TEAM #52

C.A. No. 20-000123

IN THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

CLIMATE HEALTH AND WELFARE NOW,

Plaintiff-Appellant

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Defendant-Appellant

-and-

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

On Appeal from the United States District Court for the
District of New Union
No. 66-CV-2019

BRIEF FOR DEFENDANT-APPELLANT, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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STATEMENT OF JURISDICTION

Plaintiff-Appellee-Cross Appellant Climate Health and Welfare Now (Plaintiff) brought this action against Defendant-Appellant Environmental Protection Agency (EPA) under 42 U.S.C. § 7604. The United States District Court for the District of New Union granted jurisdiction under the citizen suit provision in 42 U.S.C. § 7604(a) and under the federal question provision in 28 U.S.C. § 1331. However, the district court did not have jurisdiction under 42 U.S.C. § 7604(a) for the first issue presented on appeal concerning Plaintiff's unreasonable delay claim, because pursuant to 42 U.S.C. § 7607(b) the United States Court of Appeals for the District of Columbia has the exclusive jurisdiction for that issue. On August 15, 2020, the district court issued an Order that granted Plaintiff's motion for summary judgement in part. From that Order, this Notice of Appeal was timely filed. This Court has appellate jurisdiction over the United States District Court for the District of New Union under 28 U.S.C. § 1291.

ISSUES PRESENTED

1. Did the United States District Court for the District of New Union have jurisdiction over Plaintiff's unreasonable delay claim under 42 U.S.C. § 7604(a) when the proper jurisdiction under 42 U.S.C. § 7607(b) is the United States Court of Appeals for the District of Columbia because of the nationwide applicability of the rule sought?

2. Is the 2009 Endangerment Finding ("Endangerment Finding") valid with respect to an endangerment of public welfare when climate changes attributed to increasing global temperatures and changing storm frequency and precipitation patterns reduce agricultural productivity, reduce water supplies, and increase property and economic damage due to the storms and rising sea levels?

3. Is the Endangerment Finding valid with respect to an endangerment of public health when the portion of the Endangerment Finding that pertains to public health is legally invalid because public health cannot be interpreted to include indirect health impacts flowing solely from climate change?

4. Does the EPA's ten-year delay in taking any action on listing Green House Gases (GHGs) as criteria pollutants under 42 U.S.C. § 7408(a) constitute an unreasonable delay when the statutory deadline necessary to relinquish the EPA of its discretion on taking such action is missing from the statute?

5. Does the EPA have a non-discretionary duty to designate GHGs as criteria pollutants under 42 U.S.C. § 7408 based on the Endangerment Finding when *Chevron* instructs the courts to admit the EPA's reasonable interpretation that no such duty exists, when the developments in the rules of statutory construction since *Train* render it inapplicable to the current case, and when a finding of such a duty is contrary to public policy?

STATEMENT OF THE CASE

Plaintiff brought this action against the EPA in the United States District Court for the District of New Union for a claim under the Clean Air Act (CAA) § 304, codified in 42 U.S.C. § 7604, for an action to force the EPA to list GHGs as criteria pollutants under CAA § 108, 42 U.S.C. § 7408. R. at 4. Plaintiff's suit arose from their claim that the Endangerment Finding, which stated at the time it was published that emissions from GHGs endanger public health and welfare, imposes a mandatory duty on the EPA to list GHGs as a criteria pollutant. R. at 5. The Coal, Oil, and Gas Association (COGA) was granted the motion to intervene as a Defendant on the side of the EPA pursuant to the FED. R. CIV. P. 24(a). *Id*. COGA asserted that granting Plaintiff's requested relief "would result in regulatory limits that would severely limit, or completely destroy, the market for its products." *Id.* On August 15, 2020, the district court granted Plaintiff's motion for summary judgment in part, COGA's cross-motion for summary judgment in part, and issued a judgment that vacated the Endangerment Finding to the extent that it declares GHGs to endanger public health. R. at 13-14. The EPA appeals from that Order. R. at 2.

STATEMENT OF THE FACTS

In 2009, the EPA issued an Endangerment Finding that the emissions of GHGs pose a concern to public health and welfare. R. at 5. GHGs were defined as a single air pollutant consisting of emissions from six gases: hydrofluorocarbons, methane, carbon dioxide, nitrous dioxide, perfluorocarbons, and sulfur hexafluoride. *Id*. at 6. The finding stated that these GHGs were emitted by numerous mobile sources, and that these emissions may be of concern "to both public health and public welfare, by increasing global temperatures and changing storm frequency precipitation patterns." *Id*. at 6-7. Specifically, "[t]hese climate change impacts were determined to endanger public health by causing an increase in ozone pollution due to hotter temperatures, an

increase in heat related deaths, and the prevalence of insect borne diseases" among other effects. *Id*. at 7. Public welfare was impacted in several respects, including as a result of reduction in agricultural productivity and "water supplies and an increasing property and economic damage due to storms and rising sea levels." *Id.* at 7. Immediately upon release of the finding, a coalition of environmental organizations, which included Plaintiff, filed a petition with the EPA that demanded that the organization lists GHGs as a criteria pollutant under CAA § 108, 42 U.S.C. § 7408. *Id*. at 5. Concerned about the implications of granting the petition and disagreeing with the arguments presented in the petition, the EPA instead embarked on a series of regulatory actions limiting GHGs emissions. *Id.* at 6, 8. Further, Executive Order 13771, which set its highest priority as the reduction of regulatory burdens on businesses and economic activity, directed the direction that the EPA took. *Id.* at 13. Despite these diligent efforts from the EPA, Plaintiff commenced a lawsuit on October 15, 2019, against the EPA under the citizen suit provision of CAA § 304(a)(2), 42 U.S.C. § 7604(a)(2). *Id.* at 5.

Plaintiff alleged in their complaint that the Endangerment Finding imposed a non-discretionary duty on the EPA to list GHGs as a criteria pollutant under CAA § 108, 43 U.S.C. § 7408 and thus asked the court to force the EPA to do so. *Id.* at 5. Plaintiff claims that the Endangerment Finding is valid with respect to public welfare and public health, and that the EPA's delay in listing GHGs as a criteria pollutant constitutes an unreasonable delay despite the statue having no statutory deadline. *Id*. at 5, 10. COGA has intervened on behalf of the EPA per the FED. R. CIV. P. 24(a) by asserting that granting Plaintiff's requested relief "would result in regulatory limits that would severely limit, or completely destroy, the market for its products." *Id*. at 5. COGA has also filed a cross-claim against the EPA requesting the court to declare that the Endangerment Finding is "unsupported by the record and contrary to law." *Id.*

SUMMARY OF THE ARGUMENT

The trial court erred in granting Plaintiff the summary judgment in part. This Court should reverse the lower court's erroneous holding that the EPA has unreasonably delayed responding to Plaintiff's petition for designation of GHGs as a criteria pollutant, that the EPA has unreasonably delayed designating GHGs as a criteria pollutant, and that the EPA has a non-discretionary duty to designate GHGs as a criteria pollutant. Alternatively, this Court should uphold the district court's correct holding that the Endangerment Finding is valid with respect to public welfare and is invalid with respect to public health.

First, the district court never had jurisdiction over Plaintiff's unreasonable delay claim under 42 U.S.C. § 7604(a) because the rule sought by Plaintiff has nationwide applicability, and Congress has explicitly reserved judicial review for such rules under 42 U.S.C. § 7607(b) for the Court of Appeals for the District of Columbia. Because Plaintiff's action was brought in the wrong venue, this court must fashion a remedy to correct the procedural injustice suffered by the EPA.

Second, it is clear that the Endangerment Finding is valid with respect to GHGs being an endangerment to public welfare due to their negative impact on the environment. Under 42 U.S.C. § 7521 it is possible for an Endangerment Finding to be based solely on a threat to public welfare. However, even if GHGs were to be regulated under the National Ambient Air Quality Standards (NAAQS), their impact on the environment would restrict them to qualifying only as Secondary NAAQS and not as a Primary NAAQS.

Third, the Endangerment Finding is invalid with respect to GHGs constituting an endangerment to public health. Although scientific studies and case law both support a finding that GHGs negatively impact public welfare, no such evidence has been presented to substantiate the allegation that GHGs directly harm public health. Without more than mere allegations, the EPA

does not and should not have the authority to regulate indirect effects until evidence substantiates the claim of a direct negative impact on public health.

Fourth, the EPA's careful consideration concerning the implications of listing GHGs as a criteria pollutant over the past ten years does not constitute an unreasonable delay in responding to Plaintiff's petition to list GHGs as a criteria pollutant. Listing GHGs as criteria pollutants would result in a failing primary NAAQS program that would place the EPA and the States in an impossible position of promulgating an unachievable standard, only to result in depriving every single state in the nation of their critical funding. Further, the lack of a deadline in a statute provides the EPA with the discretion as to when to list the GHGs as a criteria pollutant.

Finally, the EPA clearly has the discretion to designate GHGs as a criteria pollutant under 42 U.S.C. § 7408 based on the Endangerment Finding. The district court improperly relied on *NRDC v. Train* to argue that a non-discretionary duty exists, failing to consider that *Train* predates significant developments in the law, predates significant amendments of the statute, and is narrow in scope. Moreover, interpreting the EPA to have a non-discretionary duty to designate GHGs as a criteria pollutant would lead to absurd results that are contrary to legislative intent and policy.

ARGUMENT

The trial court improperly granted Plaintiff's motion for summary judgment in part by incorrectly holding that the (1) EPA has unreasonably delayed responding to the Plaintiff's petition for designation of GHGs as a criteria pollutant, and that the (2) EPA has a non-discretionary duty to designate GHGs as a criteria pollutant. This Court has appellate jurisdiction over the district court and is thus not bound by the district court's adverse findings and conclusion. *See* 28 U.S.C. § 1291. Plaintiff alleges that the Endangerment Finding imposed a non-discretionary duty on the EPA to list GHGs as a criteria pollutant under 42 U.S.C. § 7408 and that the EPA has unreasonably

delayed responding to the Plaintiff's petition seeking to force the EPA to list GHGs as a criteria pollutant. R. 4-5. However, not only was the Plaintiff's petition brought in the wrong court, but the Endangerment Finding is only legally valid with respect to public welfare and is legally invalid with respect to public health. Further, the EPA maintains discretion on when to list GHGs as a criteria pollutant as well as discretion on whether to list them at all.

I. THIS CASE MUST BE HEARD IN THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA BECAUSE THE RULE SOUGHT IS ONE OF NATIONWIDE APPLICABILITY.

In Plaintiff's petition, the appellees are seeking a rule that regulates "any national primary or secondary ambient air quality standard" which may "only be filed in the United States Court of Appeals for the District of Columba . . . ." CAA § 307(b)(1), U.S.C. § 7067(b)(1). In passing the CAA, Congress has "evince[d] a clear congressional intent" to centralize review in the D.C. Circuit of "matters on which national uniformity is desirable." *Texas v. EPA,* No. 10-60961, 2011 WL 710598, at *4 (5th Cir. Feb. 24, 2011). The statute is unequivocally clear that the CAA's judicial review provision allocates venue among the various courts based on the nature of EPA's action:

> "(1) A petition for review of . . . any . . . *nationally applicable regulations* promulgated, or final action taken, by the Administrator under this chapter *may be filed only in the United States Court of Appeals for the District of Columbia.*
>
> (2) A petition for review of . . . any . . . final action of the Administrator under this chapter . . . which is locally or regionally applicable may be file only in the United States Court of Appeals for the appropriate circuit.
>
> (3) Notwithstanding the preceding sentence a petition for review of any action referred to in such sentence *may be filed only in the United States Court of Appeals for the District of Columbia* if such action is based on a determination of *nationwide scope or effect* and if in taking such action the Administrator finds and publishes that such action is based on such a determination."

CAA §307(b)(1)-(3), U.S.C. § 7607(b)(1)-(3) (emphasis added). This case must be dismissed because although Plaintiff may have standing under CAA § 304(a), § 307(b)(1) states that the present case may only be heard in the D.C. Circuit Court. In addition, Plaintiff failed to

demonstrate that the rule they seek is not of nationwide scope and should stay in the present court. The district court conceded that Congress bestowed upon the D.C. Circuit Court a unique role of hearing challenges to regulations of "national applicability," and this court must not disturb precedent as a matter of *stare decisis*. *See* § 307(b); R. at 9; *Dalton Trucking, Inc. v. EPA*, 808 F.3d 875, 879 (D.C. Cir. 2015). In addition, the regulation sought clearly has a nationwide scope, which would require *all* of the states creating a State Implementation Plan (SIP) subject to EPA approval. *See* R. at 6. Furthermore, in fashioning a remedy, this court should dismiss the present action for lack of jurisdiction or alternatively transfer to the D.C. Circuit because the district court was wrong that § 307(b) was merely a venue requirement, when it actually serves a dual role as a venue and jurisdictional provision. *See Sierra Club v. EPA*, 926 F.3d 844, 848-50 (D.C. Cir. 2019); *Texas v. EPA*, 2011 WL 710598 at *3; *Dalton Trucking Inc.*, 808 F.3d at 879; *ATK Launch Sys., Inc. v. EPA*, 651 F.3d 1194, 1197 (10th Cir. 2011).

A. Plaintiff Seeks a Regulation That is of Nationwide Scope Under CAA § 307(b) and Congress Exclusively Precluded Review to Any Court of Appeals Except the D.C. Circuit.

Although Plaintiff may have overcome the hurdle of standing under CAA § 304(a), they cannot overcome § 307(b) because the record clearly demonstrates that the current climate crisis is faced by the *entire* country. *See* R. at 5, 6. Circuit courts have confronted similar challenges, and this court must follow the approach of those circuits declining to hear cases that Congress did not intend for them to hear. As a matter of principle, the issue turns on the judicial review provision of the CAA in deciding whether the petitions are properly adjudicated in the court or rather the D.C. Circuit. CAA § 307(b)(1), 42 U.S.C. § 7607(b)(1); *ATK Launch Sys., Inc.*, 651 F.3d at 1196. As such, the D.C. Circuit is the *exclusive* venue for review of all "nationally applicable" final EPA actions. CAA § 307(b)(1), 42 U.S.C. § 7067(b)(1); *S. Ill. Power Coop. v. EPA*, 863 F.3d 666, 670

(7th Cir. 2017); *Dalton Trucking, Inc.*, 808 F.3d at 879. Regional circuits may be the proper venue for "locally or regionally applicable" final EPA actions, but if the action is based on a determination of "nationwide scope or effect," venue lies in the D.C. Circuit. 42 U.S.C. § 7607(b)(3); *S. Ill. Power Coop.*, 863 F.3d at 671; *Texas v. EPA*, 706 F. App'x. 159, 164 (5th Cir. 2017). Consequently, § 307(b) "facilitat[es] the orderly development of the basic law" under the CAA because it ensures that the D.C. Circuit reviews "matters on which national uniformity is desirable," preventing "piecemeal review of national issues in the regional circuits, which risks potentially inconsistent results." *S. Ill. Power Coop.*, 863 F.3d at 674. Although CAA § 307(b)(1) does not use the phrase "subject matter jurisdiction," the U.S. Supreme Court "was clear [§ 307(b)] confers jurisdiction on the court of appeals". *Dalton Trucking Inc.*, 808 F.3d at 879 (citing *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 591-92 (1980)). Moreover, CAA § 307(b)(1) also specifies venue, distinguishing between actions with nationwide applicability that must be brought in the D.C. Circuit and those with state or regional applications that must be brought in the appropriate circuit court. *See Texas v. EPA*, 829 F.3d 405, 418 (5th Cir. 2016) (citing *Dalton Trucking, Inc.* for the proposition that CAA § 307(b)(1) "confers jurisdiction on all courts of appeal and divides venue among them"). As such, subject matter jurisdiction and venue under § 307(b) "are not coterminous." *Dalton Trucking, Inc.*, 808 F.3d at 879.

The D.C. Circuit, observing the words of the Supreme Court in *Harrison*, has already made it plainly clear that CAA § 307(b)(1) operates dual functions as a jurisdiction and venue provision in *Dalton Trucking, Inc.* 808 F.3d at 879. This sheds light to the earlier D.C. Circuit decision in *Tex. Mun. Power Agency v. EPA*, in which the court held that § 7607(b)(1) is a matter of venue and not jurisdiction. *Compare Tex. Mun. Power Agency v. EPA*, 89 F.3d 858, 862 (D.C. Cir. 1996) *with Dalton Trucking, Inc.*, 808 F.3d at 879. Turning to the words of § 307(b), the question of

whether a matter is national or regional in scope turns on the legal rather than the de facto scope of the particular regulation. *Id.* at 881; *Texas v. EPA*, 706 F. App'x at 163. In *NRDC v. Thomas*, the D.C. Circuit Court rejected the NRDC's argument that the EPA regulation was regional when its impact fell on sources in "limited geographic areas." 838 F.2d 1244, 1249 (D.C. Cir. 1988). In addressing § 307(b), the court found that the "nationwide scope of the regulation is controlling" and noted that the "clause governing 'nationally applicable regulations' provides jurisdiction over both the direct challenge to the regulations and the petition for reconsideration. *Id.* In *Dalton Trucking, Inc.*, the D.C. Circuit focused on the substance of the finding required under this provision. In that case, the EPA determined that a waiver decision granted to California's nonroad diesel engine standards was a "final action of national applicability," not a determination of "nationwide scope and effect," and that the two findings are not the same. *Dalton Trucking, Inc.*, 808 F.3d at 881-82. The D.C. Circuit concluded that the court need only look at the face of the rulemaking and not the practical effect. *Id.* at 880-81. The court therefore dismissed the petition for review. *Id.* In *Sierra Club*, the D.C. Circuit dismissed the case on venue grounds concerning a Title V permit because the order "on its face" involved a "single permit for a single plant located in a single state." 926 F.3d at 849.

Several courts also have specifically addressed § 307(b) requiring challenges to local or regional rules that the EPA finds will have a "nationwide scope and effect" to be filed in the D.C. Circuit. In *Lion Oil Co. v. EPA*, for example, the EPA considered the procedure used to "publish" EPA's finding regarding nationwide scope, concluding that "[u]nder the ordinary meaning of 'publish,' EPA must make public distribution of its decision, not just to the petitioner." 792 F.3d 978, 982 (8th Cir. 2015). The EPA had not made any announcement on any public record, "including its website." *Id.* Since the EPA sent notice of its finding *only* to the petitioner, the court

allowed petitioner's appeal in the Eighth Circuit to proceed. *Id.* In *S. Ill. Power Coop*, the petitioner challenged EPA's decision to designate a particular county as nonattainment under the revised NAAQS. 863 F.3d at 669. In concluding that the challenge should have been brought in the D.C. Circuit, the Seventh Circuit declared that venue under § 307(b)(1) "depends entirely on — and is fixed by— the nature of the agency's action; the scope of the petitioner's challenge has no role to play in determining venue." *Id.* at 670. The petitioners sought review of the EPA's rule "of broad geographic scope . . . covering 61 geographic areas across 24 states . . . and promulgated to a common, nationwide analytical method." *Id.* The court found that a rule with such characteristics was "nationally applicable" within the meaning of § 307(b)(1) and review lied in the D.C. Circuit. *Id.* (citing *ATK Launch Sys., Inc.,* 651 F.3d at 1197 for the proposition that a similar air quality designation rule with wide geographic reach, promulgated to a "'uniform process and standard across the country,'" is nationally applicable). Noting that the final rule contained air quality designations covering dozens of geographic areas across the country, the court concluded that the rule was clearly "nationally applicable," noting that § 307(b)(1) assigns judicial review based on the nature of the agency action and not on the nature or scope of the petition for review. *Id.* at 671.

On the other hand, an action may be regional in nature but must still be heard in the D.C. Circuit if it is later determined to be of nationwide scope or effect. *See* § 307(b)(3); *Texas v. EPA*, 706 F. App'x. at 165; *W. VA. Chamber of Com. v. Browner*, 166 F.3d 336, *7 (4th Cir. 1998). In *Texas v. EPA*, the court concluded that while the challenged rule was part of a nationwide area designation effort, it was a separate "action" that was only "locally or regionally" applicable, making the regional circuit the default venue. 706 F. App'x. at *7. However, the court left open the possibility that the EPA could demonstrate that the rule was based on determinations of nationwide scope and effect and therefore required to be filed in the D.C. Circuit. *Id.* at 165**.** In *W.*

VA. Chamber of Com., the case involved an ozone transport SIP call, and petitioners challenged the EPA's Regulatory Flexibility Act certification in the notice of proposed rulemaking. 166 F.3d at *3-4. The Fourth Circuit concluded that it was a nationally applicable rulemaking in light of its nationwide scope, the interconnected nature of the ozone problem, and the large number of states involved. *Id.* at *6-8. Additionally, in light of *S. Ill. Power Coop.*, the rationale for the Fourth Circuit's holding, that venue would still be proper if the petitioners challenged a local factor of the national program, was grounded in the Seventh Circuit's now-overturned decision of *Madison Gas & Electric Co. v. EPA*. *See W. VA. Chamber of Com.*, 166 F.3d at *7; *S. Ill. Power Coop.*, 863 F.3d at 674 (stating "*Madison Gas* is overruled").

In the current case, the Plaintiff seeks a regulation that is nationwide in scope and would require the cooperation of *all* states. *See* R. 5-6. Plaintiff implores the EPA to classify the six gases as GHGs, but Plaintiff ignores the fact that such a regulation impacts the entire nation. In passing such a wide-ranging regulation, it would not be limited to a particular state but instead binding upon *all* of them under a NAAQS program. *See id.* at 6. This clearly demonstrates a regulation that fits § 307(b)(1), or at the very least a regulation that would have a nationwide scope or effect under § 307(b)(3). *See S. Ill. Power Coop.*, 863 F.3d at 670; *Texas v. EPA*, 706 F. App'x at 165.

Unlike in *Lion Oil Co.*, the present case does not yet involve a "final agency action" as the EPA is currently determining which action is appropriate. *See* 792 F.3d at 982. Furthermore, the Eighth Circuit found that an appeal of an action under § 307(b) to be locally or regionally applicable must still be filed in the D.C. