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STATEMENT OF JURISDICTION

The Coal, Oil, and Gas Association (COGA) appeals from an Opinion and Order granting Plaintiff's motion for summary judgment, entered September 1, 2020, by the honorable Judge Remus in the U.S. District Court for the District of New Union, No. 66-CV-2019. The district court had subject matter jurisdiction pursuant to 28 U.S.C § 1331 (2018), as the Complaint raises questions arising under federal law, and under the Citizen Suit provision of the Clean Air Act, 42 U.S.C. § 7604(a) (1990). Appellants filed a timely Notice of Appeal pursuant to Fed. R. App. P. 4 (2016). The U.S. Court of Appeals for the Twelfth Circuit has valid jurisdiction over the appeal based on 29 U.S.C. § 1291 (2018).

STATEMENT OF ISSUES

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

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

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

IV. Does the EPA's ten-year delay in taking an any action on listing GHGs as criteria pollutants under CAA § 108(a) constitute an unreasonable delay?

V. Does the EPA have 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. Factual Background

In 1999, several environmental organizations petitioned for the EPA to find that Greenhouse Gas (GHG) emissions from automobiles posed a danger to the environment and human health under section 202 of the Clean Air Act (CAA), 42 U.S.C S 7521 (the 202 petition).

EPA denied this petition, and explained that as a matter of statutory interpretation, the pervasive emissions of GHGs do not fit the concept of "air pollutants" regulated by the CAA. However, litigation later ensued and the decision of *Massachusetts v. E.P.A*, 548 U.S. 497 (2007), held that GHGS do fit within the definition of "air pollutants" and are thus subject to potential regulation under the CAA. As a result of *Massachusetts*, the EPA was directed to respond to the 202 petition by making a finding of whether GHGs present an endangerment to public health of welfare, which would then trigger regulation under the CAA. On December 15, 2009 the EPA made a formal finding of endangerment under section 202 of the CAA (Endangerment Finding"). The Endangerment Finding defined a group of GHGs as a single air pollutant. These GHG's include carbon dioxide, nitrous oxide, and methane. The EPA found these pollutants increase global temperatures, and influence storm frequency, and thus present an endangerment to public welfare and public health. Specifically, these climate change impacts are claimed to endanger public health by causing temperatures and heat related deaths to increase, reducing water supplies, and increasing economic damages because of storms and rising sea levels.

While the EPA has not yet designated GHGs as criteria they did respond to the endangerment finding the EPA did commence many regulatory actions to limit GHG emissions. The first of these regulatory actions was establishing GHG emissions limits for new passenger vehicles and light trucks. Additionally, the EPA adopted New Source Performance Standards and the Best Available Control Technology guidance under Title I of CAA to apply to major sources of GHG pollutants, including power plants. Furthermore, the EPA adopted the Tailoring Rule, which limits the scope of permitting and review requirements that would apply to sources of GHGs. Another regulation the EPA commenced was the Clean Power Plan regulations, Carbon Pollution Emission Guidelines for Existing Sources: Electric Utility Generating Units. This

regulation directs states to modify their CAA implementation plans so that they can reduce GHG emissions so that they are consistent with EPA guidance on the Best System of Emissions Reductions under CAA S 111(d), 42 U.S.C. S 7411(d). Coil Oil and Gas Administration (COGA) moved to intervene pursuant ot Fed. R. Civ. P. 24(a). COGA is a trade association representing the economic interests of fossil fuel companies. These companies engage in the extraction, processing, and marketing of coal, natural gas, and oil. CHAWN's requested relief would result in regulatory limits that would completely destroy or at the minimum severely limit the market for its products.

II. Procedural History

Plaintiff Climate Health and Welfare Now (CHAWN) brought a citizen suit under Clean Air Section 304, 42 U.S.C S 7604, to impel the United States Environmental Protection Agency (EPA) to list greenhouse gases (GHGs) as criteria pollutants subject to the National Ambient Air Quality Standards (NAAQS) program under CAA S 108(a), 42 U.S.C. S 7408. The United States District Court for the District of New Union granted the Coal, Oil, and Gas Association's (COGA's) motion to intervene as a defendant on the side of the EPA. Both parties moved for summary judgment. The District Court granted plaintiff's motion for summary judgment in part and granted intervenor's motion in part.

SUMMARY OF ARGUMENT

The U.S. Appellee Climate Health and Welfare Now is entitled to bring a claim against the Environmental Protection Agency under the Clean Air Act § 304(a). The District Court for the District of New Union concluded correctly when claiming jurisdiction over Appellee's unreasonable delay claim. R. at 5. Traditional principles of statutory interpretation illustrate that

CAA § 307(b) serves as a venue provision, focusing on which federal court may hear the case, not if a federal court can. The plain language is unambiguous, and the legislative history shows Congress amended the statute to serve as a map for where plaintiffs can file. No party objected to venue; therefore any objection has been waived. R. at 5.

The District Court did not adequately vet the agency's rationale, namely in regards to the causal link between the emission of air pollutants and its danger to public health and welfare. Furthermore, under CAA § 108, Congress's intention was to authorize the EPA to protect the public health only from *direct* harm, EPA however extended its interpretation to also cover indirect harm to public health. The agency extended the interpretation of "public welfare" even though it was given a clear definition by Congress. Therefore, without controlling deference to the agency, the Endangerment Finding is invalid in respect to an endangerment of public health and public welfare.

The EPA does not have a non-discretionary duty to designate GHGs as a criteria pollutant under CAA § 108 based on the Endangerment Finding. The plain language of CAA § 108(a)(1)(A) and historical precedent shows that the EPA Administrator has sole authority over determining if air pollutants endanger public health or welfare. Presently, the current Administrator has never made an affirmative determination that GHGs endanger public health or welfare. The District Court incorrectly used the holding of *Nat'l Res. Def. Council, Inc. v. Train*, where the Administrator had already conceded lead's adverse effects on human health. 545 F.2d 320, 325 (2nd. Cir. 1976). Until the current Administrator gives an affirmative determination that GHGs are averse to public health or welfare, there is no non-discretionary duty to list under CAA § 108.

STANDARD OF REVIEW

The U.S. District Court for the District of New Union erred as a matter of law when granted Appellee's motion for summary judgment in part. Therefore, this court should review the decision de novo. *See Howard v. Office of the Chief Admin. Officer of the U.S. House of Representatives*, 720 F.3d 939, 945 (D.C. Cir. 2013) ("Because this case comes to us on an appeal from a motion to dismiss, we review the District Court decision *de novo*.") This district court's legal determinations are entitled to little to no deference. *Id*.

ARGUMENT

I. TRADITIONAL PRINCIPLES OF STATUTORY INTERPRETATION ILLUSTRATE CAA § 307(b) IS A VENUE PROVISION AND THE EPA'S FAILURE TO OBJECT WAIVED THE ISSUE, THEREFORE THE DISTRICT COURT HAD JURISDICTION.

CAA § 307(b) was created to allow cases to be heard in federal courts that can adequately remedy their asserted harms. 42 U.S.C. § 7607(b). By determining which court is best suited to hear a given case, CAA § 307(b) serves as a map for potential plaintiffs. The District Court ruled correctly finding it held jurisdiction over the Appellee's claim under the Citizen Suit provision of the Clean Air Act, 42 U.S.C. § 7604(a). R. at 5. District Courts have jurisdiction over cases where plaintiffs are seeking relief from "unreasonable delay." *Id*. However, such action must "be *filed* in a United States District Court within the Circuit in which such action would be reviewable under section 7607(b)." *Id*. (emphasis added). The language of both section 304(a) and 307(b), focus on which of the federal courts a plaintiff may file. The legislative history surrounding the Congressional amendments to section 307 shows that Congress intended for the section's effect to not be jurisdictional, but rather Congress created a venue provision.

A. The Plain Language of CAA § 304(a) and 307(b) is Unambiguous and Clearly Shows the Sections Were Intended to Decide Where Cases Shown be Heard, not if Cases Should be Heard.

When interpreting the meaning of a statute, the plain language of the statute must be analyzed first. *United States v. Fitzgerald*, 906 F.3d 437, 442 (6th Cir. 2018). If a statute's language is unambiguous, then further interpretation is not necessary. *Rubin v. United States*, 449 U.S. 420, 424 (1981).

The plain language of both section 304 and 307 illustrate that 307(b) is a venue provision. Section 304 states that the District Courts have jurisdiction over petitions seeking to compel agency action unreasonably delayed except unless that action falls within 7607(b), then it "may only be *filed*" in a specific District Court. 42 U.S.C. § 7604(a). (emphasis added). Section 307(b) mirrors this language stating cases involving regulations of nationwide application "may be *filed* only in the United States Court of Appeals for the District of Columbia." 42 U.S.C. § 7607(b)(1). (emphasis added). The usage of "file" in both sections illustrates that section 307(b) is focused on where the petition is filed, not if the court has jurisdiction to hear it. It is clear from the repeated usage of "file" that the House Committee was focused on where cases were being filed, not if the court the plaintiff chose had jurisdiction.

