Team No. 50
Brief

IN THE TWELFTH CIRCUIT
COURT OF APPEALS

CLIMATE HEALTH
AND WELFARE NOW
Plaintiff-Appellee-Cross Appellee

v.

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY,
Defendant-Appellant,

and

COAL, OIL, AND
GAS ASSOCIATION,
Defendant-Appellant.

No. 20-000123

On Appeal from the United States
District Court for New Union.

BRIEF OF APPELLEE,
CLIMATE HEALTH AND WELFARE NOW

Team #50

Attorneys for Plaintiff-Appellee

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Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act; Final Rule, 74 Fed. Reg. 66, 496 (Dec. 15, 2015).

Proposed Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act; Proposed Rule, 74 Fed. Reg., 18,901 (Apr. 24, 2009).

JURISDICTIONAL STATEMENT

The United States District Court of New Union had jurisdiction over this case under the citizens suit provision of the Clean Air Act (CAA) section 304, 42 U.S.C. § 7604 to compel the administrator of the United States Environmental Protection Agency (EPA) to list greenhouse gases (GHGs) under CAA § 108(a), 42 U.S.C. § 7408, as criteria pollutants subject to the National Ambient Air Quality Standards (NAAQS) program.

This court has jurisdiction of this appeal pursuant to Article III, Section 2 of the United States Constitution as an appeal from a final decision from the United States District Court for New Union.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. 42 U.S.C. § 7607(b) prescribes a choice a party has among circuits and not the power of a particular federal court to hear a claim. The statute references that the suit "may" be filed not that it "must" or "shall" be filed. Also, the legislative history of the statute has been interpreted as a venue requirement. If a party chooses not to object, § 7607(b) can be waived, then the parties accept to be sued in a court that would otherwise be an improper venue.

II. Two Supreme Court cases affirmed that greenhouse gas emissions are affecting public welfare by increasing the temperature of the Earth and contributing to rising sea levels. Following these two Supreme Court cases, greenhouse gas emissions have only increased, thus increasing the Earth's temperature and sea level.

III. The 2009 Endangerment Finding regarding public health is valid and because the EPA followed the proper procedures for rulemaking under CAA § 307, 42 U.S.C. § 7607,

the Endangerment Finding warrants controlling *Chevron* deference. Therefore, the District Court correctly held that the EPAs newfound position is not entitled to deference.

IV. The District Court correctly concluded that the EPA's ten- year delay in listing greenhouse gases as criteria pollutants under CAA § 108(a), 42 U.S.C. § 7408 constitutes an unreasonable delay when evaluated using *TRAC* factors.

V. Once the EPA and its administrator issue an official finding of endangerment and make policy determinations as to if pollutants may endanger public health or public welfare, the mandatory non-discretionary duty to list the pollutants as criteria pollutants is automatically triggered.

STATEMENT OF FACTS

In 1999, many environmental groups petitioned the Environmental Protection Agency to issue a finding that greenhouse gases (GHGs) from automobiles pose a danger to both human health and the environment under section 202 of the Clean Air Act (CAA). R. 6. If the EPA and its administrator were to issue this finding, it would trigger regulation of GHGs from mobile sources, namely automobiles, by the EPA. R. 6. Here, the finding of endangerment as to human health and the environment under section 202 of the CAA is the same as for listing criteria pollutants pursuant to section 108 of the CAA. R. 6. However, the section 202 petition in this case did not seek regulation under the National Ambient Air Quality Standards program. R. 6.

On September 8, 2003, the EPA denied the 1999 petition. R. 6. The EPA reasoned that the ubiquitous emissions of GHGs did not fit into the statutory definition of air pollutants that are subject to regulation by the CAA. R. 6. The EPA went on to state that any regulation relating to global climate change should be subject to a more specific legislation as opposed to the catch-all provisions of the 1970 Amendment to the Clean Air Act. R. 6.

In 2009, the EPA submitted a formal finding of endangerment relating to the GHGs pursuant to CAA § 202. R. 6. This 2009 finding will hereby be referred to as the "Endangerment Finding." R. 6. The Endangerment Finding defined a group of GHGs as a singular air pollutant, rather than separate individual pollutants subject to unique regulation. R. 6. Additionally, the Endangerment Finding stated that these GHGs may present an endangerment to public health and public welfare by increasing the rate of climate change globally. R. 7. More specifically, the increase in the production of ozone pollution resulting from hotter temperatures, an increase in the existence of insect borne diseases, and an increase in heat related deaths may endanger both public health and public welfare. R. 7. The Endangerment Finding went on to state that climate change may also endanger public welfare by reducing agricultural output, depleting clean water supplies, and raising sea levels. R. 7.

After the Endangerment Finding was officially submitted, the EPA began a series of regulatory initiatives on the listed GHGs. R. 7. First, the EPA limited GHG emissions from all new passenger vehicles and light trucks, which were upheld in *Coalition for Responsible Regulation v. EPA*, 684 F.3d 102 (D.C. Cir. 2012), reversed in part on other grounds sub nom in *Utility Air Regulatory Group v. EPA*, 573 U.S. 302 (2014). R. 7. The EPA also adopted the New Source Performance Standards and Best Available Control Technology guidance under Title I of the Clean Air Act. R. 7. Additionally, the EPA adopted to "tailoring rule," which would limit the scope of permitting and the requirements that would apply to the GHG sources. R. 7. In 2015, the EPA issued the Clean Power Plan regulations, and Carbon Pollution Emission Guidelines for Existing Sources. R. 7. These new regulations and guidelines directed states to modify their existing CAA implementation plans in order to achieve GHG emissions reductions that would

coincide with EPA guidance on the Best System of Emissions Reductions under CAA § 111(d), 42 U.S.C. § 7411(d). R. 7.

