Team No. 48

C.A. No. 20-000123

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

CLIMATE HEALTH AND WELFARE NOW
Plaintiff-Appellee-Cross Appellant

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Defendant-Appellant

and

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

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR NEW UNION

BRIEF OF APPELLANT CLIMATE HEALTH AND WELFARE NOW

Oral Argument Requested

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STATEMENT OF JURISDICTION

The United States District Court for the District of New Union from which this appeal is filed had jurisdiction over Plaintiff's unreasonable delay claim pursuant to 42 U.S.C. § 7604. Additionally, the district court had jurisdiction over all other claims pursuant to 28 U.S.C. § 1331.

On September 1, 2020, the district court issued a final order of summary judgment, pursuant to Fed. R. Civ. P. 56, resolving all claims among the parties. R. 13-14. Plaintiff-Appellee-Cross Appellant Climate Health and Welfare Now, Defendant-Appellant United States Environmental Protection Agency, and Intervenor-Defendant-Appellant-Cross Appellee Coal, Oil, and Gas Association have each filed a timely Notice of Appeal under Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction over the appeal pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

I. Whether the lower court correctly determined the Endangerment Finding is valid with respect to an endangerment of public welfare.

II. Whether the Endangerment Finding is valid with respect to an endangerment of public health in light of statutory language and the EPA's recent and unexplained change of stance on the issue.

III. Whether the district court had jurisdiction over Plaintiff's unreasonable delay claim under Section 304(a) of the Clean Air Act.

IV. Whether EPA has a discretionary duty to list greenhouse gases as a criteria pollutant under Section 108(a)(1) of the Clean Air Act.

V. Whether the EPA's ten-year delay in listing greenhouse gases as a criteria pollutant under Section 108(a)(1) of the Clean Air Act constitutes an unreasonable delay under Section 304(a) of the Act.

STATEMENT OF THE CASE

I. Factual Background

The EPA was first petitioned to issue a finding that greenhouse gas (GHG) emissions from automobiles posed a danger to human health and the environment under the Clean Air Act (CAA), in 1999, over twenty years ago. R. 6. The EPA denied the petition, stating that GHGs did not qualify as "air pollutants" for the purposes of the CAA, and positing that, as a policy matter, global climate change is properly addressed through more specific authorizing legislation and international agreements than through the CAA regulatory scheme. 68 Fed. Reg. 52,922 (Sept. 8, 2003). The issue was then brought to the courts, with the United States Supreme Court ultimately finding that "greenhouse gases fit well within the Act's capacious definition of 'air pollutant,'" so as to be subject to regulation under the CAA. *Massachusetts v. EPA*, 549 U.S. 497, 499 (2007).

With changing administrations, mounting evidence, and growing consensus on the realities and dangers of anthropogenic climate change, the EPA issued a formal finding of endangerment (Endangerment Finding) under CAA Section 202, announcing that the mixture of six "long-lived and directly emitted" GHGs amounted to a collective "air pollution" under the CAA, that "may reasonably be anticipated both to endanger public health and to endanger public welfare." Endangerment Finding, 74 Fed. Reg. 66,496, 66496-546 (Dec. 15, 2009).

The EPA noted that the Endangerment Finding was appropriately grounded in "the best available science," citing the research of the International Panel on Climate Change (IPCC), the U.S. Global Climate Research Program (USGCRP), and the Natural Resource Council (NRC), among others, 74 Fed. Reg. at 66497. The Finding cites widespread threats to human health and wellbeing, many of which the Administrator observed were already causing hardship in 2009,

including sea level rise, increased temperatures, and more frequent and devastating natural disasters. *Id*.

In the ten years since the Endangerment Finding was issued, consensus has only grown in the scientific community that anthropogenic GHG emissions are causing the climate to warm at unprecedented rates to the detriment of human health and wellbeing. USGCRP, in its 4th National Climate Assessment published in 2017, observed the already widespread impacts of climate change in the US including increased drought, sea level rise, and rising temperatures. USGCRP, 4TH NATIONAL CLIMATE ASSESSMENT (2018). Additionally, the assessment detailed climate change's negative impacts on agriculture, economies, and the overall wellbeing on the people of the United States and the ecosystems communities depend on. In 2018, IPCC published a Special Report on Global Warming of 1.5ºC, with a chapter dedicated to impacts on natural and human systems which observes, with high confidence,[1] that "[a]ny increase in global temperature . . . is projected to affect human health, with primarily negative consequences." IPCC, SPECIAL REPORT: GLOBAL WARMING OF 1.5°C, 180 (2018).

Although over the years a number of the EPA GHG regulations, under various sections of the CAA, have been relaxed or rolled-back, the Endangerment Finding has remained unchanged and the EPA has not sought to rescind the Finding through formal rulemaking. R. 9. Ten years after its issuance, the EPA has yet to list GHGs as a criteria pollutant under CAA § 108, R. 7. This inaction has catalyzed the present controversy.

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[1] In the Report, "[e]ach finding is grounded in an evaluation of underlying evidence and agreement. A level of confidence is expressed using five qualifiers: very low, low, medium, high and very high, and typeset in italics, for example, medium confidence. The following terms have been used to indicate the assessed likelihood of an outcome or a result: virtually certain 99–100% probability, very likely 90–100%, likely 66–100%, about as likely as not 33–66%, unlikely 0–33%, very unlikely 0–10%, exceptionally unlikely 0–1%." IPCC, Special Report: Global Warming of 1.5: Summary for Policymakers 4, footnote 3 (2018).

II. Procedural History

Plaintiff-Appellant, Climate Health and Welfare Now (CHAWN) filed proper notice of its intention to sue the EPA for its failure to carry out its asserted mandatory duty to regulate GHGs as a criteria pollutant and for "unreasonable delay in carrying out its non-discretionary duty to designate GHGs as a criteria pollutant." R. 5. Subsequently, on October 15, 2019, CHAWN brought a citizen suit before the United States District Court for the District of New Union, under CAA § 304, 42 U.S.C. § 7604, seeking an order to compel the Administrator of the EPA to list GHGs as a criteria pollutant subject to the National Ambient Air Quality Standards (NAAQS) program under CAA § 108(a), 42 U.S.C. § 7408. The Coal, Oil, and Gas Association (COGA), a trade association representing the economic interests of fossil fuel companies, successfully intervened as a defendant on the side of the EPA, asserting that the grant of CHAWN's requested relief would result in regulatory limits that would severely inhibit or completely destroy the market for its products. R. 5.

The parties filed cross-motions for summary judgement. R. 5. CHAWN alleged that, as a result of the Endangerment Finding, the EPA has a non-discretionary duty to list GHGs as a criteria pollutant, and that the Agency's ten-year delay in issuing that listing is per se unreasonable. R. 5. The EPA argued that no such non-discretionary duty exists and that the regulatory complexities that would result from listing GHG as a criteria pollutant justify its delayed response. R. 5. COGA asserted that the Endangerment Finding is unsupported by law and the administrative record, and in any case, does not sufficiently support a finding of endangerment of public health so as to justify the establishment of primary NAAQS. R.5. The EPA defended the Endangerment Finding with respect to public welfare, but agrees with COGCA that the Finding is not valid as it pertains to the endangerment of public health. R. 5.

On August 15, 2020 the district court issued an order finding that (1) the Endangerment Finding is valid with respect to an endangerment to public welfare; (2) the Endangerment Finding determining GHGs to endanger public health is contrary to law; (3) the EPA has unreasonably delayed action on responding to Plaintiff's petition for designation of GHGs as a criteria pollutant; (4) the EPA has unreasonably delayed designating GHGs as a criteria pollutant; and, (5) the EPA has a non-discretionary duty to designate GHGs as a criteria pollutant. All parties filed a timely Notice of Appeal. R. 2.

SUMMARY OF THE ARGUMENT

The record cited in the 2009 Endangerment Finding supports the finding of an endangerment to public welfare. In addition, the statutory definitions provided in CAA § 302(h), 42 U.S.C. §7602(h) includes an expansive definition of public welfare as it is used in the statute. As this endangerment distinction should be recognized, at least secondary NAAQS are applicable to this case under their lesser regulation standards.

The finding of an endangerment to public health was erroneously denied by the lower court and is supported by multiple sources. The record in the Endangerment Finding describes and lists the myriad ways GHGs pose a threat to public health as well as public welfare. The public welfare definition found in the CAA § 302(h), 42 U.S.C. §7602(h), is not all-inclusive and can be read to include public health effects. Finally, deference cannot be given to the EPA regarding its change in stance on the public health determination since the 2009 finding because the Agency has not given justification for this change. Though the following arguments proceed without this determination, a finding of an endangerment to public health enhances protections for the public and heightens the duty the EPA already has to list GHGs as a criteria pollutant.

The district court had jurisdiction over Plaintiff's unreasonable delay claim under CAA § 304(a), because Congress intended CAA § 304(a)'s filing rule to be a venue requirement. 42 U.S.C. § 7604(a). Congress did not set out an explicitly jurisdictional requirement when it described where unreasonable delay claims "may only be filed." Additionally, Congress's use of jurisdictional language at the start of the section and later departure from that language confirms congressional intent that the filing rule does not concern a court's authority to hear unreasonable delay claims. Because no party objected to venue, the district court was correct in hearing Plaintiff's unreasonable delay claim.

The EPA's 2009 Endangerment Finding for GHGs, an air pollutant emitted from numerous and diverse sources, creates a non-discretionary duty to designate GHGs as a criteria pollutant under CAA § 108(a), 42 U.S.C. § 7408. The legislative history displays a congressional intent to create a non-discretionary duty to list with the use of the mandate "shall," in Section 108(a). This interpretation is further supported by the strict timelines provided by the statute for both the initial listing of criteria pollutants and the subsequent publishing of criteria and NAAQS under Sections 108(b), and 109(a)(2), 42 U.S.C. §§ 7408, 7409.

Additionally, a fundamental goal of federal regulation under the Clean Air Act is "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population," and a non-discretionary duty to list is a necessary component of an effective regulatory regime under the CAA. 42 U.S.C. § 7401(4)(b)(1). Given the non-discretionary nature of the EPA's duty to list a qualifying pollutant under 108a(1)(A)-(C), there is no place for considerations of the regulatory complexity, rather those discretionary determinations are relegated to the creation and implementation of the NAAQS themselves.

The EPA unreasonably delayed acting on its non-discretionary duty to list GHGs as a criteria pollutant under CAA §108(a), because ten years have passed since the Endangerment Finding and Plaintiff's petition requesting EPA list the pollutant. Ten years exceeds the "rule of reason" crafted by courts, and the Clean Air Act does not support extending this rule any further than previous court cases. EPA's decade-long delay is putting human health and welfare at stake, and is exacerbating the threat of climate change, harming Plaintiff and the general public.

A court order instructing EPA to list the pollutant under CAA § 108(a) would not intrude on agency activities of a competing or higher priority. The executive order cited by EPA does not affect its statutory duties, and listing the pollutant after an endangerment finding is already made will not interfere with other agency activities. Though Plaintiff does not allege impropriety in EPA's delay, it is nonetheless unreasonable considering the extent of the delay, the minimal effort required to list the pollutant, and the considerable human health and welfare interests at stake.

STANDARD OF REVIEW

Courts review de novo a district court's assumption of jurisdiction. *Snell v. Cleveland, Inc.*, 316 F.3d 822, 825 (9th Cir. 2002). The legal standard used by the district court to determine whether agency delay is unreasonable is a question of law to be reviewed de novo by the appellate court. *Cobell v. Norton*, 240 F.3d 1081, 1096 (D.C. Cir. 2001).

The *Chevron* deference standard applies to the review of the EPA's decision to publish the 2009 Endangerment Finding for both public health and welfare. Since, the EPA has not gone through the necessary rule-making process for reversing the Endangerment Finding, their newly stated position that the Endangerment Finding is invalid is not subject to deference or consideration by this Court.

Chevron deference requires a court to defer to an agency's interpretation of its statutory mandates, so long as that interpretation is reasonable. In order to determine whether *Chevron* deference applies, a court must consider:

> 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.

Chevron, U.S.A., Inc. v. NRDC, 467 U.S. 837, 842-3 (1984). Put another way, "administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority," *U.S. v. Mead Corp.*, 533 U.S. 218, 226-7 (2001).

Courts of Appeals review de novo a district court's grant of summary judgment under Fed. R. Civ. P. 56(a). *Woodruff v. Peters*, 482 F. 3d 521, 527 (D.C. Cir. 2007). Summary judgment is appropriate where, based on the admissible evidence submitted by the parties, there is no genuine dispute of material fact, and a party is entitled to judgment in their favor as a matter of law. Fed. R. Civ. P. 56.

ARGUMENT

I. The Endangerment Finding and statutory definitions provided by Congress support a finding of endangerment of public welfare.

The Clean Air Act (CAA) of 1970 is legislation that seeks to combat the threats of air pollution through regulatory means. This is achieved by implementing National Ambient Air Quality Standards (NAAQS). 42 U.S.C. § 7409(a). NAAQS are standards determined by

analyzing air quality that then mandate a state work to improve that air quality within certain time limits and parameters. 42 U.S.C. § 7408. These regulations fall into two categories: primary and secondary. 42 U.S.C. § 7409(b).

Primary NAAQS are required in order to protect the public health. *Id.* at §7409(b)(1). Secondary NAAQS are required in order to "protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air." *Id.* at §7409(b)(2). Determining whether or not air pollutants may harm public health or welfare also determines which NAAQS regulation is used to remedy the pollution. *Id*. at §7408(a)(1)(A).

The Endangerment finding, released by the EPA Administrator in 2009, describes how GHGs threaten both public health and public welfare. Endangerment Finding, 74 Fed. Reg. 66,496, 66,523 (Dec. 15, 2009). This Court is asked to review de novo the validity of EPA's Endangerment Findings for both public health and welfare. Based on the language of the CAA and the findings put forth by the EPA in 2009, the public health and welfare designations are both legally valid and applicable in this case. The lower court correctly ruled that the public welfare interpretation of the endangerment finding is binding upon the case at hand. R. at 9.

A. The Endangerment Finding found GHGs to endanger public welfare

The 2009 Endangerment Finding showed that GHGs were proven to be detrimental to public welfare. Endangerment Finding, 74 Fed. Reg. 66,496, 66,523 (Dec. 15, 2009). The impact on public welfare or public health was not required, per the CAA section 202(a), to be a bright line rule. *Id*. Rather, the Administrator was permitted to use her judgement when making these determinations. *Id*. In the Endangerment Finding, the Administrator determined that the elevated levels of greenhouse gases affect "essentially every aspect of human health, society and the

natural environment." *Id*. The Administrator also found that the emission of GHGs causes or contributes to these risks to public welfare and health. *Id*. at 66,536.

Effects on public welfare are reasonably expected to affect industries such as agriculture, forestry, energy, and even national security. *Id*. at 66,517. The "clearest and strongest" areas of public welfare are water resources and coastal rising. *Id*. at 66,534. These areas of public welfare are risks that may not necessarily harm the health of individual people, but rather affect societal systems at large.

According to the Clean Air Act, public welfare concerns invoke secondary NAAQS. 42 U.S.C. §7408(a)(1)(A). These rules are less stringent than primary NAAQS. The court in *Massachusets v. EPA* gives broad discretion to agencies to make their own policies and enforce them accordingly. *Massachusetts v. EPA*, 549 U.S. at 528.

B. Congress defined concepts of public welfare within the statutory language of the Clean Air Act.

Congress has addressed impacts on public welfare in Section 302 of the CAA, which provides an expansive definition for what public welfare refers to in context of the Act. CAA § 302(h), 42 U.S.C. § 7602(h). This definition aligns with the findings of the Endangerment Finding and supports the lower court's decision to rule in favor of the public welfare determination. The Endangerment Finding, Clean Air Act, and cases such as *Juliana v. United States*, provide sufficient support for the lower court's ruling and further conclusions that climate change from GHGs is real and substantially affects public welfare and social systems. 947 F.3d 1159, 1175 (9th Cir. 2020) (a case in which multiple plaintiffs seek declaratory and injunctive relief against the government for damages suffered that were caused by the effects of climate change).

The Endangerment Finding expressly states that GHGs harm public welfare, providing ample scientific evidence as support. The plain language of Congressional statutes regulating this area of law further support this claim. The district court's decision affirming the validity of the Endangerment Finding for public welfare should thus be upheld.

II. Endangerment to public health is supported by both Congressional statutes and the Endangerment Finding, and no deference can be given to the EPA's new stance on the matter.

The lower court erred in failing to recognize the validity of the Endangerment Finding's determination of endangerment to public health. R. at 10. The Endangerment Finding names public health threats caused by GHGs such as: direct temperature effects, air quality effects, and potential for increased severity of natural disasters, Endangerment Finding, 74 Fed. Reg. at 66,524, threats expected to harm both current and future generations. *Id.* An endangerment to public health would invoke a primary NAAQS regulation.