B. Legislative History Shows Congress Drafted Section 307(b) to Serve as a Venue Provision, and Not to Give Jurisdictional Authority of Cases to Specific Courts.

Section 307(b) was created to "clarify some questions relating to venue." H.R. REP. NO. 294, 95th Cong., 1st Sess. 323–24 (1977). Since the amendment conferred jurisdiction to multiple Courts of Appeals, the House Committee on Interstate and Foreign Commerce chose to focus directly on the venue distinction between the Court of Appeals for the District of Columbia Circuit and other Courts of Appeals. *Id.* The legislative history clearly supports section 307(b) as a venue provision.

In *Harrison*, the Supreme Court was clear that the purpose of section 307(b) was to prescribe proper venue based on types of distinct agency action. *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 590 (1980); *Tex. Mun. Power Agency v. EPA*, 80 F.3d 858, 867 (D.C. Cir. 1996). Determining which court is proper relies strictly on the nature of the agency's action. *S. Ill. Power Coop. v. EPA*, 863 F.3d 666, 670 (7th Cir. 2017). The provision categorizes reviewable agency actions and then designates venues accordingly. *Id*. Here, the designation of GHGs as criteria pollutants could only be filed in the United States Court of Appeals for the District of Columbia as the designation would be "nationally applicable." 42 U.S.C. § 7607(b)(1); *Texas v. EPA*, 829 F.3d 405, 418 (5th Cir. 2016).

While the United States District Court for the District of New Union is not the proper venue, the EPA's failure to object waives the issue. FED.R.CIV.P. 12(h)(1); *Panhandle Eastern Pipe Line Co. v. FPC*, 324 U.S. 635, 638-39 (1945). Since the designation of GHGs as criteria pollutant would be a regulation of nationwide applicability, the United States Court of Appeals for the District of Columbia would be the proper venue for this case to be heard. 42 U.S.C. 7607(b). However, no party has objected to venue. R. at 5. Typically, parties can consent to engage in litigation in an improper venue. *Dalton Trucking Inc. v. EPA*, 808 F.3d 875, 880 (D.C. Cir. 2015); *Tex. Mun. Power Agency*, 89 F.3d at 867. Therefore, since the EPA failed to object to venue, the venue provision of section 307(b) has been waived.

II. EPA'S ESTABLISHED THE ENDANGERMENT FINDING ON PARTIAL AND INCOMPLETE DATA.

The Endangerment Finding's fallacious rationale makes it invalid and that would have been evident to the district court if EPA's rationale was adequately evaluated.

In order to make an endangerment finding, the CAA authorizes EPA to find "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.A §7521(a)(1). The words "reasonably be anticipated to endanger" requires the agency to establish a causal link between the emission of "air pollutants" and "public health" or "public welfare." In other words, CAA requires the agency to use a foreseeability test, which has historically been the traditional legal repertoire to prove causation of cognizable harms, to support its findings. *Palsgraf v. Long Island R.R.*, 162 N.E. 99 (N.Y. 1928). More specifically, our jurisprudence has "well established principle of law, that in all case of loss we are to attribute it to the proximate cause, and not to remote cause: *causa proxima non remota spectatur*." *Waters v. Merchants' Louisvill Ins. Co.*, 36 U.S. (Pet. 11) 213, 222 (1837); cf. *CSX Transp., v. McBride*, 564 U.S. 685, 702 (2011)("To prevent 'infinite liability,' courts and legislatures appropriately place limits on the chain of causation that may support recovery on any particular claim."). These limitations are imperative for EPA's statutory construction or else it is given broad authority to regulate any and all "airborne compounds of whatever stripe" that might impact and endanger the human's life or welfare. *Massachusetts*, 549 U.S at 529. Therefore an salient part of the requirement for an endangerment finding must be shown, through empirical evidence, of reasonable foreseeability that connects the danger to human life and welfare to the emission of the pollutant. And to that end, the statutory term "'will endanger' and the relationship of the term to other sections of the Clean Air Act" limits and "direct" EPA's authority. *Ethyl Corp v. EPA* F.2d 1, 29 (D.C. Cir. 1978).

The district court judge failed to adequately consider whether EPA has a reasonable rational basis when it made the Endangerment Finding, because there is nothing in the record

that shows that the district court judge made such effort to analyze the "rational determination based on the record before it." *Coalition for Responsible Regulation*, 684 F.3d at 120. The judge only presumes that such rational determination exists and attempts to justify the uncertainties through case law.

The district court judge also overlooked the agency's authority to regulate a pollutant only when—by using of "[her] judgment"—it can show a particular type of causal connection between the air pollutant and public health or welfare endangerment. 42 U.S.C.A §7521(a)(1).

Here, instead of exercising her independent judgment in determining the endangerment question, the director of EPA mainly relied on third party assessment—namely the work of the Intergovernmental Panel of Climate Change (IPCC). Therefore the failure to use her own judgment is repugnant to the statutory provision use to authorize the making of the Endangerment Finding. It is also in violation of the Information Quality Act (IQA) and EPA's IQA guidelines. Furthermore, the finding failed to consider the current public welfare benefits of the energy source that emit GHGs. The failure to make such consideration supports the conclusion the finding was made under the pretext that GHGs endangers public health and welfare. Such failure would be evident to the district court judge if they adequately vetted the agency's rationale of the endangerment to public health and public welfare.

II. EPA'S FINDING OF AN ENDANGERMENT OF "PUBLIC HEALTH" WAS NOT WITHIN THE AMBIT OF THE CCA.

Contrary to EPA's findings, Congress intention was to only consider the consequences of harm to public health from *direct* exposure to air pollutants. The EPA's finding did not comply with the "unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Natural Resources Defense Counsil Inc.*, 467 U.S. 837, 840 (1984). And in light of the CAA, the concept

of protecting "public health" has long been understood to mean protection against risk from direct exposure, i.e. from inhalation of pollution. See *NRDC*, Inc. EPA, 902 F.2d 962, 973 (D.C. Cir. 1990)(holding that CCA "does not permit EPA to consider" the health consequences of unemployment), vacated in irrelevant party by *NRDC, Inc. v. EPA*, 921 F.2d 362 (D.C. Cir. 1991).

Here, EPA's public health endangerment finding "relies entirely on the consequential health harms resulting from changing climate, and does not rely on any health impact resulting from breathing air" that is ostensibly polluted with ambient concentration of carbon dioxide and other GHGs. Nor does the record does show any evidence that greenhouse gases directly cause health effects.

And without any empirical evidence on record, the plaintiff therefore cannot show that the Endangerment Finding directly affects public health.

III. EPA'S FINDING OF ENDANGERMENT OF "PUBLIC WELFARE" IS BASED ON A MISREADING OF THE CAA.

EPA lacks discretion to create a new analysis for "public welfare" around its newly invented categories. The court should not give any deference to EPA's new interpretation of "public welfare." The agency's new interpretation therefore makes the endangerment finding invalid in regards to GHGs' endangering public welfare because it goes beyond the scope of its purpose.

To begin with, statutory interpretation, "must be promulgated pursuant to authority Congress has delegated to the [agency]." *U.S. v. Mead*, 533 U.S. 218, 226 (2001). Also the court does not give agency deference when the portion of the statute at question is unambiguous. *Chevron*, 467 U.S. at 839. Furthermore, when a question of deep "economic and political

significance" becomes the salient issue to a statutory scheme, the court must ask itself whether congress has expressly wished to assign an agency with that task. *King v. Burwell,* 576 U.S. 473, 486 (2015). The court has traditionally required a "substantial guidance" from Congress when the EPA attempts to set air standards "that affect the entire national economy".

A. Congress has Given "Public Welfare" an Unambiguous Interpretation

The court should not give EPA deference because congress has provided the agency with an unambiguous interpretation in CAA. *Chevron,* 467 U.S. at 839.

The Supreme Court has created a two-step analysis that redefines the scope of judicial review when the "agency's construction of the statute which it administers" is at issue: the first, and most important, question is whether "congress has directly spoken to the precise question at issue." And if so, that is the end of the inquiry.

The CAA provides a specific interpretation and method to categorize "welfare effects." Traditionally, the finding of welfare endangerment has been fairly narrow and particular. According to the statute, pollutant exposure-related welfare effects have usually been compartmentalize under the one more of ten primary categories: (i) solid, (ii) water, (iii) vegetation, (iv) crops, (v) manmade materials, (vi) animals, (vii) wildlife, (viii) weather, visibility, and climate, (ix) damages to and deterioration of property, and (x) hazards to transportation. 42 U.S.C. § 7602(h).

EPA, however, went beyond the scope of the original inquiry framed by Congress. While lacking the discretion to deviate from principles set forth by the act, the agency chose to organize its endangerment analysis for "public welfare" around a set of new interpretation—namely in the favor of making prediction of how multi-stage set of causes might produce impacts in future on

(i) “food production and agriculture,” (ii) “forestry,” (iii) “water resources,’ (iv) “sea level rise and coastal areas,” (v) “ecosystems and wildlife. Endangerment Finding at 18902-03.
The court therefore should not give controlling deference, under *Chevron*, to the agency due to this conspicuous deviation from a set of clear statutory interpretation set forth by Congress.

B. The Broad application of the Endangerment Finding with respect to public welfare will affect the entire national economy and, therefore, requires substantial guidance from Congress.

EPA cannot justify its finding of welfare endangerment exclusively based on direct welfare effects involving “climate.”

In the Endangerment Finding, EPA mentions that one the enumeration of welfare, under section 202(a)(1), a category pertaining to “effects on economic values and on personal comfort and well-being.” 42 U.S.C. § 7521. such category is extremely broad and congress has not provided an “intelligible principle” for analysis of such statutory language that would allow for pragmatic assessment of welfare effects rather than an assessment that is nothing more than caprice analysis. *Whiteman v. American Trucking Association, Inc.*, 531 U.S. 457 (2001). It is hard to imagine how an agency can put value on personal comfort and well-being without a “substantial guidance” from congress. *Id.* at 475. One would nonetheless presume that congress would provide such guidance when an agency is establishing the parameters of GHG emission based on what is obsentisely an endangerment to our “public welfare,” especially when such standards “affect the entire national economy.” *Id.*

Therefore, Congress has not however set forth any guidance for the agency and such inaction is a basis for the court to enforce its nondelegation principle.

IV. THE EPA'S TEN-YEAR DELAY IN TAKING ACTION TO LIST GHGS AS CRITERIA POLLUTANTS UNDER THE CLEAN AIR ACT §108(A) DOES NOT CONSTITUTE AN UNREASONABLE DUE TO THE CLEAN AIR ACT'S AMBIGUOUS LANGUAGE, LEGISLATIVE HISTORY, AND INTERPRETATION BY OTHER JURISDICTIONS.

A. The Ambiguous Language of the Clean Air Act Requires Further Statutory Interpretation to Determine What Constitutes an Unreasonable Delay.

It is clear that the EPA not designating GHGs as a criteria pollutant does not constitute an unreasonably delayed action. The statutory text in the Clean Air Act, case law, and policy reasonings all support this conclusion.

The purpose of statutory interpretation is to determine the legislature's intent when enacting the statute. *Brilliance Audio, Inc., v. Heights Cross Commc'ns, Inc.*, 474 F.3d 365, 371 (6th Cir. 2007). When interpreting a statute, the court must first look at the language of the statute itself and determine if the language is plain. *United States v. Fitzgerald*, 906 F.3d 437, 442 (6th Cir. 2018). If the terms of the statute when read within the context of the statute are plain, meaning that the language is clear, then further statutory interpretation cannot be pursued. *United States v. Choice*, 201 F.3d 837, 840 (6th Cir. 2000). When the meaning of the statute is clear, the court should apply the statute according to the plain language. *Id.* Further statutory interpretation is needed only when the statute contains ambiguous language. *Brilliance Audio, Inc.*, 474 F.3d at 372. If the statute contains ambiguous language, then the court can conduct further statutory analysis by looking at other sources, including the context of the statute, the statute's legislative history, and other jurisdictions' interpretation of the statute. *Id.*

Looking at the text and context of the Clean Air Act (CAA), it is clear the term "unreasonable delay" is ambiguous, and thus further statutory interpretation is needed. The definitions section of the CAA does not define the term "unreasonable delay." 42 U.S.C. § 7602. Section 304 of the CAA only brings up this issue of an "unreasonable delay" when discussing

jurisdiction. 42 U.S.C. § 7604. Section 304 of the CAA provides that "an action to compel agency action referred to in section 7607(d) of this title which is unreasonably delayed may only be filed in a United States District Court within the Circuit in which such action would be reviewable under section 7607(b) of this title." *Id*. The statute does not describe a time period that would constitute an unreasonable delay, or the purposes of dictating a delay as "unreasonable." *Id.* Rather, the CAA simply mentions this aspect of an unreasonable delay purely for jurisdictional purposes. *Id.*