However, all of these initiatives were subject to scrutiny, and would therefore not survive completely intact. The Tailoring Rule and the scope of application of new source GHG limits were struck down in part by the United States Supreme Court in *Utility Air Regulatory Group v. EPA*, 573 U.S. 302 (2014). R. 7. In 2017, the new administration, and therefore newly installed EPA, began a series of rollbacks on regulatory actions placed by the previous administration. R. 7. These rollbacks included a relaxation on the GHG emissions standards for new motor vehicles produced. R. 7.

The EPA has not to date invoked its authority to be able to designate the GHGs as criteria pollutants under CAA § 108, which states that:

> For the purpose of establishing national primary and secondary ambient air quality standards, the Administrator shall, within 30 days of December 31, 1970, and shall from time to time thereafter revise, a list which includes each air pollutant –
>
> (A) emissions of which, in his judgement, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare;
>
> (B) the presence of which in the ambient air results from numerous or diverse mobile or stationary sources; and
>
> (C) for which air quality criteria had not been issued before December 31, 1970 but for which he plans to issue air quality criteria under this section.

42 U.S.C. § 7408(a)(1). R. 7, 8. Section 108 of the CAA thereafter uses identical language to explain the endangerment trigger for regulation as used in § 202 of the CAA, which the EPA has invoked here. R. 8. When the EPA lists a pollutant as a criteria pollutant under CAA § 108, several regulatory consequences come into play. R. 8. First, the EPA is then required to propose both primary and secondary NAAQS for that pollutant within 12 months of listing. R. 8. States that fail to submit a satisfactory plan are subject to direct regulation of emissions within the state by the EPA as well as a loss of highway funding. R. 8. Primary NAAQS are established at a level

to protect public health, while secondary NAAQS are set at a level to protect public welfare. R. 8. In any event, any duty the EPA or its administrator to act pursuant to CAA § 108(a) is based on the existence of a prior valid endangerment finding. R. 8.

Climate Health and Welfare Now (CHAWN) brought an action in lower court styled as a citizen suit under CAA § 304 to compel the administrator of the EPA to list GHGs under CAA § 108(a) as criteria pollutants subject to NAAQS programming. R. 3. The EPA answered this action and asserted numerous defenses. R. 3. The Coal, Oil, and Gas Association (COGA) joined EPA as a defendant in this case. R. 3. CHAWN asserts that once the EPA made its Endangerment Finding, it became subject to a non-discretionary duty to list the GHGs as a criteria pollutant under CAA § 108. R. 5. CHAWN also stated that the EPA unreasonably delayed in its duty to list these criteria pollutants. R. 5. Both the EPA and COGA deny these claims and go on to assert defenses as such. R. 5.

Despite the rollbacks of regulatory programs based on the Endangerment Finding after the change of administration, the EPA has not sought to rescind the Endangerment Finding itself. R. 8. COGA wishes to unravel many aspects of the Endangerment Finding. R. 8. COGA faces a burden to fight this seemingly settled issue relating to climate policy. R. 8. COGA first challenged the application and understanding of the term "reasonably anticipated to endanger" as stated in CAA § 108 and 202. R. 8. Next, COGA challenged the interpretation of the term in the statute which states that the criteria pollutant is an "endangerment to public health." R. 8. The lower court here decided that COGA's challenge to the scientific evidence within the endangerment finding had no basis. R. 9. The lower court reasoned that because the scientific data the Endangerment Finding was based on was so specialized that it was highly deferential to the EPA. R. 9. The question there was not if the court would have reached the same decision as

the EPA, but if the EPA had made a rational determination based on the finding. R. 9. The lower court ultimately agreed with the finding that the air pollution may be reasonably anticipated to endanger public health or welfare. R. 9.

Ultimately, the lower court issued a judgement holding the following: 1) the Endangerment Finding is valid with respect to an endangerment to public welfare; 2) EPA has unreasonably delayed on responding to Plaintiff's petition for a designation of GHGs as a criteria pollutant and has unreasonably delayed in designating GHGs as a criteria pollutant; and 3) EPA has a duty that is not discretionary to designate GHGs as a criteria pollutant. R. 13. The lower court additionally stated that the portion of the Endangerment Finding determining GHGs to endanger public health is contrary to law, and that it is vacated only to that extent as it relates to endangering public health. R. 14.

SUMMARY OF THE ARGUMENT

First, the EPA waived its objection to jurisdiction at the District Court level by failing to raise a § 7607(b) motion in the initial petition. If a party chooses not to object, then § 7607(b) can be waived and the parties accept to be sued in a court what would otherwise be an improper venue. Next, because GHG emissions have been found to drastically increase the Earth's temperature, impact habitability, decimates crops, and impacts livestock, they are deemed correctly to endanger public welfare. Additionally, the defendant COGA affirms in their petition that the alleged causation articulated in the Endangerment Finding that specifies that GHGs have an effect on a changing climate may support a finding of endangerment to public welfare. Next, the 2009 Endangerment Finding that greenhouse gases endanger both public health and welfare is valid. Additionally, because the Endangerment Finding was subject to proper rules and procedures, including notice and comment under the Clean Air Act section 307, 42 U.S.C § 7607, the

Endangerment Finding is a regulation carrying the force of law, warranting *Chevron* deference. Furthermore, section 108(a) of the CAA contains language that the EPA administrator has a mandatory duty to issue air quality criteria following an endangerment finding. The EPA's ten-year delay in doing so amounts to an unreasonable delay when examined using the *TRAC* factors. Lastly, once the EPA and its administrator issue an official finding of endangerment and make policy determinations as to if pollutants may endanger public health or public welfare, the mandatory non-discretionary duty to list the pollutants as criteria pollutants is automatically triggered.

ARGUMENT

I. The EPA waived its right to remove this case to another jurisdiction when it failed to raise the issue before the circuit court.

First, 42 U.S.C. § 7607(b) is waivable. The language within the statute is permissive, not mandatory. Specifically, the statute uses "may" and not "must" or "shall." To give federal courts unilateral jurisdiction to hear this claim, even when it was not raised by the moving party, would go against the purpose of the statute. First, CHAWN commenced this litigation alleging an unreasonable delay claim under CAA § 304(a) where the rule sought would apply nationally. Since the rule sought national applicability, § 7607(b) may apply if the EPA wishes to remove the case. However, this is waived if the EPA does not raise the issue before the court and subject themselves to the court's decision where the lawsuit was filed. *Tex. Mun. Power Agency v. EPA,* 89 F.3d 858 (D.C. Cir. 1996); *State of N.Y. v. EPA*, 133 F.3d 987, 990 (7th Cir. 1998). Further, the legislative history of § 7607(b) has been interpreted as a venue requirement rather than a jurisdictional one. *Tex. Mun. Power Agency*, 89 F.3d 858 at 867.

For example, in *Texas Mun. Power Agency v. EPA*, electric utilities filed petitions for review of orders from the Environmental Protection Agency (EPA) concerning marketable permit system under the Clean Air Act (CAA) for acid rain emissions. *Id.* at 861. Importantly, this court raises an issue which neither party raised, the potential application of § 7607(b) as a jurisdictional requirement or a venue requirement. *Id.* at 866. The EPA opined that § 7607(b) is a jurisdictional requirement while the petitioners alleged the statute was a venue requirement which can be waived. *Id*.

This court agreed with the petitioner that § 7607(b) is a venue requirement, and thus, waivable. Specifically, § 7607(b) can be read as prescribing the choice among circuits and not the power of a particular federal circuit court to hear a claim. *Id.* at 867. This reading is supported by the provision's reference to where a petitioner may "file," and by its unequivocal characterization in the legislative history as a venue provision. *Id.* Since parties may normally consent to be sued in a court that would otherwise be an improper venue, EPA's failure to object waives the issue. *Id*. Therefore, given the less than clear language, the structure of the section—dividing cases among the circuits—and the legislative history indicate that § 7607(b) is framed more as a venue provision. Therefore, the EPA's failure to object waives § 7607(b) venue requirements. *Id.*

Conversely, in *State of New York v. EPA*, the State of New York petitioned for review of the final rule issued by the EPA. The final rule granted states abutting Lake Michigan exemption from nitrogen oxide emission limitations that the Clean Air Act required states to impose. Importantly, none of the parties raised an issue that the petition was filed in this court, although, this court raised the issue of 7607(b) interpretation. Ultimately, this court determined that

7607(b) is merely a venue provision and any objection to a court entertaining a petition is waivable. *State of New York,* 133 F.3d at 990.

This court reasoned, it would be usurpative for a federal court to assert jurisdiction over a case that the Constitution or statute had cosigned to a state court, or for a federal district court to assert jurisdiction over a case that should have been brought in a federal court of appeals. *Id.* A federal court must refuse to do so even if no party objects; that is the practical meaning of a jurisdictional requirement. *Id.* But it is not usurpative for one federal court of appeals to assert jurisdiction over a case that it would have been authorized to adjudicate. *Id.* This court reasoned that § 7607(b) does not mandate where this claim can be heard. Rather, it is read as an option that can be waived if a party does not object to the venue of the litigation.

Here, the EPA had the opportunity to object raising § 7607(b) when the petition was filed in the district court. The EPA waived this option when they remained silent. As in both *Tex. Mun. Power Agency v. EPA* and *State of New York v. EPA* where the courts determined that § 7607(b) does not specifically mandate a particular court to hear this type of litigation, evidenced from the statute which states that it "may" be filed not that it "must" or "shall" be filed in a particular court. Additionally, as articulated in *Tex. Mun. Power Agency* § 7607(b) legislative history is interpreted as a venue requirement, because the entirety of the statute articulates where particular issues may be filed. Therefore, if a party chooses not to object, then § 7607(b) can be waived and the parties accept to be sued in a court that would otherwise be an improper venue. Specifically, § 7607(b) can be read as prescribing the choice a party has among circuits and not the power of a particular federal circuit court to hear a claim. Thus, the EPA consented to be sued in this court by not removing or objecting to venue and since § 307(b) does not unilaterally give the power of a particular federal circuit court to hear a claim, venue is proper.

II. The change in our environment induced by GHGs endangers public welfare

Greenhouse gases (GHG) are not currently regulated appropriately, and it is endangering public welfare. Specifically, effects on public welfare include, but are not limited to, effect on soils, water, crops, vegetation, manmade materials, animals, wildfire, weather, visibility, and climate, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and well-being, whether caused by transformation, conversion, or combination with other air pollutants. 42 U.S.C. § 7602(h). Moreover, there is jurisprudence which articulates that current GHG emissions are classified as negatively affecting public welfare. *Massachusetts v. EPA,* 549 U.S. 497 (2007); *See American Electric Power Company v. Connecticut,* 564 U.S. 410, 417-418 (2011).

For example, in the United States Supreme Court case *Massachusetts v. EPA,* states, local governments, and environmental organizations petitioned for review of an order of the EPA denying a petition for rulemaking to regulate greenhouse gas emissions under the Clean Air Act. *Massachusetts,* 549 U.S. at 505. Importantly, the Supreme Court heard arguments regarding whether greenhouse gas emissions affect public welfare. The court reasoned that when carbon dioxide is released into the atmosphere, it acts like the ceiling of a greenhouse, trapping solar energy and retarding the escape of reflected heat. Then, it is a species—the most important species—of a "greenhouse gas." *Id.*

Therefore, "emissions resulting from human activities are substantially increasing the atmospheric concentrations of … greenhouse gases which will enhance the greenhouse effect, resulting on average in an additional warming of the Earth's surface." *Id.* at 508-509. Additionally, this court determined that greenhouse gases are accumulating in Earth's atmosphere as a result of human activities. These activities are causing surface air temperatures

and subsurface ocean temperatures to rise. *Id.* at 511 Further, accepting the EPA's failure to curb greenhouse gas emissions contributed to the sea level changes that threatened Massachusetts. *Id.* at 515. Ultimately, this court determined that this was sufficient in satisfying that greenhouse gases negatively affects public welfare.

