientific evidence and a small amount of scientific uncertainty does not render them invalid.

III. The 2009 Endangerment Finding is invalid for public health because the text and legislative history of the Act indicate EPA may consider only direct health effects.

The 2009 Endangerment Finding is invalid with respect to "public health" because the finding relies entirely on indirect effects on human health in making a finding of endangerment.

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[7] *See supra* note 5. Similar to section 202(a)(1), section 108(a)(1)(A) states "For the purpose of establishing national primary and secondary ambient air quality standards, the [EPA] 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*." 42 U.S.C. § 7408(a)(1)(A) (emphasis added).

That reliance is contrary to the text and legislative history of the Act, both of which indicate that EPA may consider only direct health effects. Although EPA previously concluded that the public health portion of the Endangerment Finding was valid, that does not preclude EPA, nor this Court, from reaching a different conclusion today. The Supreme Court has held that the level of deference given to an agency administering its own statute will vary with the circumstances, taking into account the "degree of the agency's care, its consistency, formality, and relative expertness, and . . . the persuasiveness of the agency's position." *United States v. Mead Corp*., 533 U.S. 218, 228 (2001). A newly adopted agency position is not entitled to deference if it is wholly unsupported by regulations, rulings, or administrative practice. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 473–74 (1988). If it is supported in some way, a court's acceptance of a newly adopted agency position should largely depend on its plausibility. *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993). Courts should be reluctant to reject a new agency interpretation that closely fits with the design of the statute as a whole. *Id*. at 418. Where a new interpretation is just as plausible as competing ones, there is "little if any reason not to defer to its construction." *Id*. at 417. This Court should defer to EPA's new interpretation because the plain text, legislative history, and EPA practice support a finding that EPA's interpretation is plausible and fits with the Act's construction.

The Act's text demonstrates Congressional intent that "public health" extend only to direct impacts of air pollutants, and that any indirect effects of climate change should be considered only with regard to public welfare. Under section 108(a)(1)(A), EPA must consider the endangerment of public health separately from that of public welfare, meaning that an affirmative finding of endangerment for one does not necessitate the same finding for the other. *See* CAA § 108(a)(1)(A); 42 U.S.C. § 7408(a)(1)(A). The Act does not define "public health,"

but the Supreme Court defined "public health" as the "health of the public." *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 466 (2001). The act defines "public welfare" broadly, encompassing indirect effects, *inter alia*, impacts on soils, water, crops, vegetation, wildlife, weather, climate, and effects on economics, personal comfort and well-being. CAA § 302(h); 42 U.S.C. § 7602(h). EPA expressed in the 2009 Endangerment Finding that the plain text of the Act does not resolve whether indirect climate-change health effects should be considered under "public health" or "public welfare." 2009 Endangerment Finding, *supra*. However, because the plain language indicates that the effects on climate should be considered under public welfare, EPA should consider only indirect health effects from climate under public welfare.

The legislative history of the 1977 Amendments underscores Congressional intent that the "public health" encompass only direct health impacts from air pollutants. Before 1970, adverse effects on welfare included only "injury to crops and livestock, damage to and deterioration of property, and hazards to transportation." 42 U.S.C. § 7602(g) (1970), *amended by* 42 U.S.C. § 7602(h) (1977). The 1970 Amendments incorporated impacts on "climate" and "personal comfort and well-being" as additional consideration factors under public welfare. CAA § 302(h); 42 U.S.C. § 7602. These changes evince Congress's intent that EPA consider climatic effects exclusively under public welfare. Furthermore, Congress intended that EPA evaluate effects on "public health" and "public welfare" separately. An early version of section 109(b) would have required NAAQS to protect only "public health," with the protection of "welfare" as part of that standard. Congress rejected that version of the bill, unbundling the consideration of "public health" and "public welfare." *Compare Air Pollution - 1970: Hearings Before the Subcommittee on Air and Water Pollution on S. 3229, S. 3466 and S. 3546* (1970), *with* CAA

§ 109, and 42 U.S.C. § 7409. To consider indirect health effects under public health would contravene Congressional intent.

Since the enactment of the 1977 Amendments, EPA has consistently categorized direct health impacts from exposure to air pollutants as "public health" impacts, and has categorized indirect impacts from pollutant-caused environmental changes as "public welfare" impacts.[8] While EPA considered ozone's indirect public health effects, EPA asserted that only "direct adverse effects on public health, and not indirect, allegedly beneficial effects" should be considered when setting primary NAAQS designed to protect public health. EPA, Pet'n for Rehearing, *Am. Trucking Ass'n v. EPA*, 195 F.3d 4, No. 97-1440 (D.C. Cir. 1999). EPA classified effects from climate change as a "public welfare" impacts in a prior Endangerment Finding.[9] In the 2009 Endangerment Finding, EPA acknowledged that there is no evidence that greenhouse gases directly cause health effects. 74 Fed. Reg. at 66526. There, EPA relied solely on indirect health effects in determining that greenhouse gases endanger public health. *Id*. EPA never previously determined that an air pollutant endangers public health solely through indirect effects. 2009 Endangerment Finding, *supra*, at 66527. This Court should reject such a determination, because EPA's consideration only of indirect health effects diverges from plain text of the Act, legislative history, and EPA practice.