B. Case Law Demonstrates What Factors to Consider When Determining if a Delay is Unreasonable

Case law supports that what constitutes a reasonable delay is a very narrow set of circumstances. While claims of unreasonable agency delay do fall within this narrow class of "rare instances," the high threshold a litigant must reach to receive further judicial review demonstrates that the legislature intended the review of an ongoing agency proceeding is a very strict and high standard. *Association of National Advertisers v. FTC ("National Advertisers")*, 627 F.2d 1151, 1156 (D.C.Cir.1979) (Tamm, J.) (citing *McKart v. United States*, 395 U.S. 185, 193–94, 89 S.Ct. 1657, 1662–63, 23 L.Ed.2d 194 (1969)), *cert. denied*, 447 U.S. 921, 100 S.Ct. 3011, 65 L.Ed.2d 1113 (1980). This standard is not ironclad, and often suffers from vagueness as there is not an articulated test for determining whether a delay is unreasonable. In National Advisers, Judge Leventhal emphasized that "[o]nly in rare instances is a non-final agency action reviewed in the teeth of a general denial of jurisdiction."627 F.2d at 1178 (concurring opinion). These "rare instances" are generally only cases of "clear right", for example, violations of a clear statutory provision or basic rights established by a structural flaw. *Id.* In this present case, there

is no clear violation of a statutory flaw, because there is not a clear definition as to what makes a delay unreasonable.

The first step of judicial inquiry when determining if an agency's delay is unreasonable, is to consider whether the delay is "so egregious as to warrant mandamus." Clean Air Act, § 307(d)(7)(B), 42 U.S.C.A. § 7607(d)(7)(B). In *Sierra Club*, the court identified two routes for establishing an unreasonable delay claim: (1) showing that an agency violated a statutory "right to timely decision making" implicit in the agency's regulatory scheme, or (2) showing that some other interest—financial, aesthetic, or related to human health and welfare, for example—"will be irreparably harmed through delay." 828 F.2d 783, 796–97 (D.C.Cir.1987). However, there are a set of six factors that aid in determining whether a delay is unreasonable laid out by the District of Columbia Circuit in *Telecomm. Research & Action Ctr. v. F.C.C. ("TRAC")*, 750 F.2d 70 (D.C. Cir. 1984). These factors are: (1) the time agencies take to make decisions must be governed by a "rule of reason", (2) where congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for for this rule of reason, (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake. (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority, (5) the court should also take into account the nature and extent of the interests prejudiced by delay, and (6) the court need not "find any impropriety lurking behind agency lassitude in order to hold that agency action is "unreasonably delayed."" *Id.* These factors weigh in favor of COGA, in that the EPA not designating GHGs as a criteria pollutant does not constitute an unreasonably delayed action.

The first and second TRAC factors both support that an unreasonable delay has not occurred in this case. When determining if an unreasonable delay has occurred, the amount of time an agency is allowed to act is governed by a "rule of reason." *Id.* Here the "rule of reason" does not give a deadline to action. Clean Air Act, § 304, 42 U.S.C. § 7604. Where Congress has not established a deadline, the EPA must nevertheless avoid unreasonable delay, however it does not follow that EPA is, for the purposes of section 304(a)(2) under a nondiscretionary duty to avoid unreasonable delay. Instead, this type of duty is discretionary and, pursuant to the *TRAC* factors. *Gorsuch*, 715 F.2d at 792. When assessing the second factor the D.C. Circuit is mindful that, "[a]bsent a precise statutory timetable or other factors counseling expeditious action, an agency's control over the timetable" of its proceedings "is entitled to considerable deference," *Id.* (alteration in original) (internal quotation marks omitted) (quoting *Sierra Club v. Gorsuch,* 715 F.2d 653, 658 (D.C.Cir.1983)), and that "[e]ven where a statutory timetable exists, noncompliance with it has sometimes been excused as long as the agency has acted rationally and in good faith," *Gorsuch,* 715 F.2d at 658 n. 35. Congress has not provided a timetable or other indication of the speed at which it expects the EPA to proceed with listing gasses as criteria pollutants. Clean Air Act, § 304, 42 U.S.C. § 7604. This is reasonable and expected, as each individual pollutant will have vastly different policy implications that follow. Even if Congress had established a deadline the endangerment finding relies entirely on consequential health harms stemming from climate change, rather than the direct health consequences from breathing air. As discussed earlier in this brief, the record does not show evidence that GHGs directly cause adverse health effects.

The third and fourth TRAC factors also support the contention that this delay is reasonable because this delay is a result of economic regulation and there is no support that

human health and welfare are directly at stake. As discussed earlier in the brief, interpretation of the statutory term "endangerment to public health" only includes direct adverse impacts of breathing air contaminated by the pollutant. Second order climate change impacts that occur as a result of atmospheric conditions that transpire from an emission. Therefore, a delay is much more tolerable in this case because human health and welfare are not directly at stake. Furthermore, when a question of deep "economic and political significance" becomes the salient issue to a statutory scheme, the court must ask itself whether congress has expressly wished to assign an agency with that task. *King v. Burwell*, 576 U.S. 473, 486 (2015).