Moreover, in *American Electric Power Company, Inc v. Connecticut* eight states, New York, and three land trusts separately sued the same electric power corporations that owned and operated fossil-fuel-fired power plants in twenty states, seeking abatement of defendants' ongoing contributions to public nuisance of global warming. The Supreme Court reiterated the EPA's duty to establish emissions standards for categories of stationary sources that, in the administrator's judgment, cause, or contribute significantly to, air pollution which may reasonably be anticipated to endanger public health or public welfare. *American Electric Power Company, Inc,* 564 U.S.at 428. This court reaffirmed *Massachusetts v. EPA* when it stated that *Massachusetts* made plain that carbon dioxide emissions qualify as air pollution subject to regulation under the Clean Air Act. *American Electric Power Company, Inc,* 564 U.S. at 424. Further, it was equally plain that the Act speaks directly to carbon dioxide emissions from the defendant's plants. *Id.* Therefore, since GHG emissions are reasonably anticipated to endanger public welfare, this court reaffirms *Massachusetts* reasoning that greenhouse gas emissions are subject to regulation under the Clean Air Act.

Here, GHG emissions have not changed and have arguably increased since the *Michigan v. EPA* case. As the Supreme Court articulates in *Michigan v. EPA* and *American Electric Power Company v. Connecticut* greenhouse gas emissions have negatively impacted public welfare. Specifically, greenhouse gas emissions have been found to drastically increase the temperature of the Earth which directly impacts habitability, crops, and animals. Furthermore, greenhouse

emissions have been linked to contribute to the rise in sea level. Thus, greenhouse gas emissions are negatively affecting public welfare.

Additionally, the defendant, Coal, Oil, & Gas Associations (COGA), affirms in their petition that the alleged causation articulated in the 2009 Endangerment Finding specifying greenhouse gases have an effect on a changing climate may support a finding of endangerment to public welfare. Therefore, the defendants in this case are even able to foresee that greenhouse gas emissions likely are the cause to the endangerment to public welfare. Thus, greenhouse gas emissions currently negatively affect public welfare.

III. The District Court erred in concluding that the Environmental Protection Agency's 2009 Endangerment Finding that Greenhouse Gases endanger public health is contrary to law.

This court should affirm the district court's decision that the EPA's newfound position concerning public health does not meet the deference threshold because they did not follow the proper rules and procedures. Furthermore, the 2009 Endangerment Finding warrants controlling *Chevron* deference because it is valid regarding public health, was subject to notice and comment rulemaking, and is a regulation that carries the force of law.

A. The 2009 Endangerment Finding warrants controlling *Chevron* Deference

The Supreme Court set forth a test for reviewing an agency's construction of a statute in *Chevron v. Natural Resources Defense Council.* 467 U.S. 837 (1984). The two-part test is as follows: (1) is whether congress has directly addressed the question at issue and if the intent is clear, the inquiry is over and, 2) if congress has not directly spoken on an issue, the court does not simply impose its construction of the statute but rather, if the statute is silent or ambiguous, the question for the court is whether the agency's interpretation is "a permissible construction of

the statute." *Chevron*, 467 U.S. at 842-843 (1984). The Supreme Court routinely recognizes that an agency position qualifies for *Chevron* deference when it appears congress delegated authority to the agency to make rules that carry the force of law, and the interpretation claiming deference was promulgated in the exercise of that authority. *See U.S. v. Mead Corp*., 533 U.S. 218, 226-227, 229 (2001) (holding a tariff regulation by U.S. customs was not entitled to *Chevron* deference because it did not carry the force of law) (citations omitted).

When there is doubt of congressional intent to delegate to an agency, *Chevron* deference is inapplicable. *Mead Corp*., 533 U.S. at 230 (citations omitted). Congressional delegation occurs in several ways, including the agency's power to engage in adjudication and notice and comment rulemaking. *Id*. at 227. Section 307(d) of the Clean Air Act (CAA), applies to the promulgation of any National Ambient Air Quality Standards (NAAQS) under § 7609 and outlines the proper procedures for rulemaking. 42 U.S.C. § 7607(d)(1)(a). This statute notes that § 533 through § 577 of the Administrative Procedures Act (APA) do not apply unless expressly provided in a certain subsection. § 7607(d)(1)(v). Notice of proposed rulemaking accompanied by a specified period for public comment "shall be published in the Federal Register" as provided by § 533(b) of the APA. § 7607(d)(2)(3). In promulgating a rule, the administrator "shall allow any person to submit written comments, data, or documentary information." § 7607(d)(5). Additionally, there must be a time for interested persons to give an oral presentation of "data, views or arguments, in addition to an opportunity to make written submissions…" *Id.* Lastly, the administrator is required to keep the record open for thirty days following the completion of proceedings to provide time for rebuttal submissions or other information. *Id.*

An agency must engage in informed rulemaking continually, thus their initial interpretation of a statute is not set in stone. *Chevron*, 467 U.S. at 863. If an agency changes its

prior interpretation, it may still be entitled to some form of deference; however, not if the newfound position represents a sharp break with their initial interpretation of the act. *Id.* at 863-864. Justice Scalia, strongly opined that *Chevron* deference is applicable when the stance is "the official position of the agency." *Mead Corp*., 533 U.S. at 237. *Chevron* did not eliminate *Skidmore's* holding that an agency may be entitled to a lesser degree of non-controlling deference. *Id.* Therefore, if an agency's interpretation is reasonable, but *Chevron* is inapplicable, it may still hold some persuasive value. *Id.* at 235. (citations omitted).

