Team No. 43

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

v.

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

ON APPEAL FROM THE UNITED STATES DISTRICT COURT OF NEW UNION

BRIEF FOR THE PLAINTIFF-APPELLEE-CROSS APPELLANT,
CLIMATE HEALTH AND WELFARE NOW

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

JURISDICTIONAL STATEMENT

Climate Health and Welfare Now (CHAWN) appeals from the issuance of an Order and Decision on August 15, 2020 by the honorable Judge Remus in the United States District Court for the District of New Union. Timely Notice of Appeal was filed. Jurisdiction exists under 38 U.S.C. § 1331 and 42 U.S.C. § 7604, and, under 42 U.S.C. § 7607(b)(1), venue is proper in the United States Court of Appeals for the Twelfth Circuit. The Court lacks jurisdiction over Intervenor-Appellant Coal, Oil and Gas Association's (COGA) challenges to the 2009 Endangerment Finding. The sixty-day filing period has long expired, and there are no grounds arising after the sixtieth day to support a newly ripened claim.

STATEMENT OF THE ISSUES

1. Whether a District Court outside the D.C. Circuit can assert jurisdiction and proper venue under 42 U.S.C. § 7607(b) for an action concerning a rule of nationwide applicability.
2. Whether the 2009 Endangerment Finding is valid with respect to an endangerment of public welfare.
3. Whether the 2009 Endangerment Finding is valid with respect to an endangerment of public health.
4. Whether EPA's ten-year delay in taking any action on listing GHGs as criteria pollutants under CAA § 108(a) constitutes an unreasonable delay.
5. Whether EPA has a non-discretionary duty to designate GHGs as a criteria pollutant under CAA § 108 based on the 2009 Endangerment Finding.

STATEMENT OF THE CASE

I. Statement of Facts

It is well known that greenhouse gases (GHGs) are major contributors to global warming and its numerous environmental and health consequences. In 1999, this knowledge prompted several environmental groups to petition the Environmental Protection Agency (EPA) to make just such a finding: that GHG emissions from automobiles posed a danger to human health and the environment under § 202 of the Clean Air Act, 42 U.S.C. § 7521. R. at 6. EPA denied the petition in 2003, stating that GHG emissions did not qualify as air pollutants under the Clean Air Act. *Id.* In response, the environmental groups joined forces with states and local governments to mount a legal challenge that culminated in the Supreme Court decision in *Massachusetts v. EPA*. *Id*. There, the Court held that GHGs fit precisely within the definition of air pollutants in the Clean Air Act, meaning that EPA had a duty to respond to the petition. *Id.*

What followed was a monumental step forward in environmental protection—a formal Endangerment Finding for carbon dioxide, nitrous oxide, methane, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride, collectively termed GHGs. R. at 6; *Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air* Act, 74 Fed. Reg. 66,496, 66,496, 66,516 (Dec. 15, 2009) [hereinafter "Endangerment Finding"]. The Endangerment Finding detailed that these pollutants, when emitted from mobile sources, present an endangerment to public health and welfare through their contributions to global climate change. Endangerment Finding, 74 Fed. Reg. at 66,523. In making this finding, EPA pointed to reliable scientific data linking the presence of GHGs in the atmosphere to climate change. *Id.*at 65,522–23. Climate change poses a threat in all aspects of society. This includes threats to public health through increases in temperature, changes in air quality, increases in food and water borne

pathogens, and changes in extreme weather events. *Id.* at 66,525–26. Each of these factors contributes to public health effects overall, and particularly with respect to vulnerable populations such as children, the elderly, and socioeconomically disadvantaged communities. *Id.* Climate change also threatens public welfare by reducing agricultural productivity, altering wildlife ecosystems, reducing water supplies, impacting energy and infrastructure, and increasing economic damage from storms and rising sea levels, among other things. *Id.* at 66,531.

Though protections have been eroded in recent years, EPA nonetheless used the Endangerment Finding as the basis for enacting several regulatory programs to combat global warming by reducing GHG emissions. *See, e.g., Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule,* 75 Fed. Reg. 31,514 (June 3, 2010); *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); *Electric Utility Generating Units*, 80 Fed. Reg. 64,662 (Oct. 23, 2015). Any progress that has been made thus far can be traced back to the 1999 petition urging EPA to regulate GHG emissions from mobile sources under 42 U.S.C. § 7521. R. at 6. CHAWN now hopes to take a similar course of action and push EPA to further regulate GHGs and protect communities.

Section 108 of the Clean Air Act, 42 U.S.C. § 7408, contains an endangerment finding requirement identical to § 7521, but uses it as the basis for listing a criteria pollutant under the National Ambient Air Quality Program. R. at 6. Under § 7521(a)(1), the Administrator is to prescribe standards for emissions of air pollutants from motor vehicles, which "cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." Section 7408(a)(1) similarly states that the Administrator shall establish primary and

secondary national ambient air quality standards (NAAQS) for air pollutants, the "emissions of which, in his judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare" and "the presence of which in the ambient air results from numerous or diverse mobile or stationary sources."