[8] *See, e.g.*, Review of the National Ambient Air Quality Standards for Nitrogen Dioxide, U.S. EPA (September 1995) (categorizing effects of NO_2 on the environment as "public welfare" impacts, and effects from direct inhalation of NO_2 as "public health" impacts).

[9] In listing new municipal solid waste landfills as a source category under section 111, EPA identified global climate change as a public welfare impact. Standards of Performance for New Municipal Solid Waste Landfills, 56 Fed. Reg. 24469 (May 30, 1991). Although section 111 governs the New Source Performance Standards under the CAA, the endangerment finding language is identical to that in sections 108 and 202. *See* 42 U.S.C. § 7411(b)(1)(A).

IV. EPA does not have a non-discretionary duty to list greenhouse gases as "criteria pollutants" under section 108(a) because EPA does not "plan" to issue air quality criteria as provided by section 108(a)(1)(C).

As the district court correctly determined, under the date-certain doctrine, section 108(a) does not impose on EPA a non-discretionary duty to list GHGs . R. at 10.[10] However, CHAWN alternatively contends that the 2009 Endangerment Finding gave rise to an independent non-discretionary duty for EPA to list GHGs based on the construction of section 108(a). In support of this position CHAWN relies heavily on the Second Circuit's decision in *NRDC v. Train*, 545 F.2d 320 (2d Cir. 1976). *Train*, however, was wrongly decided. Further, even if this Court agrees with the *Train* court's conclusion, the underlying facts of that case are distinguishable from those here. Finally, even if this Court finds that EPA has a non-discretionary duty to list GHGs under section 108(a), this Court it should exercise its equitable powers under the absurd-results doctrine and not require EPA to list GHGs .

A. Section 108(a) does not impose on EPA a non-discretionary duty to list GHGs because a statutory deadline is an essential element of any non-discretionary duty, and section 108(a) imposes no such deadline.

Section 304(a)(2) grants citizens a cause of action against EPA for its failure "to perform any act or duty under [the Act] which is not discretionary." 42 U.S.C. § 7604. The district court correctly relied on a robust line of case law adopting the "date-certain doctrine," under which for a duty to be non-discretionary a statute must impose a bright-line deadline on the relevant action. *See Riverkeeper v. Wheeler*, 373 F. Supp. 3d 443, 450–52 (S.D.N.Y. 2019) (explaining evolution of the date-certain doctrine). Absent a clear deadline, an agency has discretion in the timing of an action that might otherwise be mandatory, and a section 304(a) non-discretionary duty claim

[10] The Court requested briefing for these last two issues in the reverse order, but because "a delay can't be unreasonable with respect to action that is not required," *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 63 n.1 (2004), so EPA first addresses the issue of non-discretionary duty.

does not lie. Because section 108(a) does not impose a clear deadline for listing criteria pollutants, the district court correctly found that CHAWN cannot bring a section 304(a)(2) claim.

Following the analyses of the D.C. and Second Circuits, this court should adopt the date-certain doctrine and hold that CHAWN's non-discretionary duty claim falls outside section 304(a)(2). The Second Circuit in *Environmental Defense Fund v. Thomas* adopted the D.C. Circuit's distinction "between those . . . provisions in the [Clean Air] Act that include stated deadlines and those that do not," holding that "provisions that *do* include a stated deadline should, as a rule, be construed as creating non-discretionary duties." 870 F.2d 892, 897 (2d Cir. 1989) (adopting the conclusion of *Sierra Club v. Thomas* (*Thomas*), 828 F.2d 783, 791 (D.C. Cir. 1987)) (emphasis added). As the D.C. Circuit explained, the CAA's citizen suit provision is a conditional waiver of sovereign immunity, and requiring a date-certain deadline to enforce a non-discretionary duty is consistent with the Supreme Court's requirement that "a waiver of sovereign immunity must be unequivocally expressed in the statutory text" and that courts must "construe [ambiguities] in favor of immunity." *FAA v. Cooper*, 566 U.S. 284, 290 (2012) (quoted in *Sierra Club v. Wheeler*, 956 F.3d 612 (D.C. Cir. 2020)) (cleaned up).

As the D.C. Circuit recognized in *Thomas*, it is "highly improbable that a deadline will ever by non-discretionary . . . if it exists only by reason of an inference drawn from the overall statutory frame." 828 F.2d at 791. In fact, the *Thomas* court was aware of only two instances in which a court had inferred a clear-cut deadline from the structure of a statute. *Id*. at 791, n.56. In *NRDC v. Train*,[11] for example, the D.C. Circuit noted that the Clean Water Act (CWA) required polluters to obtain permits by a specified date, and that EPA therefore had a "general duty" to

[11] This *NRDC v. Train*, a 1974 Clean Water Act case, runs on a different track from the *Train* discussed above and below. *Compare NRDC v. Train*, 510 F.2d 692 (D.C. Cir. 1974) *with NRDC v. Train*, 545 F.2d 320 (2d Cir. 1976).

publish relevant guidelines by that date. 510 F.2d 692, 710–11 (D.C. Cir. 1974) (discussed in *Thomas*, 828 F.2d at 791).[12] The CAA has no equivalent strictures that impose a mandatory duty to list GHGs by a set date. *See Thomas*, 783 F.2d at 791, n.56. Because the Act imposes no date-certain deadline, and because a clear-cut deadline cannot reasonably be inferred from the statute, under the date-certain doctrine EPA has no mandatory duty to list GHGs .

B. Section 108(a) does not create a non-discretionary duty to list GHGs because section 108(a)(1)(C) confers on EPA discretion whether to list air pollutants.

Central to the question of whether EPA has discretion when listing criteria pollutants under section 108(a) is the provision's conflicting language: section 108(a)(1) states that EPA "shall" list pollutants, but section 108(a)(1)(C) provides that EPA need only list pollutants "for which he plans to issue air quality criteria." 33 U.S.C. § 7408(a)(1), (a)(1)(C). To resolve this tension, the district court adopted the Second Circuit's holding in *Train,* concluding that EPA had no discretion whether to list lead as a criteria pollutant after making an endangerment finding under section 108(a)(1). 545 F.2d at 328. However, the court below addressed neither the flaws in the *Train* court's reasoning nor how post-1976 developments in the law undermine the Second Circuit's conclusion. Both considerations firmly support the conclusion that *Train* is no longer good law and that EPA has discretion under section 108(a) whether to list GHGs as a criteria pollutant.

[12] In *In re Center for Auto Safety*, the second case discussed in *Thomas*, the D.C. Circuit found that the Energy Policy and Conservation Act (EPCA) imposed on the National Highway Traffic Safety Administration a mandatory deadline to set fuel economy standards. 793 F.2d 1346 (D.C. Cir. 1986). The EPCA required the agency to prescribe standards "at least 18 months prior to the beginning of [the] model year." *Id.* at 1348. Although the EPCA did not set a specific date as the official start of that year, the court concluded that NHTSA's delays left the agency with no choice but to "rubberstamp" the fuel economy levels set by manufacturers, and thus inferred a deadline. *Id.* at 1354.

C. The Second Circuit's decision in *NRDC v. Train* is neither dispositive nor persuasive in resolving the issue of EPA's discretion under section 108(a).

1. The *Train* court's reliance on legislative history specific to lead limits *Train*'s applicability and persuasiveness in answering whether EPA has a non-discretionary duty to list GHGs.

In *Train,* the court recognized that the contradictory language of section 108(a) made it difficult to determine whether EPA had a mandatory duty to list lead as a criteria pollutant, and turned to legislative history to resolve the issue. 545 F.2d 320, 325–27. However, most of the legislative history that the Second Circuit relied upon is specific *only* to EPA's duty to list lead. *Id.* That is, although portions of the history indicate Congressional intent to impose a mandatory duty to list lead, the history does not support a general non-discretionary duty to list other pollutants, including GHGs. *Id.* For example, the court gave significant weight to Senator Muskie's statement that Congress "expects criteria to be issued for . . . lead." *Id*. at 326 (quoting Legislative History, Clean Air Amendments, Vol. 1 at 430, 432 (1977) [hereinafter Leg. Hist., Vol. 1]). Additionally, the *Train* court found the Senate Report's discussion of section 108(a)'s mandatory deadlines indicative of a lack of discretion when listing. *Id.* This portion of the legislative history, however, references the original criteria pollutants and a number of other pollutants, including lead, that were widely known to endanger public health and welfare and that Congress anticipated EPA would list expeditiously. *Id.* (citing Leg. Hist., Vol. 1, at 409, 410). Given that the bulk of the legislative history cited by the *Train* court was specific to lead and the unique circumstances surrounding its listing, the persuasiveness of the case is reduced considerably with respect any duty to list GHGs under section 108(a).

Train's relevance is further diminished by the Second Circuit's references to portions of the legislative history that suggest 108(a) grants EPA's discretion to list pollutants. The court below failed to mention how these contrary elements of the legislative history impact the

conclusion that EPA has a non-discretionary duty. The *Train* court quoted the Senate Report wherein Congress specifically contemplated that the initial list of criteria pollutants shall include all pollutants that "have an adverse effect on health and welfare . . . are emitted from widely distributed . . . sources, *and* . . . for which air quality criteria are *planned*." *Id.* (quoting Leg. Hist. Vol. 1, at 454) (emphasis added). This history evidences that, as a threshold matter, EPA has broad discretion when listing a pollutant based on whether the agency "planned" to issue criteria. This history also suggests why in the case of lead, EPA had no discretion: not only had the requisite endangerment finding been made but Congress had also already initiated plans for the listing of lead, thereby satisfying the planning element of section 108(a)(C).

2. *NRDC v. Train* does not survive the Supreme Court's subsequent holding in *Chevron v. NRDC*, which announced the test for when to defer to agency interpretations of ambiguous statutory provisions.

Eight years after *Train*, the Supreme Court in *Chevron v. NRDC* announced the test for the level of deference owed to agency interpretations of ambiguous statutes. 467 U.S. 837 (1984). Under this framework, a reviewing court must resolve two questions when considering whether to defer to an agency's interpretation: first, whether Congress directly and unambiguously spoke to the issue, and, if not, whether the agency's interpretation is reasonable. *Id.* at 842–43. Under this framework, when faced with ambiguous statutory language the role of the court is not to assess whether an agency's interpretation is the best possible construction, but merely a "permissible" one. *Id.* at 843.