Congress expressly delegated to the EPA administrator under § 108(a) of the CAA, the authority to establish air quality criteria for air pollutants which "in his judgment, cause or contribute to air pollution which may be reasonably anticipated to endanger public health or welfare;…" 42 U.S.C. § 7408(a)(1)(A). The Endangerment Finding under § 202 contains the same criteria for listing criteria pollutants as § 108, though unlike § 202, § 108 triggers regulation under the NAAQS program. *Id.* Additionally, by not including a definition of "public health" or distinguishing between direct and indirect impacts for public health, congress implicitly delegated to the EPA to determine what effects are included in the Endangerment Finding. Endangerment Finding, 74 Fed. Reg. at 66,510 (Dec. 15, 2009). This delegation of authority grants deference to the EPA, as long as their findings are reasonable. *See Chevron*, 467 U.S. 837; *Mead Corp*., 533 U.S. 218.

The 2009 Endangerment Finding has been properly subjected to extensive notice and comment rulemaking pursuant to the procedures outlined in CAA § 307. § 7607. Following the statutory guidelines, the EPA published an Advanced Notice of Proposed Rulemaking in July 2008, subject to a 120-day comment period. Endangerment Finding, 74 Fed. Reg. at 510. The EPA then published the Proposed Rule on April 24th, 2009, in the Federal Register. *Id.* at 500.

The Proposed Rule was subject to a sixty-day comment period, which resulted in over 380,000 comments. *Id.* Additionally, two public hearings took place where interested parties were allowed to "present data, views or arguments concerning the proposed findings." *Id.* Finally, the administrator signed the decades of research and analysis on December 7, 2009 and published in the Federal Register on December 15, 2009. *Id.* at 496. The Final Rule entered into effect on January 14, 2010. *Id.* The administrator rejected all challenges to the adequacy of the sixty-day notice and comment period. *Id.* at 503. Therefore, because congress delegated to the EPA to make Endangerment Findings to public health and because they followed the necessary and burdensome statutory procedures, the 2009 Endangerment Finding is a regulation that carries the force of law, and warrants controlling *Chevron* Deference.

B. The 2009 Endangerment Finding is valid in regard to Public Health

This court should reverse the district court's decision that the Endangerment Finding is contrary to law regarding public health. The validity of the Endangerment Finding to public health is of great consequence in this case because it distinguishes between primary and secondary (NAAQS). *See* 42 U.S.C. § 7409. Primary NAAQS are "based on such criteria allowing an adequate margin of safety requisite to protect public health" and are subject to strict compliance deadlines and sanctions. § 7409 (b)(1). Additionally, they have a ten-year deadline for achieving attainment, which does not apply to criteria requisite to protect public welfare subject to secondary NAAQS regulations. § 7502(a)(2)(A), (B).

Congressional intent with the CAA amendments of 1970 is not limited to only direct hazards resulting from GHG emissions, indicating that climate impacts resulting from indirect hazardous materials are considered when evaluating the potential dangers to public health. Endangerment Finding, 74 Fed. Reg. at 66,510. While the CAA does not include a formal definition of public

health, the Supreme Court defined public health in its most natural term: "the health of the public." *Whitman v. Am. Trucking Ass'n* 531 U.S. 457,466 (2001). This language is precautionary and consistent with the CAA's "preventative and precautionary orientation." *Coalition for Responsible Regulation, Inc., v. EPA* 684 f.3d 102, 121 (D.C. Cir. 2012) quoting *Lead Indus. Ass'n, Inc., v. EPA*, 647 F.2d 1130, 1155 (D.C. Cir. 1980).

The CAA gives courts the power to reverse the administrator's rulemaking only if it is arbitrary, capricious, or contrary to law. *Coal. for Responsible Regulation*, 684 f.3d at 116 (citations omitted). It is not the court's job to reach their own conclusion by weighing scientific evidence, nor do they determine the convincing force of evidence. *Id.* at 122 citing *see, e.g., New York v. EPA*, 413 F.3d 3, 30 (D.C. Cir. 2005). Therefore, the statutory question is whether sufficient information exists to make an endangerment finding. *Mass.*, 549 U.S. at 534.

The CAA § 108(a)(2), states that air quality criteria for an air pollutant "shall accurately reflect the latest scientific knowledge useful in indicating that kind of extent of *all identifiable effects* on public health and welfare, which may be expected from the presence of such pollutant in the ambient air." 42 U.S.C. § 7408(a)(2) (emphasis added). Further, this section outlines some criteria for an air pollutant such as (a) "those variable factors (*including atmospheric conditions*), which of themselves or in combination with other factors, may alter the effects on public health or welfare of such air pollutant" and (b) "types of air pollutants which when present in the *atmosphere*, may interact with, such pollutant to produce an adverse effect on public health or welfare." *Id.* This language of § 108(a)(2) outlines that it is well within the administrator's discretion to determine what factors are considered when making endangerment findings. Further, although the CAA does not address the issue of direct and indirect health impacts it is evident that congress never intended the possible risks of GHG emissions to the public to be so

narrowly tailored to only include direct health impacts from breathing concentrates of ambient air and not potential effects on health flowing from atmospheric conditions. Endangerment Finding, 74 Fed. Reg. at 66,527.

The 2009 Endangerment Finding states that GHGs taken in combination with the atmosphere "may reasonably be anticipated" to endanger public health and supports this finding by providing detailed scientific analyses, studies, and data to explain effects on the health of the public. *See Id.* at 496. The EPA's own findings supporting the impacts to public health from climate change included, but are not limited to, respiratory illness, increased hospital admissions, asthma attacks, chronic sinusitis, bronchitis, lost workdays, changes in pulmonary function, and hypertension. *Id.* at 530-533. Further, the Endangerment Findings forward-looking considerations include future temperature increases, extreme weather events, droughts, decreased water supply, rising sea levels, increased morbidity, and mortality, increased spread of diseases, crop failure, reduced livestock, and damage to the water infrastructure. *Id.*

The EPA now attempts to retract and contradict their extensive scientific record along with decades of research that provided the basis for their finding. Now, the EPA asserts that public health cannot be read to include indirect impacts flowing from climate change. R. 10. The administrator faced several challenges during the comment period for the Proposed Rule and Final Rule. These challenges asserted that the Endangerment Finding to public health could not be made because those health effects associated with elevated atmospheric conditions of GHGs occur via climate change, not through direct inhalation of GHGs and that because "climate" is included in the "welfare" definition under § 302(h) any impact from climate must be considered to fall under a public welfare risk. Proposed Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act; Proposed Rule, 74 Fed. Reg.,