Mobile source emissions of GHGs were found to endanger public health and welfare in the Endangerment Finding, so CHAWN filed a petition on December 15, 2009 demanding that EPA also list GHGs as criteria pollutants under § 7408. R. at 5. If GHGs are listed, it would trigger a host of additional environmental protection measures. Once listed as a criteria pollutant, EPA would be required to establish national standards under the NAAQS program and states would be required to create State Implementation Plans (SIPs) to ensure compliance. 42 U.S.C. §§ 7408, 7409. This is true for both primary NAAQS, regulating based on public health, and secondary NAAQS, regulating based on public welfare. 42 U.S.C. § 7409. The main difference is that the primary standards are subject to compliance deadlines that do not apply to secondary NAAQS. 42 U.S.C. § 7502(a)(2).

II. Procedural History

EPA has taken no action on the petition filed by CHAWN and other environmental groups on December 15, 2009. R. at 5. Accordingly, on April 1, 2019, CHAWN served EPA with notice of intention to sue for failure to carry out a mandatory duty to regulate GHGs as criteria pollutants and for unreasonable delay in carrying out its non-discretionary duty to designate GHGs as a criteria pollutant. *Id.* EPA, again, did not respond, and on October 15, 2019, CHAWN commenced a Clean Air Act citizen suit in the United States District Court for the District of New Union as authorized by 42 U.S.C. § 7604(a)(2). *Id.* CHAWN sought a court order directing EPA to include GHGs as a criteria pollutant. *Id.* Coal, Oil and Gas Association

(COGA) moved to intervene in the suit pursuant to FED. R. CIV. P. 24(a). Its motion was granted on November 30, 2019. *Id.* Along with an answer to the complaint, COGA asserted a cross claim against EPA, seeking a declaration that the Endangerment Finding is unsupported by the record and contrary to law. *Id.*

The parties cross-filed for summary judgment and Judge Romulus N. Remus granted CHAWN's motion in part and granted COGA's motion in part in an Order and Decision, No.66-CV-2019, dated August 15, 2020. R. at 4–5. The court held that 42 U.S.C. § 7607(b) is a venue requirement and is not jurisdictional. R. at 12. In addition, venue was proper in the U.S. District Court for the District of New Union because defendants did not raise an objection and therefore waived. *Id*. The 2009 Endangerment Finding was upheld with respect to its finding of impact on public welfare, but the finding of an impact on public health was deemed contrary to law. R. at 9–10. In assessing EPA's duties stemming from the endangerment finding, the court held that the agency has unreasonably delayed action under § 108(a) of the Clean Air Act by failing to designate GHG's as a criteria pollutant. R. at 13. Further, EPA has a non-discretionary duty to list GHGs as a criteria pollutant under § 108(a)(1). *Id*. CHAWN, COGA, and EPA then each filed timely notice of appeal therefrom. R. at 2.

SUMMARY OF THE ARGUMENT

More than two decades ago, CHAWN and other environmental groups began the legal process of seeking to catalyze EPA action on greenhouse gases. In the ensuing years, EPA has, in fits and starts, implemented various programs and initiatives to combat GHG emissions. In recent years, EPA's recalcitrance has reached new heights, as it has adopted the position of fossil fuel industry groups such as COGA and has made arguments that have either been previously rejected by other courts of appeal or are dubious of their own right. CHAWN asks this court to

grant summary judgment in its favor on matters of jurisdiction, agency deference, and statutory construction.

First, this court should affirm the holding of the District Court for the District of New Union and find that the Twelfth Circuit is the proper venue for both the unreasonable delay and non-discretionary duty claims because the statutory requirements to bring either claim in federal district court are well-established here. Although similar in nature, the two claims have different venue requirements. The requirements for the non-discretionary claim have been met, and any objection to venue for the unreasonable delay claims has been waived by the defendants.

CHAWN should prevail on both the unreasonable delay and non-discretionary duty claims. EPA has unreasonably delayed in listing GHGs under 42 U.S.C. § 7408(a)(1)(B) because that provision of the Clean Air Act establishes clear listing guidelines which, as articulated by the D.C. Circuit in the instructive case of *Telecommunication Research & Action Center v. F.C.C.*, imposed timelines on the listing obligation that EPA has long since exceeded by failing to list GHGs for ten years. 750 F.2d 70 (D.C. Cir. 1984). Similarly, Congress's willful use of the operative term "shall" in the relevant section of the Clean Air Act demonstrates that it intended EPA to have a non-discretionary duty to list pollutants once they met the listing criteria, which is the case for GHGs.

COGA and EPA also challenge, to different degrees, the validity of various aspects of the 2009 Endangerment Finding that precipitated much of the last ten years of GHG regulations from EPA. As a preliminary matter, COGA makes a patently untimely challenge to this court's jurisdiction over this claim. Beyond that, COGA merely retreads two arguments against the validity of the public welfare portion of the Endangerment Finding, both of which have previously been rejected by the D.C. Circuit Court of Appeals. Since COGA presents no novel

arguments on this claim, this court should follow the holdings of the D.C. Circuit. Regarding the public health aspect of the Endangerment Finding, COGA and EPA proffer an argument of statutory interpretation that runs counter to longstanding EPA interpretations of whether climate change endangers public health. This court should apply *Chevron* deference and defer to that interpretation, rather than the unpersuasive alternative interpretation that COGA and EPA have provided.