A. Congressional definitions for public welfare can be read to include public health

Congressional definitions have not expanded to precisely include public health in the CAA. CAA § 302(h), 42 U.S.C. § 7602(h). However, the definition of public welfare in the CAA includes effects on aspects of health such as weather and "personal comfort and wellbeing." *Id*. This statute specifies that the listed categories are not all-inclusive. *Id*. This language does not specifically preclude public health from being considered as well as public welfare.

However, the lower court erred in strictly interpreting section 7602(h) only as a provision regarding public welfare. Even a strict reading does not preclude the inclusion of public health under this definition, and often these two terms are used interchangeably in other sections of the CAA, including those that describe the use and function of NAAQS. 42 U.S.C. §§ 7408, 7409.

B. *The EPA's new stance on public health need not be shown deference because it has never been expressed before this litigation.*

Though the EPA previously supported this interpretation of the Endangerment Finding, their stance now differs from the document they researched and produced. As stated in the lower court decision, *Chevron*, and later *US v. Mead Corp.*, allow a court to refuse to give deference to the EPA's new position on public health interpretations unless those interpretations were made in exercise of a given Congressional authority by that agency. *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001). The EPA cannot claim deference to a new interpretation that has not been made in exercise of authority and has only arisen in litigation. R. at 10. *FCC v. Fox TV* states that an agency is permitted to change its mind, but must still provide at least some reasoning for the policy change. *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009). The record does not show any evidence that the EPA has shown reasons for changing its stance prior to this litigation. R at 10. Per this case law and the lower court's decision, the EPA's argument does not receive deference in the case at hand.

How this Court rules on the interpretation of public health is the deciding factor between whether or not primary or secondary NAAQS are applied. The public health interpretation warrants a primary NAAQS application. As previously noted, courts prefer not to litigate the policy behind the application of NAAQS, rather preferring to consider legal implications. *Massachusetts v. EPA*, 549 U.S. at 528. However, courts have shown deference to EPA decisions to "set a standard not lower or higher than is necessary ... to protect the public health." *Am. Farm Bureau Fed'n v. E.P.A.*, 559 F.3d 512, 526 (D.C. Cir. 2009) (quoting *Whitman v. American Trucking Ass'n*, 531 U.S. 457, 475-76 (2001)). The decision before this Court is how to interpret Congressional definitions of public health and welfare as they apply to the Endangerment

Finding: no other policy considerations or discussions about the validity of either public health or welfare interpretations need be considered.

The public health determination was supported by the EPA up until this litigation. Case law states that the Court need not give deference to the EPA's change of position without the agency justifying their change in stance. Further, Congressional statutes do not explicitly exclude public health and are expansive, even when read strictly. For these reasons, the district court's decision to uphold the validity of the Endangerment Finding for both the public health and welfare should be upheld.

III. The district court was correct in hearing Plaintiff's unreasonable delay claim, because CAA § 304(a) delineates a venue, rather than jurisdictional, requirement, and no party objected to venue in the district court.

Labelling a rule as jurisdictional allows litigants to raise their objections to the rule at any time in court proceedings. *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153 (2013). Late objections to jurisdiction can result in wasted judicial resources and can "disturbingly disarm litigants." *Id.* On the other hand, parties, including the government, that fail to object to a venue requirement in lower courts lose the right to do so later in the litigation. *Panhandle E. Pipe Line Co. v. Fed. Power Comm'n*, 324 U.S. 635, 639 (1945). With these ramifications in mind, the Supreme Court has "tried in recent cases to bring some discipline" to the jurisdictional label as applied by courts. *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 435 (2011).

To remedy the fact that jurisdiction has become a "word of many, too many, meanings," the Court has elaborated on the differences between statutes that invoke a court's power to hear a case and statutes that are merely claims-processing rules. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 90 (1998) (quoting *United States v. Vanness,* 85 F.3d 661, 663, n. 2 (D.C.

Cir. 1996)). The Court addressed the issue by administering a "readily administrable bright line" for determining whether to classify a statutory limitation as jurisdictional. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 516 (2006). Additionally, courts consider historical "context," including how the Supreme Court has characterized similar provisions in the past. *Sebelius*, 568 U.S. at 153-54.

To determine whether a particular rule is jurisdictional in nature, courts must look to the text of the statute and see whether Congress "has clearly stated" that the rule is jurisdictional. *Id.* (quoting *Arbaugh*, 546 U.S. at 515-16). Restrictions lacking such a clear statement should be treated as nonjurisdictional in character. *Id*. Additionally, a requirement that would otherwise be nonjurisdictional does not become jurisdictional simply because it is in a section of a statute that also contains jurisdictional provisions. *See Gonzalez v. Thaler*, 565 U.S. 134, 132 (2012). Finally, when Congress includes particular language in one section of a statute but omits it in another, "it is generally presumed that Congress acted intentionally and purposely in the disparate inclusion or exclusion." *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) (quoting *Russello v. United States,* 464 U.S. 16, 23 (1983)). Rules that speak to where a claim may be filed but do not rise to the level of a jurisdictional requirement are deemed venue requirements. *See e.g., Clean Water Action Council of Ne. Wis., Inc. v. U.S. E.P.A.*, 765 F.3d 749, 751 (7th Cir. 2014) (Finding that CAA § 307(b)'s filing rules are venue requirements in light of the Court's bright-line requirements).

Clean Air Act § 304(a) states the filing requirements for an unreasonable delay claim under the Act:

> The district courts of the United States shall have jurisdiction to compel . . . agency action unreasonably delayed, except that an action to compel agency action referred to in section [CAA § 307(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 section [CAA § 307(b)] of this title.

42 U.S.C. § 7604(a). CAA § 307(b) outlays the filing rules for different types of nationally and regionally applicable claims under the Act. 42 U.S.C. § 7607(b).