The agency, in this case the EPA, may delay guidelines mandated by CAA to prevent significant deterioration of air quality which would result from emissions of pollutants especially when budgetary commitments and manpower demands required to complete guidelines are beyond the capacity of EPA or would unduly jeopardize implementation of other essential programs. This is also the case when the EPA is unable to conduct significant evaluation of available control technology to determine which is best practicable. *Id. Sierra Club v. Thomas*, 658 F.Supp. 165, 170-71 (1987). The court has traditionally required a "substantial guidance" from Congress when the EPA attempts to set air standards "that affect the entire national economy," and Congress has not substantially guided the EPA in the matters at issue in this case. The EPA has taken upon itself to initiate other regulatory methods to limit GHG emissions. The first of these regulatory actions was establishing GHG emissions limits for new passenger vehicles and light trucks. Additionally, the EPA adopted New Source Performance Standards and the Best Available Control Technology guidance under Title I of CAA to apply to major sources of GHG pollutants, including power plants. Furthermore, the EPA adopted the Tailoring Rule. Another regulation the EPA commenced was the Clean Power Plan regulations, Carbon

Pollution Emission Guidelines for Existing Sources: Electric Utility Generating Units. The court should consider the expediting delayed action on these agency actions and regulations of a competing priority.

The fifth factor states that the court should also take into account the nature and extent of the interests prejudiced by delay. COGA is a trade association representing the economic interests of fossil fuel companies. These companies engage in the extraction, processing, and marketing of coal, natural gas, and oil. CHAWN's requested relief would result in regulatory limits that would completely destroy or at the minimum severely limit the market for its products. The court should recognize the interests at stake here, and the current lack of infrastructure available to completely divest from the fossil fuel industry. A complete divestment and change in infrastructure are completely reasonable to take more than ten years to accomplish, and thus this delay is reasonable.

It is clear, that when further statutory interpretation is done and the TRAC factors are analyzed, that they weigh in favor of not deeming this delay as unreasonable.

I. UNTIL THE NEWLY APPOINTED EPA ADMINISTRATOR DETERMINES GHGS ENDANGER PUBLIC HEALTH OR WELFARE UNDER CAA § 108(A)(1)(A), THERE IS NO NON-DISCRETIONARY DUTY TO LIST GHGS AS A CRITERIA POLLUTANT.

For an air pollutant to be listed under CAA § 108, the EPA Administrator must "in his judgment" find that the pollutant might reasonably be anticipated to endanger public health or welfare and derive from multiple sources. *Nat'l Res. Def. Council, Inc. v. Train*, 545 F.2d 320, 325 (2nd. Cir. 1976). According to the plain language of section 108(a)(1)(A), the EPA Administrator has exclusive authority to judge whether or not pollutants contribute to air pollution that might endanger public health or welfare. *Zook v. McCarthy*, 52 F.Supp.3d 69, 74 (D.D.C. 2014). When the EPA Administrator has not made an affirmative determination, there is

no non-discretionary duty under CAA § 108. Therefore, since the current Administrator has never made an affirmative determination, no non-discretionary duty exists. The District Court incorrectly concluded a non-discretionary duty to list GHGs existed. R. at 13.

A. Traditional Principles of Statutory Interpretation Authorize the Current EPA Administrator to Determine Possible Endangerment from Air Pollutants

1. The Unambiguous Language of CAA § 108(a)(1)(A) Gives Sole Authority of Determinative Power to the Current EPA Administrator

When interpreting statutory meaning, the analysis should start with the plain language of the statute. *United States v. Fitzgerald*, 906 F.3d 437, 442 (6th Cir. 2018); *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002). When a statute contains clear, unambiguous language, there is no further inquiry. *United States v. Choice*, 201 F.3d 837, 840 (6th Cir. 2000).

The plain language of section 108(a)(1)(A) illustrates that the Administrator shall have authority over determining if air pollutants reasonably may endanger public health or welfare. 42 U.S.C. § 7408(a)(1)(A). The language is unambiguous, as it purposefully states the Administrator is required to include an air pollutant if "in his judgment," he deems to endanger public health or welfare. *Id*. The inclusion of "of which, in his judgment" explicitly leaves the determination power up to the Administrator's sole judgment. *Zook*, 52 F.Supp.3d at 74.