18,901 (Apr. 24, 2009). The administrator rejected these challenges confirming that a narrow approach to deciphering the endangerment criteria is erroneous. In her reasoning she acknowledged that although congress did include climate in the definition of public welfare this does not exclude climate change impacts from being considered when evaluating public health. Proposed Rule, 74 Fed. Reg., 18, 902. For example, "it would be anomalous to argue that a person who is injured or dies from heat exhaustion or increased exposure to a pathogen has not suffered a health impact." *Id.* Furthermore, "mortality and morbidity that result from the effects of climate change are clearly public health problems." Endangerment Finding, 74 Fed. Reg. at 66,527. The potential dangers to public health focus on the commonsense interpretation of risks that have "actual effect on the people." *Id.* at 527. Therefore, some overlap is inevitable for adequate protection of the public. *Id.* In summary, congress did not intend for such a strict boundary between the effects on public welfare and public health that would result in climate impacts being excluded from considerations of public health risks. *Id.* at 527-528. Thus, the EPA's Endangerment Finding to public health is not so unsupported as to be "contrary to law," warranting a reversal by the district court.

In conclusion, because congress delegated to the EPA to make findings of endangerment and because the 2009 Endangerment Finding followed the necessary rules and procedures, it warrants controlling *Chevron* deference. Furthermore, because congress did not narrowly limit the CAA to include only direct impacts in their considerations for endangerment to public health, the administrator himself rejected these arguments, and because the extensive scientific record supports an Endangerment Finding to Public Health, primary NAAQS regulations apply.

IV. The district court did not err in concluding that the EPA unreasonably delayed taking action listing greenhouse gases as criteria pollutants under CAA§ 108(a).

The passage of ten years since the EPA's issuance of the Endangerment Finding and their lack of action to list GHGs as criteria pollutants subject to primary NAAQS constitutes an unreasonable delay. The starting point for this inquiry is to determine if the EPA had a duty to act. *In re A Cmty. Voice v. U.S. E.P.A.*, 878 f.3d 779, 784 (9th Cir. 2008). Section 108(a) of the CAA provides mandatory language that "the administrator shall within 30 days after December 31, 1970, publish a list which includes each pollutant harmful to health and welfare" and is required to revise the list from "time to time." *National Resources Defense Council v. Train*, 545 F.2d 320, 325 (2nd Cir. 1976) *See also*, § 7409(d)(1) (requiring at five-year intervals, the administrator must review the criteria published under § 7408 and make revisions as he deems appropriate). If the administrator determines the pollutant meets the two requisites set forth in § 108, then § 109 and § 110 are automatically invoked. *Train*, 545 F. 2d at 325. Following the invocation of § 109 and § 110, promulgation of NAAQS and the states' implementation within a fixed time schedule becomes mandatory. *Id.* The intentional inclusion of ambient air quality standards by congress would be useless if the administrator could avoid listing pollutants by merely choosing not to issue air quality criteria. *Id.* The 1970 amendments to the CAA have been referred to as "a drastic remedy to what was perceived as serious and otherwise uncheckable problems of air pollution", and "central to the regulatory scheme." *Id.* at 327. While the literal language of CAA §108 is ambiguous, the ambiguity is resolved when placed in the context of the act as a whole and its legislative history. *Id.*

Even if the court is to find that there is no duty triggered for the EPA by the CAA, there is an additional duty by the Administrative Procedures Act (APA) which requires agencies to

conclude matters within "a reasonable time" and stipulates that "the reviewing court shall … compel agency action unlawfully withheld or unreasonably delayed…" 5 U.S.C. §§ 555(b), 706(1) (1982) *see, In re A Cmty. Voice,* 878 f.3d at 784*; In re Pesticide Action Network N. Am., Inc.,* 798 F.3d 809, 813 (9th Cir. 2015).

A mandamus directing a federal agency to act resulting from an unreasonable delay is only justified if the agency's delay is egregious or "in exceptional circumstances." *In Re Pesticide Action,* 798 F.3d at 813. Issuing a writ of mandamus is necessary when needed to "end the cycle of incomplete responses, missed deadlines, and unreasonable delay." *Id.* Unreasonable delay claims are governed by the six-factor test introduced in *Telecommunications v. FCC* known as the "*TRAC* factors". *Telecomm. Research & Action Ctr. v.* F.C.C.*,* 750 F.2d 70, 80 (D.C. Cir. 1984). The test is as follows:

> "(1) the time it takes agencies 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, the 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 an impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed."

Id. (citations omitted). Courts have uniformly held that delays of seven to ten years are unreasonable when applying the *TRAC* factors. R.13.; *see, e.g.*, *In re Core Commc'ns Inc.*, 531 F.3d 849 (D.C. Cir. 2008) (seven- year delay unreasonable); *In re Pesticide Action Network N. Am., Inc.*, 798 F.3d 809 (9th cir. 2015); *In re Cmty. Voice v. U.S. E.P.A.*, 878 F. 3d 779 (9th Cir. 2017) (eight-year delay unreasonable). Further, the D.C. Circuit noted that "a reasonable time for an agency action is typically counted in weeks or months, not years" and thus "a six-year plus delay is nothing less than egregious." *In re Cmty. Voice*, 878 F.3d at 779 (citations

omitted). However, a fourteen-month delay, without more, is not unreasonable. *Id.* (citations omitted) (contrast in this instance where the EPA's delay is 120 months and counting). The *TRAC* factors alone are not dispositive, and therefore courts examine them along with precedents similar to the case at hand. *See*, *In re Core Commc'ns Inc.,* 531 F.3d 849 at 856. While not determinative, courts place an increased emphasis on the rule of reason and a potential threat to human health or welfare. *In re Cmty. Voice,* 878 F.3d at 787. If there is a finding of danger to public health and welfare, courts have no difficulty concluding that the agency should be compelled to act quickly to resolve administrative petitions. *Id; see, In re Pesticide Action Network N. Am., Inc.,* 798 F.3d at 814.