STANDARD OF REVIEW

The District Court granted plaintiff's motion for summary judgment in part and granted intervenor's motion for summary judgment in part. R. at 4. This Court reviews grants of summary judgment de novo, upholding them only if there is no genuine issue of material fact and the parties are entitled as a matter of law. *Nat'l Parks & Conservation Ass'n, Inc. v. Tenn. Valley Auth.*, 502 F.3d 1316, 1321 (11th Cir. 2007). This case is appropriate for summary judgment as there are no disputes as to the material facts, only as to issues of law. *Sierra Club v. Tenn. Valley Auth.*, 430 F.3d 1337, 1346 (11th Cir. 2005).

ARGUMENT

I. The Unreasonable Delay and Non-Discretionary Duty Claims are Properly Before the Court, but Jurisdiction is Lacking for Challenges to the Endangerment Finding.

A. The Twelfth Circuit is the correct venue because defendants failed to object to the venue requirement of 42 U.S.C. § 7607(b).

The Clean Air Act allows any person to commence a civil action on their own behalf, otherwise known as a citizen suit, under 42 U.S.C. § 7604. Section 7604(a)(2) states, in relevant part, that a person can commence an action "against the Administrator where there is alleged a failure . . . to perform any act or duty . . . which is not discretionary." The statute then grants district courts with jurisdiction to compel agency action under these claims. § 7604(a).

The Court has jurisdiction over the non-discretionary duty claim. The District Court for the District of New Union properly found that EPA has a non-discretionary duty in this case. R. at 13. Thus, under the plain language of the statute, the jurisdictional inquiry ends here. While claims of violation of a non-discretionary duty may overlap with claims of unreasonable delay, they are not identical concepts. Legislative history supports this by imposing separate duties on courts to determine whether there has been unreasonable delay, but also whether EPA is subject to a non-discretionary duty. S. REP. NO. 101-228, at *3758 (1990). CHAWN brought this claim as a non-discretionary duty, so it is not subject to the additional venue requirements of 42 U.S.C. § 7607(b) that apply to unreasonable delay claims. *Am. Lung Ass'n v. Reilly*, 962 F.2d 258 (2d Cir. 1992).

Though the claim is subject to additional venue requirements, jurisdiction over the unreasonable delay claim is also proper. After granting jurisdiction to District Courts, § 7604(a) states that an action to compel agency action referred to in § 7607(b) of this title which is unreasonably delayed may only be filed in a United States District Court within the circuit in which such action would be reviewable under § 7607(b). The actions listed in § 7607(b) that are subject to additional venue requirements include "petition[s] for review of action of the Administrator in promulgating any national primary or secondary air quality standards" or "any other nationally applicable . . . final action taken." Section 7607(b) then explains that these nationally applicable claims are to be filed in the United States Court of Appeals for the District of Columbia. On the other hand, an action "which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit."

EPA's failure to promulgate air quality standards under 42 U.S.C. § 7408 falls within the former category of national applicability. The action CHAWN challenges is undoubtedly of

nationwide scope or effect. This determination is based solely on the scope of the agency action itself, not on the scope of the challenge. *S. Ill. Power Coop. v. EPA*, 863 F.3d 666, 670–71 (7th Cir. 2017). There is no bright line rule, but courts have held that air quality rules with widespread geographic scope are nationally applicable. *Id.* at 669, 671 (challenging air quality designations for the sulfur dioxide NAAQS); *ATK Launch Systems, Inc. v. EPA*, 651 F.3d 1194, 1197 (10th Cir. 2011) (discussing PM2.5 air quality standards for areas within each state in the country). CHAWN is challenging EPA's failure to promulgate national air quality standards, which would be nationally applicable.

Although it is an action of nationwide applicability, the claim does not need to be transferred to the D.C. Circuit. Section 7607(b) specifies a requirement for venue, not jurisdiction, and objections to venue have been waived in this case. The provision prescribes a choice among circuits, which is venue, not the power of circuits to hear a claim. *Tex. Mun. Power Agency v. EPA,* 89 F.3d 858, 867 (D.C. Cir. 1996). This is further supported by its characterization in the legislative history. By contrast, a jurisdictional provision would be specifying what kind of court could hear a claim, for instance whether a claim should be brought in a circuit court versus a district court. *New York v. EPA,* 133 F.3d 987, 990 (7th Cir. 1998). So while § 7607 has a jurisdictional component, allowing cases to be brought in both D.C. and regional courts of appeals, it also has a venue component, distinguishing between cases that can be heard in each. *Dalton Trucking, Inc. v. EPA*, 808 F.3d 875, 879 (D.C. Cir. 2015).

This case is on appeal from a district court, so jurisdiction in a circuit court is undoubtedly proper. At issue here is whether CHAWN's claim belongs in the D.C. Circuit or the Twelfth Circuit—a question of venue. *See Am. Rd. & Transp. Builders Ass'n v. EPA*, 705 F.3d 453, 455–56 (D.C. Cir. 2013) (characterizing the choice between the Ninth Circuit and D.C.

Circuit under § 7607(b) as one of venue); *Tex. Mun. Power Agency,* 89 F.3d at 867 (stating that "§ 307(b)(1) is a venue provision, the application of which can be waived"). EPA has waived improper venue as a defense, so the claim can be heard in the U.S. Court of Appeals for the District of New Union. An improper venue defense is waived when the parties fail to argue it in a motion or include it in a responsive pleading. FED. R. CIV. P. 12(h)(1). This issue was first raised by the district court sua sponte, because both EPA and COGA failed to include the claim in any motions before the District Court. R. at 12. Accordingly, any objection has been waived and venue is proper in the Twelfth Circuit.

B. Challenges to the 2009 Endangerment Finding are time barred, depriving the Court of jurisdiction.

Though the Court raised the issue of jurisdiction only as to the unreasonable delay claim, jurisdiction over the COGA's challenge to the Endangerment Finding merits discussion. Unlike venue, jurisdiction is not a waivable defense and a case can be dismissed at any time for lack of subject matter jurisdiction. FED. R. CIV. P. 12(h). This Court lacks jurisdiction over COGA's challenges to the Endangerment Finding. In addition to its venue provisions, 42 U.S.C. § 7607(b) provides that:

> [A]ny petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise.

The 2009 Endangerment Finding was published in the Federal Register ten years before this challenge, so the initial sixty-day period has long passed. Endangerment Finding, 74 Fed. Reg. at 66,496.

COGA argues that the existence of a duty for EPA to list GHGs as a criteria pollutant, as asserted by CHAWN, constitutes a new ground for review. R. at 8. There are some instances where this type of indirect review is available by petitioning for a new rulemaking, then seeking review of the subsequent decision. *Am. Rd. & Transp. Builders Ass'n v. EPA*, 588 F.3d 1109, 1112 (D.C. Cir. 2009). Generally, indirect review is not permitted under statutes where Congress has specifically addressed the consequences for when a petitioner fails to bring a claim within the specified time period. The Clean Air Act is one such statutory scheme, so a later petition cannot serve as newly arising grounds to support a challenge to the Endangerment Finding. *Id.* at 1113.

Even if indirect review was available, CHAWN's petition cannot support a new claim against the Endangerment Finding. If the secondary petition is based on substantive deficiencies in the original enactment, judicial review is available despite the lapse of time limits. *Id.* at 1112. However, if the secondary petition is based on a procedural defect, then the action is viewed as a direct challenge to the original enactment and is time barred. *Id.* To be a substantive defect that would allow for indirect review, the petition would need to be challenging the validity of a rule applying the initial agency action or a substantive defect in the existing rule. *Nat. Res. Def. Council v. EPA*, 513 F.3d 257, 260 (D.C. Cir. 2008); *Am. Rd. & Transp. Builders Ass'n*, 588 F.3d at 1112.

COGA relies on CHAWN's petition as subsequent grounds for review of the Endangerment Finding, but the defect CHAWN complains of is procedural. CHAWN's petition

asserts that EPA has shirked its procedural duties by failing to list GHGs as a criteria pollutant. R. at 10–11. The alleged deficiency is that there has been no rulemaking, so there necessarily cannot be a substantive deficiency. *Id.* As a result, the procedural challenge cannot support indirect review, and the Court lacks jurisdiction over COGA's Endangerment Finding claims.

II. EPA Properly Made a Finding of Endangerment with Regard to Public Welfare Impacts of Climate Change that is Neither Deficient of Policy Considerations Nor Based on Invalid Scientific Research.

Section 202 of the Clean Air Act requires EPA Administrator to prescribe regulations for motor vehicle emissions that "may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7521. Similarly, § 108 of the Clean Air Act obligates the Administrator to establish primary and secondary NAAQS for air pollutants that "cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7408(a). Thus, the major regulatory decision to implement primary and secondary NAAQS programs is dependent upon EPA's judgment regarding the danger that greenhouse gases pose to public health and welfare.

Following a major scientific investigation, EPA concluded that these air pollutants do in fact endanger both public health and welfare. Endangerment Finding, 74 Fed. Reg. at 66,496. Prior challenges to the Endangerment Finding based on purported invalidity of its scientific findings as well as incomplete considerations of policy impacts have repeatedly been rejected by the D.C. Circuit Court of Appeals. *Coal. for Responsible Regul. v. EPA*, 684 F.3d 102, 119–21 (D.C. Cir. 2012); *Am. Farm Bureau Fed'n v. EPA*, 559 F.3d 512, 519 (D.C. Cir. 2009). Regarding the scientific findings that EPA made in the Endangerment Finding, the D.C. Circuit held in *American Farm Bureau Federation* that courts should give the agency "an extreme

degree of deference" on matters of "evaluating scientific data within its technical expertise." 559 F.3d at 519. Similarly, that court held that EPA's required considerations in the Endangerment Finding were limited to matters within the purview of its scientific expertise and could not be extended to policy impacts of such a finding, regardless of whether those impacts could be "absurd." *Coal. for Responsible Regul.*, 684 F.3d at 119. Those holdings should be adopted in this case.

A. EPA was not obligated to consider policy impacts of a finding of endangerment regarding public health and welfare.

COGA argues that purportedly "absurd regulatory policy impacts" merit invalidating the Endangerment Finding. R. at 9. This argument fails because EPA was not obligated to factor these types of policy considerations into the Endangerment Finding. Section 202(a)(1) of the Clean Air Act provides strictly science-based criteria upon which the Administrator can make a finding of endangerment. These criteria require the Administrator to promulgate standards to regulate the emissions of air pollution that "may reasonably be anticipated to endanger public health or welfare." There is no such obligation, as COGA contends, for EPA to consider the policy and logistical implications of complying with primary or secondary NAAQS.