The text of CAA § 304(a) implies that its filing requirements are not jurisdictional in nature. The rule in CAA § 304(a) that subjects review of agency delays to the requirements of CAA § 307(b) states that the unreasonable delay claim "may only be filed in a United States District Court within the circuit in which such action would be reviewable under [CAA § 307(b)]." 42 U.S.C. § 7604(a). While this rule undoubtedly intends to restrict the claims that are heard by district courts, Congress's use of "may only be filed" instead of explicit jurisdictional language informs the reader that the rule was intended to be nonjurisdictional in nature.

Congress's inclusion of the word "jurisdiction" at the beginning of CAA § 304(a) speaks to the district courts' authority to hear unreasonable delay claims. However, Congress later excluded this clear jurisdictional statement when it described where citizens may file actions of national or regional applicability. Informed by the Supreme Court's prior rulings, it is clear that Congress intended to avoid terms that would have rendered CAA § 304(a)'s filing rules jurisdictional. Finally, while the filing rule appears in a section of the statute that discusses jurisdiction, the fact that Congress placed the rule in such a section does not make the rule jurisdictional, unless there is a clear statement that the rule invokes a court's power to hear a case. Because there is no such statement, the rule is a waivable venue requirement.

No party objected to venue in the district court. R. 5. Because Congress intended for CAA § 304(a)'s filing rules to be a venue requirement, the issue needed to be raised by the parties earlier in litigation, and the district court was correct in hearing Plaintiff's unreasonable delay claim.

IV. EPA has a non-discretionary duty to list greenhouse gases as a criteria pollutant under Section 108(a) of the Clean Air Act

The EPA's 2009 Endangerment Finding for GHGs, an air pollutant emitted from numerous and diverse sources, creates a non-discretionary duty to designate GHGs as a criteria pollutant under CAA § 108. The provision, laid out below, sets out a non-discretionary duty to list a criteria pollutant when the following conditions are met: (1) air pollutant, (2) which is emitted from numerous or diverse mobile or stationary sources, (3) is determined by the Administrator of the EPA to endanger the public health and/or welfare, (4) and, for which air quality criteria has not yet been issued:

> (1) For the purpose of establishing national primary and secondary ambient air quality standards the administrator shall . . . publish, and shall from time to time thereafter revise, a list which includes each air pollutant-
>
> (A) emissions of which, in his judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare;
> (B) the presence of which in the ambient air results from numerous or diverse mobile or stationary sources; and
> (C) for which air quality criteria had not been issued before the date of enactment of the Clean Air Act Amendments of 1970, but for which he plans to issue air quality criteria under this section.

42 U.S.C. § 7408. GHGs meet all of these requirements, triggering the EPA's non-discretionary duty to list them as a criteria pollutant.

The Supreme Court has determined that GHGs are an air pollutant for the purpose of the CAA. *Massachusetts v. EPA*, 549 U.S. 497, 499 (2007). GHGs are emitted from numerous and diverse sources, have been determined by the administrator of the EPA to be reasonably anticipated to endanger the public health and welfare, and have not yet been assigned air quality criteria. Consequently, the EPA has a non-discretionary duty to list GHGs as a criteria pollutant.

CHAWN's motion for summary judgement on the EPA's non-discretionary duty to list GHG as a criteria pollutant should therefore be granted.

A. CAA Section 108(a) establishes a non-discretionary duty to list a criteria pollutant when the EPA finds an air pollutant that is emitted from multiple sources to endanger the public health and/or public welfare.

Section 108(a) sets out a non-discretionary duty to list criteria pollutants when the conditions have been met. Yet, the EPA is again making the argument that it made over three decades ago in *NRDC v. Train*, asserting that section 108(a)(1)(c) provides an escape route to discretion through the language: "but for which he plans to issue air quality criteria under this section," *NRDC v. Train*, 545 F.2d 320 (2nd Cir. 1976). The EPA argues that the language under Section 108(a)(1)(C) functions as a third criteria for listing, ultimately leaving the decision to list up to the discretion of the EPA. R. 5. The 2nd Circuit in *Train* rejected this argument, finding that "the structure of the Clean Air Act as amended in 1970, its legislative history, and the judicial gloss placed upon the Act leave no room for an interpretation which makes the issuance of air quality standards . . . under Section 108 discretionary." *Id.* at 328.

The D.C. Circuit Court similarly has recognized an unambiguous, non-discretionary duty to list, noting: "The statute makes clear that the EPA's duty is to list any pollutant that the EPA has determined meets the criteria in Section 108(a)(1)(A) and (B)," notably excluding subsection C as a determining factor. *Zook v. McCarthy,* 52 F.Supp.3d 69, 74 (D.D.C. 2014). The district court in the present case agreed with the *Train* and *Zook* courts' interpretation, finding that the EPA has a non-discretionary duty to list GHGs as a criteria pollutant. The district court's ruling on this issue should be upheld.

1. The language and substance of Section 108(a) makes plain a non-discretionary duty to list and the legislative history confirms Congressional intent to create such a non-discretionary duty

The explicit requirement under CAA § 108(a)(1) that the Administrator "*shall* publish, and shall from time to time thereafter revise a list which includes each air pollutant," clearly denotes a non-discretionary duty to list when the criteria are met. The Senate Committee Report on the 1990 Amendments to the CAA provides support for the determination that the duty to list under Section 108 is non-discretionary:

> "Where the Agency does not concede that it has a duty to take action, the citizen suit will test the plaintiff's claim that the failure to act is not in accordance with law (for example, that it violates an unqualified and specific "shall" command in the Act) or that it is arbitrary, capricious, or an abuse of discretion. Examples of the latter categories would include circumstances where the failure to act is not rationally based, ignores clear evidence, or where it frustrates the purposes and goals of the Act by failing to correct deficiencies in air pollution standards or regulations."

S. Rep. No. 101-228, at 3758 (1990). This expression of Congressional intent is vitally important to the proper interpretation of EPA's duties as it evidences that the unqualified and specific use of "shall" in Section 108(a) to be a non-discretionary mandate.