In this case, the EPA has a duty to act under CAA § 108(a), which states that for the purpose of establishing primary and secondary NAAQS, the administrator must publish and routinely update a list of each air pollutant which "in his judgement may be reasonably anticipated to endanger public health and welfare." 42 U.S.C. § 7408(a)(1)(A). Additionally, under § 108(a)(2), the administrator "shall issue air quality criteria for an air pollutant within 12 months" after he included the pollutant in a list under § 108(a)(1). § 7408(a)(2). In the 2009 Endangerment Finding, the EPA found GHGs endanger both public health and welfare, thus becoming a "criteria pollutant." Endangerment Finding, 74 Fed. Reg. at 66,496. This finding triggers the EPA's mandatory duty, that within 12 months, they must establish air quality criteria for GHGs so that states may create their implementation plans for regulation within their borders. The CAA outlines the exact sanctions resulting from a state's failure to submit a satisfactory regulatory plan. *See* 42 U.S.C. § 7410; § 7509. Even if this court finds there is no duty under the statutory language of the CAA, the APA enacts a duty by designating authority that "the district courts of the United States may compel agency action which is unreasonably

delayed." 5 U.S.C. § 706 (1966). Therefore, since congress has set forth a timetable for the EPA to act under the CAA and potentially the APA, the second *TRAC* factor weighs in favor of compelling agency action.

The EPA also suggests that burdens resulting from regulation on business and economic activity justify their delay under the fourth *TRAC* factor. R. 12. The Supreme Court rejected higher competing priority claims including absurd regulatory consequences and costs for businesses and economic activity in *Coalition for Responsible Regulation*, by stating "policy judgements… have nothing to do with whether GHG emissions contribute to climate change." 684 F.3d at 119; (quoting *Mass.*, 549 U.S. at 501).

In, *In Re Pesticide Action*, the court utilized the *TRAC* factors in their consideration of whether the EPA had unreasonably delayed their duty of reviewing the safety of pesticides under the Food Quality Protection Act. *In re Pesticide Action Network N. Am., Inc.*, 798 F.3d at 811. The petitioners sought rulemaking from the EPA that would revoke the approval of a pesticide, Chlorpyrifos. *Id.* at 812. In their reasoning, the court noted the EPA had been reviewing the petition for nearly a decade and highlighted their history of missing deadlines. *Id.* at 814. Additionally, they repeatedly failed to address adequate reasoning for their delay and failed to issue a concrete timetable for their final rule. *Id.* at 813- 814. The court noted that the EPA acknowledged themselves that the pesticide is a danger to human health by reporting that Chlorpyrifos pose a significant risk to water supply, which would result in danger to the health of the public so much so that a nationwide ban could be justified. *Id.* at 814. (*contra PCHRG v. CFDA* 740 F.2d 21 (D.C. Cir. 1984) (holding that more scientific research was needed to establish a causal connection between aspirin and Reyes disease for triggered regulation).

Therefore, the Ninth Circuit concluded the EPA had stretched the rule of reason beyond its limits and granted the writ of mandamus to end this "further delay." *Id.*

This case shares many similarities with *In Re Pesticide Action*. The EPA again has had nearly a decade to examine and review the petition, still failing to issue a response. The EPA has failed to present a timetable for a potential response to the petition, nor have they provided adequate reasoning for the delay. The EPA raises arguments that their delay will fall under the rule of reason *TRAC* factor because resolution of "thorny policy and scientific issues." This attempt will fail again because of the irrefutable scientific evidence showing the direct, as well as indirect dangers flowing from climate change that GHG emissions pose to the public. Therefore, the rule of reason factor weighs in favor of compelling agency action. The ten-year delay and any "further delay" from the EPA would prejudice the Earth's atmosphere and all individuals by putting their health at significant risk, only increasing over time. The EPA is yet again living up to their reputation of missing deadlines and failing to fulfill their duties. In conclusion, because the *TRAC* factors weigh in favor of compelling agency action, this court should compel the EPA to list GHG as criteria pollutants pursuant to CAA § 108(a) due to their unreasonable delay in taking action.

V. The District Court was correct in stating that the EPA had a non-discretionary duty to list GHGs as criteria pollutants.

For the EPA to be mandated to have a non-discretionary duty to list GHGs as criteria pollutants under § 108 of the Clean Air Act, there must first be an official endangerment finding relating to the named GHGs as to public health or public welfare. Courts have determined that the "nondiscretionary duty to list a specific pollutant does not exist unless and until the EPA first makes policy determinations as to that pollutant." *Zook v. McCarthy*, 52 F. Supp. 3d 69, 74

(D.D.C. 2014). An endangerment finding precludes the EPA's non-discretionary duty to list because doing otherwise would "improperly usurp EPA's exclusive authority to make the substantive judgement" that these pollutants endanger public health or welfare. *Id*. at 75. The Clean Air Act contains a broad citizen-suit provision, that authorizes "a district court with limited but exclusive jurisdiction to order the Environmental Protection Agency (EPA) Administrator to perform non-discretionary duties. CAA§ 304, 42 U.S.C. § 7604(a). Subsequently, "the Clean Air Act (CAA) creates a non-discretionary duty for the EPA to list those stationary sources which it already has judged to endanger public health or welfare." *Zook v. McCarthy*, 52 F. Supp. at 75.

Resultantly, it is imperative that an initial endangerment finding be issued for the requisite GHGs for the EPA to trigger the non-discretionary duty to list them as criteria pollutants pursuant to § 108 of the Clean Air Act. *Id*.