The D.C. Circuit Court of Appeals reached this same conclusion in *Coalition for Responsible Regulation*. 684 F.3d at 118–19. Following the precedent established by the Supreme Court in *Massachusetts v. EPA*, the D.C. Circuit emphasized that "policy concerns [are] not part of the calculus for the determination of the endangerment finding . . . ." *Id.* at 118 (quoting *Mass. v. EPA*, 594 U.S. 497, 534–35 (2007)). "The statute," the court continued, "speaks in terms of endangerment, not in terms of policy." *Id.* COGA has not modified this same argument, and thus the outcome should be the same. Although *Coalition for Responsible*

Regulation was decided by the D.C. Circuit, that holding should be persuasive upon the judgment of this Court, as it was strongly predicated on a previous holding by the Supreme Court in *Massachusetts v. EPA*. 684 F.3d at 118–19.

B. EPA's finding of endangerment was the product of the rational exercise of its scientific expertise.

COGA also argues that this Court should overturn the Endangerment Finding concerning public welfare due to scientific uncertainty. R. at 10. It is not the role of the judiciary to delve into the merits of the scientific investigation and fact-finding that EPA undertook in the Endangerment Finding process. Rather, as an agency of expertise, EPA is entitled to considerable deference on these types of highly scientific issues. This much was said by the D.C. Circuit in *American Farm Bureau Federation* and affirmed by that same court in *Coalition for Responsible Regulation*: "[the court] give[s] an extreme degree of deference to the agency when it is evaluating scientific data within its technical expertise." 559 F.3d at 519; 684 F.3d at 120. Similarly, this same argument was rejected by the Supreme Court in 2007 when EPA itself challenged its obligation to conduct an endangerment finding on the basis of scientific uncertainty. *Mass. v. EPA*, 549 U.S. at 534. The Court found that EPA's statutory mandate to regulate harmful air pollutants was not excused on that basis: "that EPA would prefer not to regulate greenhouse gases because of some residual uncertainty . . . is irrelevant." *Id.* EPA's subsequent scientific analysis, memorialized in the Endangerment Finding, has been upheld as a rational exercise of agency expertise and in conformity with its statutory obligation. *Coal. for Responsible Regul.*, 684 F.3d at 123. This is therefore a settled matter of law for which COGA's argument fails.

By its nature, research into the impacts that climate change has on public welfare involves a degree of uncertainty. *Ethyl Corp. v. EPA.* 541 F.2d 1, 24 (D.C. Cir. 1976). EPA's role, as embodied by its mandate in the Clean Air Act, is to operate within that uncertainty to still arrive at science-based conclusions as to how to mitigate threats to public welfare. If EPA were to await certainty in the science, then it would only be able to undertake "reactive, not preventive, regulation." *Id.* at 25. Limiting EPA to reactive regulation would violate the precautionary principle, upon which § 202(a) of the Clean Air Act is premised. Endangerment Finding at 66,506. Section 202(a) obligates EPA to develop standards to mitigate the impacts of air pollutants that "may reasonably be anticipated to endanger public health or welfare." Anticipating dangers inherently involves contending with a degree of scientific uncertainty. In upholding the conclusions of the Endangerment Finding, the D.C. Circuit has also upheld EPA's approach to conducting scientific investigations while balancing the uncertainty of the undertaking. *Coal. for Responsible Regul.*, 684 F.3d at 119–21; *Am. Farm Bureau Fed'n*, 559 F.3d at 519. COGA does not augment that same argument in the case presently before this Court.

III. EPA Properly Interpreted the Clean Air Act to Include the Impacts of Climate Change as Endangerments to Public Health.

Contrary to public welfare, there is no corresponding definition in 42 U.S.C. § 7602 for "public health." *See* 42 U.S.C. § 7602(h) (providing a definition of "public welfare"). Thus, the issue of the validity of the public health endangerment finding presents a question of statutory interpretation. As such, the holding of *Chevron U.S.A., Inc. v. NRDC* controls. 467 U.S. 837, 843 (1984). In *Chevron*, the Supreme Court was confronted with the definition of "stationary source" that EPA promulgated in regulations to fulfill the requirement of the Clean Air Act Amendments

of 1977 to require permitting for upgrades to power plants. *Id.* at 837, 838. "Under [EPA's] definition," the Court said, "an existing plant that contains several pollution-emitting devices may install or modify one piece of equipment without meeting the permit conditions if the alteration will not increase the total emissions from the plant." *Id.* at 840. EPA effectively interpreted that part of the statute, which did not define "stationary sources," to allow for a "bubble" approach that viewed "pollution-emitting devices within the same industrial grouping as though they were encased within a single 'bubble.'" *Id.* The Court took umbrage with a decision of a lower court that substituted its own interpretation of the statute, "the basic legal error of the Court of Appeals was to adopt a static judicial definition of the term 'stationary source' when it had decided that Congress itself had not commanded that definition." *Id.* at 842. Instead, judicial review of an agency's statutory construction now consists of a two-part process:

> First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Id. at 842.

Agency interpretations are entitled to *Chevron* deference if the agency has been delegated the authority to "make rules carrying the force of law," and agency interpretation implemented to do so was "promulgated in exercise of that authority. *United States v. Mead Corporation.* 533 U.S. 218, 226–27 (2001). Since not all agency interpretations are made in the context of rules

that carry the force of law, *Chevron* deference is not always applicable. For example, when faced with a tariff classification issued by the U.S. Customs Service that was not subjected to notice-and-comment rulemaking, the Supreme Court in *Mead* held that those types of agency interpretations of statutes are entitled to less deference than is accorded under *Chevron*. *Id.* at 221, 236. Rather, instead of *Chevron* deference, under which a court determines whether an agency interpretation is reasonable, agency interpretations that have not been subjected to notice-and-comment rulemaking are reviewed merely for their persuasiveness. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). EPA's longstanding interpretation of "public health" should receive *Chevron* deference and be upheld under that standard. In contrast, EPA's new interpretation of "public health" should be invalidated under *Mead and* Skidmore due to its lack of persuasiveness.