While the mandatory nature of statutory provisions can sometimes be called in question, as in *Town of Castle Rock v. Gonzalez*, 545 U.S. 748 (2005) (determining law enforcement did not have non-discretionary duty to enforce restraining orders against perpetrators of domestic violence), in the present case, in light of the clarification provided by the legislative history and the support provided by the larger regulatory structure and purposes of the CAA, there is no doubt that CAA Section 108(a) presents the EPA with a non-discretionary duty to list when the outlined conditions are met.

This interpretation is further supported by the strict timelines provided by the statute for both the initial listing of criteria pollutants and the subsequent publishing of criteria and NAAQS

under Sections 108(b), and 109(a)(2), 42 U.S.C. §§ 7408, 7409. To not require the listing of qualifying pollutants that pose a threat to the public, only to then mandate a strict regulatory timeline once they are listed, would result in disjointed and contrary regulatory effort that would do little to ensure the protection of the public from harmful pollutants.

2. A fundamental purpose of the Clean Air Act is to protect the public health and welfare necessitating a non-discretionary duty to list criteria pollutants that endanger the public health and/or welfare

One of the fundamental goals of regulation under the Clean Air Act is "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population," 42 U.S.C.A. § 7401(4)(b)(1). If Section 108 is interpreted to give the EPA the discretion to not list and appropriately regulate criteria pollutants that have been determined by the agency itself to threaten public health and welfare, then the CAA regulatory scheme for protecting the public health and welfare from dangerous air pollutants is left without teeth. The listing of criteria pollutants is essential to the protection of the public when a threat to public health and/or welfare has been identified. An interpretation of Section 108 as outlining a non-discretionary duty to list fits neatly within the regulatory framework of the CAA and flows logically from the statute's clearly stated purposes.

B. GHGs meet the necessary requirements and EPA thus has a non-discretionary duty to list GHGs as a criteria pollutant under CAA Section 108(a)

GHGs have satisfied the criteria under Section 108(a) to require listing as a criteria pollutant. Although the process for creating, implementing, and enforcing NAAQS for GHGs may prove to be challenging and complex, those considerations are not relevant at this non-discretionary stage in the regulatory process.

1. GHGs are emitted from multiple sources and have been determined to pose reasonably anticipatable threat of harm to human health and wellbeing, thus requiring listing as a criteria pollutant under CAA § 108(a)

GHGs have met all conditions to require mandatory listing as a criteria pollutant. The Supreme Court in *EPA v. Massachusetts* determined that GHGs qualify as an air pollutant, they are indisputably emitted from multiple and diverse sources, and the EPA itself has issued an Endangerment Finding detailing the threats that GHG emissions pose to human health and welfare. Consequently, the criteria for listing under CAA § 108(a) have been satisfied and the EPA has a non-discretionary duty to list.

2. Considerations of the complexity of the regulatory regime are not appropriate at the non-discretionary listing stage under CAA Section 108(a)

The EPA has a non-discretionary duty to list GHGs as a criteria pollutant as it has been identified as an air pollutant, emitted from multiple sources, and has been found to threaten the public health and welfare. The EPA denies this duty, highlighting "regulatory complexities" that would result from such a listing. R. 5. However, considerations of the regulatory complexity, including financial costs, potential impacts on industry, viability of enforcement, while relevant for determining NAAQS, do not interfere with the mandatory duty to list when an air pollutant, emitted from multiple sources, is found to endanger the public health and/or welfare.

Under CAA § 108(a)(2), the Administrator has 12 months to propose National Ambient Air Quality Standards (NAAQS) from the time of a criteria pollutant's listing. However, In *Center for Biological Diversity v. EPA*, the challenges inherent in setting NAAQS are highlighted, with the court ultimately determining that the EPA was entitled to deference in its determination that further studies needed to take place before the secondary NAAQS for acid

rain could be updated and found that the EPA's ongoing efforts to set the NAAQS satisfied its mandate under the Act, 749 F.3d 1079, 1090 (D.C. Cir. 2014). But, reliance on this precedent as support for not listing or an indefinite delay for listing GHGs as a criteria pollutant is misplaced. In fact, the case itself makes this point plain noting the EPA's non-discretionary duty to list qualifying criteria pollutants: "Under the Act, EPA is required to regulate any airborne pollutant which, in the Administrator's judgement, 'may reasonably be anticipated to endanger public health or welfare.'" *Id.* at 1083 (citing 42 U.S.C. § 7408(a)(1)(A)). Before the more discretionary process of determining, and later updating, NAAQS can begin, the non-discretionary listing of a criteria pollutant must take place, and regulatory considerations have no place at this stage in the regulatory process.

In conclusion, the EPA has a non-discretionary duty under Section 108(a)(1) of the CAA to list GHGs as a criteria pollutant, as GHGs have been determined to be an air pollutant, emitted from multiple sources, that endangers the public health and welfare. The statutory language, legislative history, and regulatory purposes of the CAA make this duty clear. The district court's ruling on this issue should therefore be upheld.

V. The EPA has unreasonably delayed action in carrying out its non-discretionary duty to designate GHGs as a criteria pollutant, because the agency's ten- year delay is consistent with unreasonable delays found by courts under *TRAC*.

The Clean Air Act authorizes courts to compel agency actions that are "unreasonably delayed." 42 U.S.C. § 7604(a). While mandamus is an extraordinary remedy, an agency's unreasonable delay warrants court action, because it "signals a breakdown of regulatory processes." *See In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 418 (D.C. Cir. 2004) (quoting *Cutler v. Hayes,* 818 F.2d 879, 897 n. 156 (D.C.Cir.1987)). Courts determine whether a

delay is unreasonable by weighing the six "*TRAC* factors" enumerated in *Telecommunications Research and Action Center v. F.C.C.*, 750 F.2d 70 (D.C. Cir. 1984):

> (1) the time agencies take to make decisions must be governed by a rule of reason;
> (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason;
> (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake;
> (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority;
> (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and
> (6) the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed.