In *NRDC.v. Train*, the court decided whether the EPA and its administrator had a mandatory non-discretionary duty "to list lead as a pollutant on the air pollution list required by the Clean Air Act Amendments of 1970." *Natural Res. Def. Council, Inc. v. Train*, 411 F.Supp. 864 (S.D.N.Y. 1976). This case revolved around the defendant's argument that even though the administrator of the EPA may have made the regulations for establishing the emissions standards for motor vehicles, this did not free him of the duty he had to list lead as a pollutant. *Id*. The Administrator conceded that "lead comes from the requisite sources and that the Administrator has found lead to have the required 'adverse effect.'" *Id*. at 867. However, the defendants argue that because the language of § 108(a)(1)(C) of the CAA states that "for which, . . . (the administrator) plans to issue air quality criteria," frees them of the mandatory non-discretionary duty. *Id.* Their reasoning is it is a separate criterion that must be met in addition to the finding of

an adverse effect to trigger the mandatory non-discretionary duty to list lead under the air pollutant list. *Id*.; 42 U.S.C. § 7409. However, in this case, the court held that "once the administrator determines that a pollutant has an adverse effect on public health or welfare and comes from the requisite numerous or diverse sources, he has the duty to list such pollutant . . .." *Id.* at 867. As to the issue of the non-discretionary duty, the court here reasoned that there "is no language anywhere in the statute which indicates that the administrator has discretion to choose among the remedies which the Act provides." *Id.* at 868.

Then in *Zook v. McCarthy*, the court decided whether the defendant had a mandatory non-discretionary duty to regulate emissions from animal feeding operations. *Zook v. McCarthy*, 52 F. Supp. 3d 69 (D.D.C. 2014). The plaintiff brought the action under the citizen-suit provision of the CAA against the EPA and its administrator to compel the EPA to regulate emissions from animal feeding operations. *Zook*, 52 F. Supp. 3d 69 (D.D.C. 2014). In this case, the court held that the EPA and its administrator "did not have the non-discretionary duty to list pollutants under the CAA subject to air quality criteria and National Ambient Air Quality Standards, and the EPA did not have non-discretionary duty to list animal feeding operations as stationary sources under the CAA." *Id*. The court reasoned that because the "statute makes clear that the EPA's listing duty is a non-discretionary duty to list any pollutant that EPA has determined meets the criteria in § 108(a)(1)(A) and (B)," and since EPA and its administrator have issued no official requisite findings as to the pollutants relating to animal feeding operations, the non-discretionary duty to list did not exist. *Id.* at 74. The court relies on *NRDC v. Train*, stating that the "EPA must list those pollutants it already has determined to 'cause or contribute to air pollution which may be reasonably anticipated to endanger public health or welfare' and result from multiple sources." *Id*.; *NRDC v. Train*, 545 F.2d 320, 325 (2d Cir.1976) (holding that "the

Administrator *must* list those pollutants which he has determined meet the two-requisites set forth is § 108").

The present case is fundamentally the same as in *NRDC v. Train*. Here, the EPA and its administrator have already made an official determination that the emissions of greenhouse gases (GHGs) endanger public health and welfare. R. 5. Also, the present case differs from *Zook* because the finding in *Zook* was based on the fact that the EPA and its administrator had not made official determinations as to the pollutants, whereas in this case they have made that determination. Because they made this official determination in their 2009 Endangerment Finding with respect to whether or not these pollutants endanger public health or public welfare, the mandatory non-discretionary duty to list them as criteria pollutants pursuant to CAA § 108 is triggered. In *NRDC v. Train*, the EPA and its administrator had already made determinations as to lead endangering public health or welfare. Because the official determinations were made, the court stated that the EPA and its administrator had a mandatory non-discretionary duty to list lead as a pollutant subject to CAA § 108. *NRDC*, 545 F.2d at 325. In our case, in their 2009 Endangerment Finding, the EPA and its administrator already made official determinations that GHGs endangered public health and public welfare. R. 8. Even if the finding that GHGs endanger public health is overturned, the fact that the finding as to public welfare still stands is still a sufficient ground to trigger the mandatory non-discretionary duty to list because the statute states that the pollutants must be those that "may be reasonably anticipated to endanger public health *or* welfare," *NRDC*, 545 F.2d at 325.(emphasis added). The operative word here is "or", because even if this court determines that the determination as to public health is not impacted, and the determination as to public welfare still stands, it is sufficient grounds to uphold the mandatory non-discretionary duty.

In this case, the court should reaffirm its decision that the EPA and its administrator have the mandatory non-discretionary duty to designate GHGs as criteria pollutants under CAA § 108 based on the 2009 Endangerment Finding because the duty is automatically triggered because of the previous determinations relating to GHGs as they pertain to public welfare and public health. *Zook v. McCarthy* clearly states that once the EPA and its administrator make official determinations on pollutants as they pertain to public health or public welfare, the "statute makes clear that the EPA's listing duty is a non-discretionary duty."

CONCLUSION AND PRAYER FOR RELIEF

For the foregoing reasons, CHAWN requests that this court affirms the district court's grant of summary judgement in CHAWN's favor against the defendants, EPA and COGA, affirming CHAWN's petition for relief. The appellee specifically requests that this Court affirm the district court's decision that the EPA waived the option to object to the issue of jurisdiction by not raising a § 7607(b) motion. Additionally, the appellee requests that this Court affirm the district court's decision that GHG emissions in fact endanger public welfare, and that the 2009 Endangerment Finding is indeed valid with respect to a finding of an endangerment to public welfare. Moreover, the appellee requests that this Court reverse the decision of the district court that the 2009 Endangerment Finding is not valid with respect to public health. Specifically, we ask that this Court find that the 2009 Endangerment Finding's decision that GHGs endanger public health to be valid. Additionally, the appellee requests that this Court affirm the district court's decision that the EPA's 10-year delay in issuing air quality criteria amounts to an unreasonable delay. Lastly, the appellee requests that this Court affirm the district court's decisions that the EPA and its administrator have a non-discretionary duty to list GHGs as a criteria pollutant.