A. Congress has not expressed a specific intention regarding the definition of "public health," thus meriting *Chevron* deference to EPA's longstanding interpretation.

In order to be given *Chevron* deference, the court must first find that the statute is silent or ambiguous. *Chevron*, 467 U.S. at 842. Contrary to the holding of the District Court of New Union, Congress has not expressed a specific intention regarding the interpretation of "public health" as it is used in the Clean Air Act. The discrepancy between the definitions of public health and public welfare is not that the definition for public health conspicuously lacks climate change as one of the possible factors that could endanger public health, while climate change is plainly stated in the definition for public welfare. Rather, there is no definition for "public health" in 42 U.S.C. § 7602 or any other provision of the Clean Air Act. As such, the statute is silent on the definition of public health.

Furthermore, the question of whether the statute is silent or ambiguous should not be confined to the particular statutory provision at issue. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000). Rather, the ambiguity of a certain statute must be ascertained by placing the statute in the broader context of the "overall statutory scheme." *Id.* at 133–134. Thus, the ambiguity of "public health" is not dependent merely on the definition of "public welfare" in 42 U.S.C. § 7602(h) and the absence of a corresponding definition for "public health." This Court must consider the fact that "public health and welfare" is a phrase used repeatedly in the Clean Air Act. *See* 42 U.S.C. § 7408; 42 U.S.C. § 7521. It is only in the differentiation between primary or secondary NAAQS programs that the terms are used separately, and which forms the basis of this issue. The use of "identical words . . . in different parts of the same act" does not necessarily mean that they have the same meaning. *Env't Def. v. Duke Energy Corp.*, 549 U.S. 561, 562 (2007). The different usage of public health and welfare in different provisions of the Clean Air Act renders the statute ambiguous.

COGA and EPA may argue that to find a statutory ambiguity in the absence of an explicit definition for public health would be "unfaithful to the principles of administrative law," in that it is creating a definition for the term out of whole cloth. *Ry Labor Exec. Ass'n*, 29 F.3d 655, 671 (D.C. Cir. 1994). This is not the case here because the term "public health" is used in crucial sections of the Clean Air Act, in conjunction with the term "public welfare." *See* 42 U.S.C. § 7408; 42 U.S.C § 7521. Congress thus has expressed an intention for "public health" to carry weight in the statutory scheme of the Clean Air Act, particularly with regard to implementation of primary NAAQS. Nonetheless, Congress has not articulated a clear definition of the term, so it has therefore delegated the authority to EPA to provide a statutory interpretation on the basis of its expertise.

B. EPA's interpretation that "public health" can be endangered by climate change is a reasonable construction of the statute.

The question under step two of *Chevron* is whether EPA's original construction of the statute was permissible. *Chevron*, 467 U.S. at 842. This court should rule in the affirmative on that question. EPA's actions prior to its recent about-face strongly suggest that it had interpreted the statute such that public health could be endangered by climate change. This much was made clear in the Endangerment Finding. Throughout the report, EPA repeatedly stated that climate change endangered both public health and public welfare: "The Administrator finds that six greenhouse gases taken in combination endanger both the public health and the public welfare of current and future generations." Endangerment Finding, 74 Fed. Reg. at 66,496. This sort of action by EPA constitutes an interpretation of public health to be endangered by climate change. Based on the scientific deference to which EPA is entitled, this is a permissible interpretation of the ambiguous statute. *See Am. Farm Bureau Fed'n*, 559 F.3d at 519 ("We give an 'extreme degree of deference to the agency when it is evaluating scientific data within its technical expertise.'" (quoting *City of Waukesha v. EPA*, 320 F.3d 228, 248 (D.C. Cir. 2003)).

Similarly, the District Court for New Union noted that the distinction between public health and public welfare "has no consequence to regulation under CAA § 202—either sort of endangerment suffices to trigger regulation." R. at 10. It is reasonable for EPA to construe that based on the interchangeability of the terms in § 202 of the Clean Air Act, the terms can be defined similarly to both include climate change as a possible endangerment in the context of NAAQS programs.

C. EPA's new interpretation of the statute merits minimal judicial deference because it has not been subjected to notice-and-comment rulemaking and is unpersuasive.

EPA's new statutory interpretation, adopted from COGA, carries little interpretive weight. This interpretation was recently adopted and thus has not been implemented in regulations that were subjected to notice-and-comment rulemaking. EPA's new position is akin to the classification ruling in *Mead* that was treated like "interpretations contained in policy statements." *Mead*, 533 U.S. at 234 (quoting *Christenson v. Harris County*, 529 U.S. 576, 587 (2000)). Without the force of law required for *Chevron* deference, EPA and COGA's interpretation only merits judicial deference to the extent of its persuasive force, "given the 'specialized experience and broader investigations and information' available to the agency." *Id.* (quoting *Skidmore*, 323 U.S. at 139).