Although the Second Circuit was not bound by this paradigm when deciding *Train*, this dispute requires the court to consider whether under *Chevron*, *Train*'s interpretation of section 108(a) survives. When evaluating a court's pre-*Chevron* decision, the interpretation only controls if made at *Chevron* step one, requiring the statute to speak plainly and unambiguously on the

matter, leaving no room for agency discretion. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005). If, however, a court resolves the issue at *Chevron* step two after recognizing the statute's language as ambiguous, that court's interpretation is entitled no deference over an agency's reasonable interpretation. *Id.*

When *Train* is evaluated under *Chevron* as informed by *Brand X*, it is evident that the Second Circuit found section 108(a) ambiguous, deciding its meaning at *Chevron* step two. Therefore, not only is the interpretation of the statute entitled to no deference from this Court, but EPA's interpretation should also prevail as a reasonable reading of the provision. The Second Circuit first found "the literal language of § 108(a) . . . somewhat ambiguous" before turning to legislative history to divine Congress's intent. 545 F.2d 320 at 327. The contradictory language in the statute's text establishes that Congress spoke neither clearly nor unambiguously on whether section 108(a) imposes on EPA a non-discretionary duty to list pollutants. Because the *Train*'s court's decision was made at *Chevron* step two, this Court need only assess whether EPA's interpretation is reasonable.

D. Under *Chevron*, EPA's interpretation of section 108(a) is reasonable under the deferential standard of review court's must apply when evaluating agency interpretations of ambiguous statutes.

The standard of review for agency interpretations of ambiguous statutes at *Chevron* step two is exceedingly deferential. Reviewing courts shall uphold the interpretation if it is reasonable—that is, "based on a permissible construction of the statute"—irrespective of whether it is the "best" interpretation or one the court would have chosen. *Chevron*, 467 U.S. at 843, n.11. Under this standard, after considering the statute's structure and legislative history, EPA's interpretation of section 108(a) is rational and must be upheld. The reasonableness of EPA's position is bolstered by fundamental changes to the Act's implementation in the years

following *Train*. These modifications evidence not only why *Train* is incorrect, but also speak to the reasonableness of EPA's interpretation.

The *Train* court considered the issuance of NAAQS as a mandatory precursor to other statutory mechanisms for regulating pollutants—programs that the Second Circuit viewed as merely supplementary to NAAQS. 545 F.2d at 325. The court reasoned that allowing EPA to exercise discretion to avoid listing pollutants under section 108(a) would foreclose regulation of those pollutants under other provisions of the statute, undermining the core purpose of the Act and preventing meaningful progress in controlling air pollution. *Id.* However, the forty-four years since *Train* have seen the CAA amended several times, making the regulatory concerns central to that court's decision limited or nonexistent today.

Congress recognized in its 1977 and 1990 Amendments to the CAA that NAAQS, while important, were not appropriate for regulating every pollutant. The New Source Performance Standards (NSPS) codified this conclusion, explicitly allowing for the regulation of an entire class of "designated pollutants" "for which air quality criteria have not been issued . . . under section 108(a)." 42 U.S.C. § 7411(d)(1), CAA § 111(d)(1). This post-*Train* statutory revision indicates that NAAQS are no longer (if they ever were) mandatory precursors to subsequent regulation under the Act, thus undermining *Train's* conclusion that because NAAQS were precursors to regulation, EPA had no discretion in listing. The modern CAA bolsters the reasonableness of EPA's interpretation based on factors the *Train* court was unable to consider.

Additionally, Congress spoke directly to EPA's discretion under section 108(a) when creating the Act's hazardous air pollutants (HAPs) program. Section 122, established in the 1977 Amendments, directs EPA to undertake an endangerment analysis for toxic air pollutants, stipulating that if EPA finds endangerment, the agency "*shall* simultaneously . . . include

such substance . . . under section 108(a)(1) . . . *or shall* include . . . [it] in the list published under section 111(b)(1)(A), *or take any combination of such actions*." 42 U.S.C § 7422(a) (emphasis added). The plain language reveals that section 108(a)(1) does not impose a mandatory duty on EPA to list, because Congress explicitly provided in section 122 that even after making an endangerment finding, EPA may choose not to regulate under section 108.

Contrary to the *Train* court's conclusion that the legislative history of section 108(a) supports a non-discretionary duty, the history is replete with references indicating Congressional intent to grant EPA broad discretion when revising the list of criteria pollutants. The Senate Report noted not only that other criteria pollutants "*may* be added . . . *if* [EPA] subsequently should find that there are other pollution agents for which [NAAQS] is *appropriate*, he *could* list those agents." S. Rep. No. 91-1196, at 10 (1970) (emphasis added). Here, Congress not only recognized EPA's need for flexibility in instances when listing a pollutant NAAQS might not be appropriate, but also went one step further, indicating that *even if* EPA found a pollutant met the relevant criteria for NAAQS regulation the agency *could* choose to regulate, impliedly granting it the authority to do the opposite. Given the broad discretion Congress intended to vest in EPA under section 108(a), EPA's interpretation is not only reasonable, but likely correct based on this robust legislative history.