In re Pesticide Action Network N. Am., Nat. Res. Def. Council, Inc., 798 F.3d 809, 813 (9th Cir. 2015).

A. EPA's ten-year delay in listing GHGs as a criteria pollutant exceeds a "rule of reason," as set out by courts.

The first *TRAC* factor directs courts to govern agency action by a "rule of reason." *Telecomm. Research and Action Ctr. v. F.C.C.*, 750 F.2d 70, 80 (D.C. Cir. 1984). The rule of reason generally will not allow for ten-year delays in agency actions. *See In re A Cmty. Voice, 878* F.3d 779, 787 (9th Cir. 2017) ("EPA fails to identify a single case where a court has upheld an eight-year delay as reasonable"). However, the remaining *TRAC* factors allow agencies to explain otherwise unreasonable delays. *See TRAC* 750 F.2d at 80.

B. The statutory framework of the Clean Air Act suggests that a ten-year delay in listing a criteria pollutant is unreasonable.

Under the second *TRAC* factor, courts look to the enabling statute to provide context for the rule of reason. *See Telecomm. Research and Action Ctr. v. F.C.C.*, 750 F.2d 70, 80 (D.C. Cir. 1984). CAA § 108(a)(1) states that "the Administrator shall within 30 days after December 31, 1970, publish, and shall from time to time thereafter" list pollutants after the administrator has

made an endangerment finding. The phrase "from time to time" is commonly understood to invite judicial review for unreasonable delay. *See Am. Lung Ass'n v. Reilly*, 962 F.2d 258, 263 (2d Cir. 1992). Additionally, the Clean Air Act includes express provisions pertaining to citizen suits for unreasonable delay claims. *See* 42 U.S.C. § 7604(a). Finally, CAA § 108(a)(2) states that the administrator shall, a year after listing a criteria pollutant, issue air quality criteria for the listed pollutants. 42 U.S.C. § 7408(a)(2).

CAA § 108(a)(1)'s use of "from time to time" and the citizen suit provision in CAA § 304(a) invite judicial review for unreasonable delay in listing criteria pollutants. Additionally, the separate timetable present in CAA § 108(a)(2) indicates that listing a criteria pollutant is a different act than deciding complex NAAQS issues. EPA contends that its delay is excused because the regulation of the criteria pollutant would require "resolution of thorny policy and scientific issues." R. 12. However, this argument fails to consider the action at issue: EPA must list a criteria pollutant following an endangerment finding. Because Congress expressly invited judicial intervention in EPA delays, and technically-intensive NAAQS rulemaking comes after listing a criteria pollutant, EPA's decade-long delay in listing GHGs as a criteria pollutant after the Endangerment Finding is unreasonable under the Clean Air Act.

C. EPA's delay puts human health and welfare at stake and is unreasonable.

Delays that put human lives at stake are even less tolerable under the third *TRAC* factor. *See In re Int'l Chem. Workers Union*, 958 F.2d 1144, 1149 (D.C. Cir. 1992). Courts do not allow a problem posed to human health and welfare to continue unabated past a general rule of reason. *See Id.* at 1150; *see also In re Pesticide Action Network N. Am., Nat. Res. Def. Council, Inc.*, 798 F.3d 809, 814 (9th Cir. 2015) ("EPA offers no acceptable justification for the considerable human health interests prejudiced by its delay").

The *Pesticide Action Network* court halted the EPA's eight-year delay in responding to a petition that would stop the use of chlorpyrifos, a pesticide linked to adverse health effects. *Id*. The court used evidence that the EPA had taken measures, such as changing labeling requirements, to reduce the harmful effects of the pesticide and cited the EPA's finding that the pesticide poses a threat to water supplies as further proof that the delay was unreasonable. *Id*. The considerable health risks presented by permissible levels of cadmium convinced the *Chemical Workers Union* court to find that a six-year delay was "an extraordinarily long time." *Id.* at 1150.

EPA's delay in listing GHGs harms health and welfare more than prior delay cases. Just like OSHA's delay in creating new standards for cadmium was more unreasonable because of the human health and welfare risks presented by the pollutant, EPA's delay is "extraordinary," considering all of the evidence linking GHG emissions to climate change and adverse health effects. *Chemical Workers Union*, 958 F.2d at 1150. However, in the present case, EPA has ignored its duty to act for four years longer than OSHA's delay. Just as in *Pesticide Action Network*, EPA has demonstrated through its findings and regulations that health and welfare are at stake. EPA has already published its Endangerment Finding and has made rules to curb the threat posed by GHG emissions. *See e.g.,* Carbon Pollution Emission Guidelines for Existing Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662 (Oct. 23, 2015). Nonetheless, EPA has ignored its statutory duty to list GHGs a criteria pollutant for ten years and offers no justification for this delay.

D. Judicial intervention would merely make EPA comply with the law and would not interfere with EPA activities of a competing or higher priority.

Under the fourth *TRAC* factor, courts will not grant relief that would have the court insert itself into the "agency's internal process." *In re Core Commc'ns, Inc.*, 531 F.3d 849, 859 (D.C. Cir. 2008) (quoting *In re United Mine Workers of Am. Int'l Union*, 190 F.3d 545, 553 (D.C. Cir. 1999)). Courts, while "acutely aware of the limits of [their] institutional competence", nonetheless will step in when delays have become unreasonable and the agency offers no justification for this delay. *See Core Commc'ns,* 531 F.3d at 859 (quoting *Grand Canyon Air Tour Coal. v. F.A.A.*, 154 F.3d 455, 476 (D.C. Cir. 1998)). Courts generally avoid affecting agencies' internal processes by declining to issue orders that would see the agency address an issue to the detriment of other mandatory duties. *See In re Barr Labs., Inc.*, 930 F.2d 72, 76 (D.C. Cir. 1991). However, courts will ensure that agencies comply with the law when this relief would not require technical or intrusive measures. *See Core Commc'ns,* 531 F.3d at 859.