The claim that public health consists of only the direct health impacts of air contaminants and not the second-order impacts of climate change is unpersuasive. That interpretation runs counter to the considerable scientific research that EPA presented in the Endangerment Finding. The results of the scientific investigation established a range of direct public health impacts posed by GHGs via their contributions to climate change. *See* Endangerment Finding, 74 Fed. Reg. at 66,524–25 (stating that "climate change can increase the risk of morbidity and mortality" via dangerous heat waves, poor air quality, extreme weather events, climate-sensitive diseases and aeroallergens). EPA is an agency of expertise that has exercised that expertise to conduct in-depth research into the public health impacts of climate change. For the agency to abruptly reverse that position without providing any countervailing factual evidence in support of its new position is unpersuasive. When viewed in the political context in which EPA has been operating

during the last four years, this position change appears to be based on mere political whims, rather than reasoned judgment based on new climate science.

IV. Under the factors used to determine unreasonable delay, EPA has unreasonably delayed listing GHGs under 42 U.S.C. § 7408(a)(1)(B).

The Clean Air Act states that the Administrator shall list each air pollutant that falls within specific criteria. 42 U.S.C. § 7408(a)(1)(B). EPA has failed to take any action to list GHGs over the past ten years even though they clearly fall within said criteria. This ten-year period of inaction is an unreasonable delay by EPA. The standard for determining if an unreasonable delay is present is: "whether the agency's delay is so egregious as to warrant mandamus". *Telecomm. Rsch. & Action Ctr. v. F.C.C. ("TRAC"),* 750 F.2d 70 (D.C. Cir. 1984). The *TRAC* factors have been used to determine whether there has been an unreasonable delay of action by an agency. *Id*. Delays of eight to ten years have uniformly been held to be unreasonable by courts applying these factors. *In re Core Commc'ns, Inc.*, 531 F.3d 849 (D.C. Cir. 2008).

The *TRAC* factors consider:

> 1) the "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.' These factors have regularly been applied to situations analogous to the current case where the delay involved agency rulemaking or requests for administrative action by private parties.

In re Core Commc'ns, Inc., 531 F.3d at 849.

The "rule of reason" calls for agencies to avoid excessive delay because excessive delays cause the public to lose confidence in the agency's ability to carry out its responsibilities. *Potomac Elec. Power Co. v. I.C.C.*, 702 F.2d 1026, 1034 (D.C. Cir. 1983), supplemented, 705 F.2d 1343 (D.C. Cir. 1983). Excessive delay creates uncertainty for those that rely on predictions of upcoming agency action to guide their future plans. Congressional indicators of a timetable or speed may be used to inform the "rule of reason". *In re Core Commc'ns, Inc.*, 531 F.3d at 849. Section 7408 has a timetable specified as "from time to time." While this does not suggest immediacy, it suggests regularity. A ten-year gap is beyond this suggested regularity. Ten years of inaction inhibits the ability of those in reliance to predict upcoming agency action. Additionally, even if such predictions were made, predictions for some time beyond ten years are not practical.

Effects on public health and welfare have been implicated by EPA itself, so arguments against listing based on economic impacts do not carry as much weight. *TRAC,* 750 F.2d at 849. Courts have found that when public health may be at risk it is more important that agencies act quickly and with reasonable efficiency. *Pub. Citizen Health Rsch. Grp. v. Auchter*, 702 F.2d 1150, 1158 (D.C. Cir. 1983). EPA itself published a finding that demonstrated that public health is at risk due to these pollutants. Endangerment Finding, 74 Fed. Reg. at 66,496. Thus, the agency was aware of the possible danger to public health and should have acted expeditiously.

Here, EPA did not meet this duty in light of the public health and welfare risks that were implicated.

The effects of the court expediting this delay is also a factor. *TRAC,* 750 F.2d at 849. EPA argues that listing these pollutants have tremendous effects from resulting regulation. However, this listing should be of high priority for EPA because human health and welfare have been implicated. After listing, EPA is required to issue air quality criteria containing relevant information and controlling techniques within 12 months for States to incorporate into their State Implementation Plans. 42 U.S.C. § 7408. While this would require some work from EPA, the States must carry out the actual implementation. The burden this would place on EPA is outweighed by the nature and extent of interests prejudiced by delay due to the serious nature of public health and welfare. Finally, there need not be any impropriety by the agency. Thus, it need not be demonstrated that EPA acted wrongly in order to find that there was unreasonable delay. *In re Core Communications, Inc.*, 531 F.3d at 849.

The Ninth Circuit applied the above factors and found that there had been unreasonable delay by EPA when it delayed action regarding listing a particular pesticide. *In re Pesticide Action Network N. Am., Nat. Res. Def. Council, Inc.*, 798 F.3d 809, 814 (9th Cir. 2015). This case is analogous to the present case since both relate to EPA duties that require review for matters that relate to public health and welfare. *Id.* However, in that case EPA had not clearly agreed with the third party that human safety was at risk because of the product. *Id.* Therefore, in the present case, the case for a finding of unreasonableness is even more easily made because the agency itself has published certainty of the product's risk. Thus, unlike in *In re Pesticide Action Network*, EPA's many competing priorities cannot minimize the risks of the current situation. *In re Pesticide Action Network N. Am.*, 532 F. App'x 649, 650 (9th Cir. 2013). Moreso, in *Pesticide*

Action Network, the court found that EPA's own assessment of an effect on human health should compel the agency to act quickly. *In re Pesticide Action Network*, 798 F.3d at 814.