Further supporting the reasonableness of EPA's interpretation is Supreme Court precedent holding that the use of "shall" in a statute does not always give rise to a non-discretionary duty. *Young v. Cmty. Nutrition Inst.*, 476 U.S. 974 (1986). There, the Supreme Court concluded that the statute's use of "shall promulgate" was modified by later language that granted FDA the discretion whether to issue regulations, and the agency's interpretation that "shall" more closely meant "may" was therefore a permissible interpretation deserving

deference. *Id.* at 979–80. Like the statute at issue in *Young*, here, section 108(a)(1)'s "shall list" language is modified by section 108(a)(1)(C), granting EPA broad discretion to list only pollutants for which "he plans to issue" NAAQS. 33 U.S.C. 7408(a)(1)(C). Given the analogous Supreme Court precedent and *Chevron*'s highly deferential standard of review for interpretations of ambiguous statutes, this Court should uphold EPA's reasonable interpretation.

E. Even if the Act imposes a non-discretionary duty on EPA to list GHGs under NAAQS, if enforced, the duty would create results congress never intended and therefore, this Court should set aside the duty under the doctrine of absurd-results.

Even if this Court concludes that section 108(a) creates a non-discretionary duty to list pollutants, it should exercise its equitable powers under the absurd-results doctrine and set aside the requirement. Under the absurd-results doctrine, courts may override statutory language where strict adherence to the text would produce results Congress never intended. *United States v. Ron Pair Enters. Inc.*, 489 U.S. 235, 242 (1989). When evaluating the unworkability of a statutory requirement, courts should consider "whether the result is absurd . . . in the particular statutory context." *Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1068 (D.C. Cir. 1998). Recently, the Supreme Court applied this doctrine in the context of regulating GHGs under the CAA's Title V and PSD provisions, with ardent textualist Justice Scalia declaring that a court's fidelity to the statute has limits—limits exceeded by the results that would follow EPA regulating "atypical pollutants that, like greenhouse gases, are emitted in such vast quantities that their inclusion would radically transform the programs and render them unworkable as written." *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 320 (2014).

This dispute is analogous to that in *Utility Air* because NAAQS are fundamentally ill-equipped to regulate GHGs. An attempt to regulate GHGs via NAAQS is not only unlikely to succeed in reducing emissions, but would also seriously harm states, citizens, and regulated

entities in the process—a result Congress could not have intended. GHGs are fundamentally distinguishable from typical criteria pollutants and more difficult to regulate because emissions disperse evenly throughout the Earth's atmosphere. Jesse Reiblich, *Addressing Climate Change*, 2 L.S.U. Energy L. & Res. 49, 55 (2013). Additionally, it is not the "mere presence of [GHGs] in the air that is dangerous," but the total "volume of carbon dioxide emissions" in the atmosphere that is harmful, making GHGs unsusceptible to local regulatory fixes compared to typical pollutants. *Id.*

Additionally, the CAA's federalism dynamic for regulating criteria pollutants is unworkable with respect to GHGs. Because "[i]ndividual states do not have the funding or resources to adequately address an international problem like climate change," *id*., it is unclear how a state could ever ensure its program provides for "implementation, maintenance, and enforcement" of the NAAQs as required by section 111(a)(1) or for section 110(k)(5)'s requirement that state plans be adequate to "attain or maintain" the standard. 33 U.S.C. § 7411(a)(1); § 7410(k)(5). States, unlikely to meet these standards through no fault of their own, would then be subject to penalties, including loss of highway funding. 42 U.S.C § 7509(b)(1).

The impracticability of regulating GHGs under NAAQS is perhaps most apparent when considering how or if EPA could establish meaningful standards for ambient air concentrations. If the level is set below present atmospheric concentrations, the entire United States would be out of attainment, and due to the global distribution of GHGs it is unlikely that any steps taken as part of a SIP would result in attainment. Robert R. Nordhaus, *New Wine into Old Bottles: The Feasibility of Greenhouse Gas Regulation Under the Clean Air Act*, 15 N.Y.U. Env't L.J. 53, 62 (2007). But if the level is set above present concentrations, the entire country would be in attainment, leaving compliance with the Act's prevention of significant deterioration program the

only significant requirement—which, given the global distribution of GHGs, would similarly be insufficient to ensure GHG levels remain below the required level. *Id*. at 62–63.

The absurd nature of trying to regulate GHGs under NAAQS was contemplated by Judge Tatel in his dissent to the D.C. Circuit's decision in *Mass. v. EPA*. 415 F.3d 50, 70 (D.C. Cir. 2005) (Tatel, J., dissenting). Noting the unworkability of regulating GHG ambient air concentrations compared to regulating of GHG emissions from automobile tailpipes, Judge Tatel explained that the absurd-results doctrine would justify an exception to any potential obligation to regulate CO_2 emissions under NAAQS. *Id.* The Supreme Court in *Mass v. EPA* cited Tatel's dissent favorably, indicating that the high court might also conclude that NAAQS are not equipped to regulate GHGs. 549 U.S. at 515.