In *In re International Chemical Workers Union*, the court relied on the extent of the OSHA's inaction to date and the fact that the agency itself believed that a rule minimizing the risks of cadmium was necessary when it ordered the agency to create the rules, 958 F.2d 1144, 1149-50 (D.C. Cir. 1992). Conversely, in *Barr Labs*, the plaintiff filed an unreasonable delay claim in response to the FDA taking nearly double its statutory time limit to approve a generic drug application, 930 F.2d at 73-74. The court, in denying the claim, observed that the issue of delay was not unique to the plaintiff's petition and that granting relief to the claimant would harm applicants at the front of the line requesting the same relief. *Id*. at 76.

Ordering EPA to list GHGs as a criteria pollutant would not interfere with EPA activities of a competing or higher priority. Just as OSHA recognized the importance of carrying out its statutory duty in *Chemical Workers Union*, EPA has already published the Endangerment

Finding, detailing the importance of limiting greenhouse gas emissions. Additionally, by ordering EPA to list greenhouse gasses as a criteria pollutant, this Court would not be favoring Plaintiffs' interests at the expense of other duties like the *Barr* petition.

The executive order cited by EPA cannot affect non-discretionary duties; it merely informs how agencies exercise discretion. The Clean Air Act mandates that the Administrator list pollutants determined to endanger public health or welfare. *See* 42 U.S.C § 7408(a)(1). Discretionary acts "can never trump the plain meaning of a statute." *See Envtl. Def. Fund v. EPA*, 922 F.3d 446, 457 (D.C. Cir. 2019) (quoting *Texas v. EPA*, 726 F.3d 180, 195 (D.C. Cir. 2013)). Additionally, listing a criteria pollutant falls outside the scope of the executive order, which instructs agencies to reduce economic regulation through discretionary acts. *See* Reducing Regulation and Controlling Regulatory Costs, Exec, Order 13771, 82 Fed. Reg. 9,339 (Feb. 3, 2017). The executive order cited by EPA does not affect its non-discretionary duties under the Clean Air Act, and the act of listing greenhouse gasses as a criteria pollutant would not interfere with agency activities of a higher or competing priority to EPA.

E. EPA's delay continues to prejudice Plaintiff and the public at large by exacerbating the threat of global climate change.

The fifth *TRAC* factor instructs courts to consider the nature and extent of the injuries caused by the delay. *See Telecomm. Research & Action Ctr. v. F.C.C.*, 750 F.2d 70, 80 (D.C. Cir. 1984). According to EPA's own Endangerment Finding, greenhouse gasses are contributing to global climate change, and are reasonably expected to endanger public health and welfare. *See* Endangerment Finding, 74 Fed. Reg. 66,496, 66,496–546 (Dec. 15, 2009). Listing greenhouse gases as a criteria pollutant would allow EPA to begin rulemaking that would curb the amount of this pollutant being emitted into the air. *See* 42 U.S.C. §§ 7408, 7409. Inaction on climate change is causing "the destabilizing climate [to] bury cities, spawn life-threatening natural

disasters, and jeopardize critical food and water supplies." *See Juliana v. United States*, 947 F.3d 1159, 1166 (9th Cir. 2020) (Noting that the problem is approaching "the point of no return").

Plaintiff's members have been gravely harmed by the effects of sea level rise and global warming, and younger members' future lives are endangered by the threat of climate change. R. 5. EPA's delay in addressing these issues is making the nature of these threats to public health and welfare worse, and this inaction comes at the expense of Plaintiff and the public at large.

F. Though Plaintiff does not allege impropriety, EPA has nonetheless ignored its non-discretionary duty for ten years.

The sixth *TRAC* factor states that bad faith is not required for unreasonable delay claims to prevail. *See Telecomm. Research and Action Center v. F.C.C.,* 750 F.2d 70, 80 (D.C. Cir. 1984). While Plaintiff does not allege bad faith on the part of EPA, the agency has nonetheless ignored, for ten years, its non-discretionary duty to list GHGs as a criteria pollutant. The EPA has published the Endangerment Finding for GHGs, while nonetheless decreasing the pollutant's regulatory standards through its discretionary actions. *E.g.,* The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks, 85 Fed. Reg. 24,174 (Apr. 30, 2020) (relaxing GHG emission standards for motor vehicles). While the EPA has recently decreased GHG regulations, its duty under statute to list GHGs as a criteria pollutant remains the same, and no proof of impropriety is needed to determine that the EPA's 10-year delay cannot be sustained under the Clean Air Act,

The district court was correct in ruling that the EPA has unreasonably delayed action in both responding to Plaintiff's petition and listing GHGs as a criteria pollutant under the Clean Air Act. EPA's ten-year delay exceeds the rule of reason set by courts and the Clean Air Act's statutory scheme, further endangers the public health and welfare, does not affect EPA action of

a competing or higher priority, and gravely harms the interests of Plaintiff and the public at large. Therefore, the district court's finding of unreasonable delay should be upheld.

CONCLUSION

For the above reasons we respectfully ask that this Court find in favor CHAWN on all matters, upholding the district court's judgement on Issue 1, finding that the Endangerment Finding is valid with respect to an endangerment to public welfare; on Issue 3, finding that the district court had jurisdiction to hear the case; on Issue 4, finding that the EPA has a non-discretionary duty to list GHG as a criteria pollutant; and on issue 5, finding that the EPA has unreasonably delayed designating GHGs as a criteria pollutant. We ask that the Court reverse the district court's decision on issue 2 and instead find that the Endangerment Finding is valid with respect to an endangerment to public health.