The District of Columbia Circuit Court found unreasonable delay by the Federal Communications Commission in stating a valid legal basis for a rule regarding telecommunications compensation. *In re Core Commc'ns, Inc.*, 531 F.3d 849 (D.C. Cir. 2008). In that case, the Commission delayed 6 years in promulgating such justifications. *Id.* at 856. The court found that when applying the *TRAC* factors, the "rule of reason" was violated because precedent indicates six years is egregious under this rule of reasonableness. *Id.* at 857. Similarly, the ten-year delay in the instant case, which is a significantly longer period, would clearly be against this rule. The "rule of reason" has been noted to be the most important of the six *TRAC* factors. *Id.* at 855.

V. EPA has a non-discretionary duty to list GHGs under 42 U.S.C. § 7408 after finding that GHGs endanger public health and welfare.

As previously stated, the Clean Air Act requires EPA Administrator to list each air pollutant that falls within specific criteria. 42 U.S.C. § 7408(a)(1)(B). GHGs fall within the criteria and thus listing these pollutants is a non-discretionary duty. The plain language of the statute supports that this duty is non-discretionary. Additionally, if date-certain doctrine is followed, EPA still has a non-discretionary duty to list GHGs. The relevant section of the Clean Air Act reads:

> For the purpose of establishing national primary and secondary ambient air quality standards, the Administrator shall, within 30 days of December 31, 1970, and shall from time to time thereafter revise, a list which includes each air pollutant –

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

42 U.S.C. § 7408(a)(1).

The plain language of the statute uses the word "shall"—which implies a lack of discretion—and is used to refer to the listing of certain pollutants. There are then three requirements that must be met for this non-discretionary listing to occur. These requirements allow for a level of discretion by EPA, as § 7408(a)(1)(A) uses the language "in his judgement." By publishing the Endangerment Finding, EPA Administrator utilized his discretion and deemed GHGs pollutants reasonably anticipated to endanger public health and welfare. GHGs also meet the requirements set forth in subsections (B) and (C). Thus, all elements of the statute have been met. This triggers EPA's duty to list "from time to time." *Id.* EPA may argue that listing "from time to time" gives it discretion on whether and when to list GHGs. However, the word "shall" was used rather than "may", which indicates that Congress intended EPA to have limited discretion on this listing decision. Instead, "from time to time" gives EPA a clear expectation of a continued and required action triggered whenever subsections (A), (B) and (C) are met.

The Second Circuit has held that EPA has a non-discretionary duty to list a pollutant that meets the requisites set forth in a section of the Clean Air Act of 1970. *Nat. Res. Def. Council, Inc. v. Train*, 411 F. Supp. 864, 868 (S.D.N.Y.), aff'd, 545 F.2d 320 (2d Cir. 1976). This decision is analogous to the issue at hand because *Train* analyzed a similarly constructed Section. *Id*. at 867. Both the section in *Train* and the section at issue here have similar requisites for listing as

well as timing requirements of an initial listing followed by time to time additions after the initial one.

The United States District Court for the District of Columbia looked at the language of a similar section of the Clean Air Act to determine whether EPA had a nondiscretionary listing duty. *Biological Diversity v. EPA*, 794 F. Supp. 2d 151, 158–160 (D.D.C. 2011). Words such as "if" and "may" were not found to suggest a required action. *Id.* But, language such as "shall" was found to be compulsory language suggesting a certain outcome. *Id.* The section at issue, 42 U.S.C. § 7408(a)(1), utilizes "shall". This suggests that EPA is required to list pollutants. Additionally, the court in *Biological Diversity* found that "from time to time" was an indicator of when these actions are meant to take place. 794 F. Supp. 2d at 161.

Section 7408(a)(1) also states a specified time for the Administrator to list these pollutants by including "within 30 days" of a specific date. The Court need not decide whether a date-certain deadline is the only way to establish a nondiscretionary duty or whether a nondiscretionary duty can also be inferred from a statute. *WildEarth Guardians v. Jackson*, 885 F. Supp. 2d 1112, 1116 (D.N.M. 2012). However, if date-certain doctrine is found to be required "from time to time" is an indicator of when the duty must occur meeting the deadline requirement under this doctrine.

In reaffirming that *Train* is good law, the United States District Court for the Southern District of New York held that EPA had a non-discretionary duty under the Clean Air Act to list pollutants under § 112(b)(1)(A). *Nat. Res. Def. Council, Inc. v. Thomas*, 689 F. Supp. 246, 256 (S.D.N.Y. 1988), *aff'd*, 885 F.2d 1067 (2d Cir. 1989). In so holding, the court found the use of the word "shall" and the fact that, if discretionary, the Act's deadlines would lose affect, compelling. Here, the statute at issue is analogous since it also uses the mandatory word "shall".

Connected sections of the statute such as the 12-month deadline for air quality criteria would also lose meaning since the Administrator could wait to trigger these subsequent deadlines at their will.

CONCLUSION

For the foregoing reasons, this court should find that: 1) the District Court had jurisdiction over CHAWN's unreasonable delay clam; 2) the Endangerment Finding is valid with respect to an endangerment of public welfare as well as public health; 3) EPA's ten-year delay in listing GHGs is an unreasonable delay; and 4) EPA had a non-discretionary duty to designate GHGs as a criteria pollutant. CHAWN's motion for summary judgement should be granted in full.