V. EPA's ten-year delay listing GHGs is not so unreasonable as to warrant the extraordinary remedy of mandamus.

A. Courts must grant agencies an exceptionally deferential standard of review where a plaintiff alleges unreasonable delay.

Even if this Court concludes that EPA has a non-discretionary duty to list GHGs as a criteria pollutant, EPA's delay is not sufficiently unreasonable to warrant mandamus. Separation-of-powers principles restrain courts' interference with executive agency decision-making. The Supreme Court in *Norton v. Southern Utah Wilderness Alliance* (*SUWA*) narrowly construed judicial power to compel agency action under the Administrative Procedure Act "to protect agencies from undue judicial interference with their lawful discretion, and to avoid judicial entanglement in abstract policy disagreements which courts lack both expertise and information to resolve." 542 U.S. 55, 66 (2004). This bedrock principle applies in force where plaintiffs allege unreasonably delayed agency action. *See, e.g., Cutler v. Hayes*, 818 F.2d 879 (D.C. Cir

1987) (recognizing "deference traditionally accorded [to] an agency to develop its own schedule"); *Oil, Chem. & Atomic Workers Union v. OSHA*, 145 F.3d 120, 123 (3d Cir. 1998).[13]

The central inquiry when analyzing a claim of unreasonable delay is "whether the agency's delay is so egregious as to warrant mandamus." *In re Core Commc'ns, Inc.*, 531 F.3d 849, 855 (D.C. Cir 2008) (quoting *TRAC*, 750 F.2d at 79).[14] As the Supreme Court has recognized, mandamus "is an extraordinary remedy, to be reserved for extraordinary situations." *Gulfstream Aerospace Corp. v. Mayacamus Corp*., 485 U.S. 271, 289 (1988). Even where a plaintiff demonstrates that "his right to . . . [mandamus] is clear and indisputable," the court must, "in the exercise of its discretion . . . be satisfied that the writ is appropriate under the circumstances." *Cheney v. U.S. D. Ct. for D.C.,* 542 U.S. 367, 380–81 (2004).[15] Under these principles, EPA's delay is not so unreasonable as to warrant that "extraordinary remedy."

B. EPA's delay is not unreasonable under the appropriate standard of review.

The D.C. Circuit in *Mashpee Wampanoag Tribal Council, Inc. v. Norton* recognized that resolving a claim of unreasonable delay "is ordinarily a complicated and nuanced task requiring consideration of the particular facts and circumstances before the Court." 336 F.3d 1094, 1100 (D.C. Cir. 2003). The D.C. Circuit has consistently recognized that "[t]here is no per se rule as to how long is too long to wait for agency action." *Core Commc'ns*, 531 F.3d at 855 (quoted authority omitted). And as the *Mashpee* court emphasized, the issue of unreasonable delay

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[13] ("We must begin a discussion of agency . . . inaction, by affording the agency considerable deference in establishing a timetable for completing its proceedings" (cleaned up).)

[14] *Accord, e.g.*, *Towns of Wellesley, Concord & Norwood, Mass. v. FERC*, 829 F.2d 275, 277 (1st Cir. 1987) ; *In re Pesticide Action Network N. Am.*, 532 F. App'x 649, 650 (9th Cir. 2015); *Mote v. Wilkie*, 976 F.3d 1337, 1344 n.6 (Fed. Cir. 2020).

[15] The D.C. Circuit has distinguished between findings of unreasonableness in the abstract and findings of unreasonableness that can trigger judicial intervention. *See, e.g.*, *In re Barr Lab'ys, Inc.*, 930 F.2d 72, 75–76 (D.C. Cir. 1991). Because courts must adjudicate "live controversies" and eschew "advisory opinions on abstract questions of law," *Hall v. Beals,* 396 U.S. 45, 48 (1969), EPA argues only that its delay is not so unreasonable as to warrant mandamus.

"cannot be decided 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. There, the court acknowledged that the type of delayed action at issue—an agency decision on a tribal recognition petition—would take the agency some fifteen years to resolve, and nonetheless declined to uphold the lower courts finding of unreasonable delay. *Id.* at 1097,1102.

Although the reasonable delay inquiry is case-specific, the D.C. Circuit in *TRAC* supplied a rough framework that most circuits apply to evaluate these claims. *See, e.g., Nat. Res. Def. Council, Inc. v. FDA*, 710 F.3d 71, 84 (2d Cir. 2013). But the D.C. Circuit has noted the limits of the *TRAC* standard: although it provides "useful guidance," it is "hardly ironclad" and "suffers from vagueness." 750 F.2d at 80. The *TRAC* court simply drew from prior cases "*some* factors *usually* relevant" to the unreasonable delay inquiry. *Mashpee Wampanoag*, 336 F.3d at 1100 (evaluating *TRAC*) (emphasis added).[16] But to the extent that *TRAC* guides this court's evaluation of CHAWN's claim, those factors weigh against finding unreasonable delay.

"The first and most important factor is that 'the time agencies take to make decisions must be governed by a 'rule of reason.'" *Core Commc'ns*, 531 F.3d at 855 (quoting *TRAC*, 750 F.2d at 79). The remaining five include:

> (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."