While the language of section 108 (A)(1) is mandatory, the language of section 108(a)(1)(A) creates a caveat allowing the Administrator to use his judgment, before listing an air pollutant. Therefore, it is clear that the plain language is unambiguous, and does not create a non-discretionary duty to list all air pollutants.

2. Historically Courts and Administrators Have Interpreted CAA § 108(a)(1)(A) as Giving Administrator's Sole Authority over Determination if an Air Pollutant Endangers Public Health or Welfare

The inclusion of "in his judgment" illustrates that Congress deliberately assigned the Administrator the responsibility to determine if an air pollutant endangers public health or welfare. *Friends of the Earth v. EPA*, 934 F.Supp.2d 40, 49 (D.D.C. 2013). The word "judgment" is synonymous with the word determination or decision. *Id*. Congress intended for the expertise of the Administrator to be the substance of the determination. *Id*.

In *Train.*, the court held that the Administrator must list air pollutants "which he has determined" fulfill the two requirements of section 108. *Train*, 545 F.2d at 325. The court gives the Administrator the discretion to decide if an air pollutant should be listed, as one cannot be listed without the Administrator determining it meets the first two requirements. *Id.*

EPA Administrators have also long interpreted this rule as requiring inclusion on the list to those pollutants which the Administrator had already found in his judgment to have an adverse effect. *Id.* EPA Administrator Ruckelshaus was the first Administrator during section 108(a)(1)(A)'s creation, and he interpreted the rule to only apply to air pollutants that he personally found to have an adverse effect on public health or welfare. 26 Fed. Reg. 1515 (1971).

B. The Second Circuit's Holding in *Nat'l. Res. Def. Council v. Train* Can Not Be Applied, the EPA Administrator Has Not Conceded GHGs Have an Adverse Effect on Public Health or Welfare

To constitute the endangerment determination necessary to create a duty to list GHGs as a criteria pollutant, the EPA Administrator must make an affirmative determination. *Envtl. Def. Fund v. Thomas,* 870 F.2d 892, 899 (2nd Cir. 1989). The determination necessary goes beyond knowledge of a pollutant's adverse effect. *Id.*

The District Court incorrectly followed the holding of *Train*, as the two cases differed on the Administrator's affirmative determination that the air pollutant endangers public health and welfare. *Train.*, 545 F.2d at 325.

In *Train*, the EPA had conceded that lead had an adverse effect on public health and welfare and that the presence of lead in the air was resulting from numerous sources. *Id.* at 324. This concession of lead's adverse effects was an affirmative determination, which created a non-discretionary duty to list lead under section 108.

Unlike in *Train*, the current Administrator has made an affirmative determination and therefore has no duty to list GHGs under section 108. While the 2009 Endangerment Finding concluded that GHGs were being emitted from numerous sources and were endangering the public health and welfare, the Endangerment Finding is not an affirmative determination by the current Administrator.

The Endangerment Finding was produced in 2009, under the supervision of the prior Administrator and their staff. R. at 7. And while the prior Administrator created new regulations based on their scientific research, these regulations were stripped in 2017 when the current Administrator was installed, including scaling back regulations regarding GHG emissions standards for new motor vehicles. R. at 7. The current Administrator has not constituted the endangerment determination necessary to make an affirmative determination.

The Appellee might argue that the 2009 Endangerment Finding holds weight since the Administrator has left it intact. However, this argument is likely to fail because the endangerment determination needed to create a non-discretionary duty is remarkably high. *Envtl. Def. Fund*, 870 F.2d at 899. Sheer acknowledgment or knowledge of adverse effects is not enough to create a non-discretionary duty to list. *Id.*

There is no non-discretionary duty to list GHGs as a criteria pollutant under CAA § 108, until the EPA Administrator makes an affirmative determination that GHGs endanger the public health and welfare and are admitted from numerous stationary or mobile sources.

CONCLUSION

Based on the foregoing, Appellants, Coal Oil and Gas Administration, respectfully request that this appellate court remand the district court's decision on all issues except the issue of jurisdiction (Issue I).

Respectfully submitted this 21st day of November, 2020,

Attorneys for the Appellants, Coal, Oil, and Gas Associations

We hereby certify that the brief for University of Oregon Law School is the product solely of the undersigned and that the undersigned have not received any faculty or other assistance in connection with the preparation of the brief. We further certify that the undersigned have read the Competition Rules and that this brief complies with these Rules.

Date: November 21st, 2020

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