[16] The D.C. Circuit itself has not applied the *TRAC* factors consistently in all cases. *See, e.g.*, *In re Int'l Chem. Workers Union*, 958 F.2d 1144, 1149 (D.C. Cir. 1992) (applying a four-factor test overlapping with but distinguishable from the six-factor *TRAC* test).

In re United Mine Workers of Am. Int'l Union, 190 F.3d 545, 549 (D.C. Cir.1999) (quoting *TRAC*, 750 F.2d at 80).

Where a plaintiff asserts unreasonable delay, a reticence to overrule agency autonomy must guide reviewing courts. Courts are "ill-suited to review the order in which an agency conducts its business" and should be "hesitant to upset an agency's priorities by ordering it to expedite one specific action, and thus to give it precedence over others." *Sierra Club v. Thomas,* 828 F.2d 783, 797 (D.C. Cir. 1987); *see also id*. at 797 n.94 (collecting cases). Such hesitance is warranted because an agency, "[w]ith its broader perspective, and access to a broad range of undertakings, and not merely the program before the court," is better positioned than a court to make "comparative judgments involved in determining priorities and allocating resources." *Id*. (quoted authority omitted). Applying these guiding principles alongside the *TRAC* factors shows that EPA's delay is not so "egregious" as to warrant the "extraordinary remedy" of mandamus.

1. Applying the first TRAC factor, EPA's delay falls within the 'rule of reason.'

Under this first factor, courts look to statutory directives that might indicate the speed at which Congress expects an agency to act. *See TRAC*, 750 F.2d at 80. No such directive exists here. And as discussed at length above, regulating GHGs under NAAQS presents enormously complex—and likely impracticable—scientific, regulatory, and financial obstacles to meaningful regulation. Considering the difficulty of developing a regulatory scheme for GHGs, and the nationwide consequences that flow from listing GHGs under section 108(a), EPA's delay is presumptively not unreasonable.

2. Under the second *TRAC* factor, the absence of a statutory timetable or standard by which to evaluate EPA's delay counsels against a finding of unreasonableness.

The second *TRAC* factor assesses whether Congress provided "a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute."

TRAC, 750 F.2d at 80. In the absence of such indication, "an agency's control over the timetable of a rulemaking proceeding is entitled to considerable deference." *Sierra Club v. Gorsuch*, 715 F.2d 653, 658 (D.C. Cir. 653) (footnotes omitted). Here, no precise "timetable or other indication" governs EPA's listing of GHGs . *Id.*[17] Moreover, as the D.C. Circuit has held, Congress's provision of explicit deadlines in some areas of the CAA, but not others, counsels against judicial intervention where a plaintiff alleges unreasonable delay in the absence of a deadline. *See Thomas*, 828 F.2d at 797 n.99 ("Because the [CAA] imposed deadlines in some areas, we must conclude that Congress' failure to impose deadlines elsewhere was not inadvertent."). This factor thus counsels against a finding of unreasonable delay.

3. Because EPA's entire docket involves issues of human health and welfare, the third *TRAC* factor is of limited relevance.

CHAWN is likely to argue that the third *TRAC* factor, which looks to whether "human health and welfare are at stake," weighs in favor of a finding of unreasonableness. Courts have consistently recognized, however, that this factor is of little relevance where EPA delays are concerned, because "virtually the entire docket of the agency" involves issues relating to human health and welfare. *Thomas*, 828 F.2d at 798; *accord In re Pesticide Action Network N. Am*., 798 F.3d 809, 814 (9th Cir. 2015) (recognizing that EPA "regulates almost entirely in the realm of human health" (citation omitted)).

4. Because of the lack of meaningful regulation of GHGs that might arise from listing, the fourth *TRAC* factor counsels against a finding of unreasonableness.

The fourth *TRAC* factor instructs courts to "consider the effect of expediting delayed action on agency activities of a higher or competing priority." *TRAC*, 750 F.2d at 80. EPA has

[17] Even where an agency has violated a statutory date-certain deadline, thus implicating the first TRAC factor, courts will hesitate to find the agency's delay unreasonable. *See, e.g., Barr Lab'ys*, 930 F.2d at 75–76 (refusing to issue mandamus despite EPA's violation of a 180-day deadline).

both a "broad mandate" and "finite resources," and thus "cannot avoid setting priorities among them." *Thomas*, 828 F.2d at 798. As the D.C. Circuit recognized in *In re Barr Laboratories, Inc.*, courts should hesitate to overrule agency discretion to allocate resources among competing priorities: "The agency is in a unique—and authoritative—position to view its projects as a whole, estimate the prospects for each, and allocate its resources in the optimal way. Such budget flexibility as Congress has allowed the agency is not for us to hijack." 930 F.2d 72, 76 (D.C. Cir. 1991). Considering the enormous practical and legal obstacles involved in listing GHGs and the lack of meaningful impact on GHG emissions that might flow from that listing, this court should hesitate to interfere with EPA's discretion to allocate resources among legitimate, competing priorities involving the protection of human health and the environment.[18]

5. Under the fifth *TRAC* factor, the "nature and extent of the interests prejudiced by delay" are insufficient to warrant a finding of unreasonableness.

The *TRAC* court cited *Public Citizen Health Research Group v. FDA* when describing the fifth factor. *TRAC*, 750 F.2d at 80 (citing *Public Citizen*, 740 F.2d 21, 35 (D.C. Cir. 1984)). There, the D.C. Circuit, arguably in dicta,[19] cautioned against "agency inaction or delay . . . tantamount to denial" of a petition. *Public Citizen*, 740 F.2d at 35. Admittedly, one might reasonably consider EPA's ten-year delay responding to the 2009 Petition as such. But the issue in *Public Citizen* was FDA's delay responding to a petition for a rule requiring labels on aspirin warning of potential severe health effects for children with chicken pox, *Public Citizen*, 740 F.2d at 23—an action with a clear and direct potential benefit. The context here is distinguishable,

[18] Under its CAA authority, for example, EPA has dedicated substantial resources to reducing the number of nonattainment areas under the existing NAAQS program, to the acid rain program, and to the cross-state air pollution rule, as well as to assisting industries, states, and tribes with technical tools to meet their CAA obligations. Env't Prot. Agency, *Working Together: Fiscal Year 2018–2022 U.S. EPA Strategic Plan*, at 8–9 (Feb. 2018).

[19] The *Public Citizen* court found that exhaustion, finality, and ripeness doctrines precluded judicial review prior to "definitive agency action." 740 F.2d at 35.

most of all because, as discussed above, the benefits that might result from listing GHGs are unlikely to be meaningful, and will force EPA to allocate resources from competing priorities, including those restricting GHG emissions. At bottom, the "nature and extent" of the prejudiced interests here do not, standing alone, warrant the extraordinary remedy of mandamus.

6. Under the sixth *TRAC* factor, an absence of bad faith weighs against a finding of unreasonableness.

A finding of bad faith requires specific, concrete action—beyond mere delay—such as "singling someone out for bad treatment" or "asserting utter indifference to a congressional deadline," such that EPA would "have a hard time claiming legitimacy for its priorities." *Barr Lab'ys,* 930 F.2d at 76. Nothing in the record suggests that EPA has acted with such intent. Accordingly, CHAWN cannot overcome "the well established presumption that public officials . . . act in good faith and are conscientiously proper in the discharge of their duties." *Bayshore Res. Co. v. United States*, 2 Cl. Ct. 625, 632 n.4 (Cl. Ct. 1983) (collecting cases).

C. The facts in this case fall squarely outside the limited categories of cases in which courts have found the extraordinary remedy of mandamus warranted.

The ultimate consideration is whether this is one of the "exceptionally rare cases" with a justifiable "basis for reordering [EPA's] priorities." *Barr Lab'ys*, 930 F.2d at 76. Courts have ordered mandamus in limited, distinguishable contexts: first, where Congress has clearly indicated how quickly it expects an agency to act, *e.g.*, *Potomac Elec. Power Co. v. ICC*, 702 F.2d 1026, 1034 (D.C. Cir. 1983) (statute required agency "to act in a timely manner"). Second, courts have found delays unreasonable where the agency determined that a particular project was more urgent than others, *e.g.*, *Pub. Citizen Health Rsch. Grp v. Auchter*, 702 F.2d 1150, 1158

(D.C. Cir. 1993).[20] Third, courts have found delays unreasonable where an agency committed to a specific timeline, *e.g., In re Int'l Chem. Workers Union*, 958 F.2d 1144, 1150 (D.C. Cir. 1992). Fourth, courts have done so where an agency repeatedly violated its own commitments to act by a date-certain deadline, *e.g.*, *Pesticide Action*, 798 F.3d at 811–15. Fifth, courts find delays unreasonable when agencies fail to respond to remands, thereby avoiding review and frustrating judicial orders, *e.g.*, *Core Commc'ns*, 531 F.3d at 856. The above cases, all in distinguishable contexts, include those cited by the court below to support its finding of unreasonable delay.

The Supreme Court in *SUWA* cautioned against "undue judicial interference" with agency discretion, 542 U.S. at 66, and courts have rightly declined to overrule agency discretion outside of the above contexts. The facts here do not fall within those categories of "exceptionally rare cases" in which courts have found mandamus warranted, and there is no adequate alternative basis for reordering [EPA's] priorities." *See Barr Lab'ys*, 930 F.2d at 76.

CONCLUSION

For the foregoing reasons, Defendant–Appellant EPA respectfully requests this Court affirm the district court's judgment that the 2009 Endangerment Finding is valid with respect to public welfare. EPA requests this Court reverse the district court's judgments that EPA has a non-discretionary duty to designate GHGs as a criteria pollutant, and that EPA has unreasonably delayed doing so. Accordingly, EPA requests this Court reverse the district court's order requiring EPA to publish proposed and final rules designating GHGs as a criteria pollutant.

[20] (reviewed in *Barr Lab'ys*, 930 F.2d at 76 ("[W]e were persuaded, largely by agency concessions, that the project backed by plaintiff was plainly more "urgent" than any that the project's acceleration might retard.")); *see also In re a Cmty. Voice*, 878 F.3d 779, 783, 787 (9th Cir. 2017) (agency acknowledging lead poisoning as "the number one environmental health threat in the U.S. for children ages 6 and younger").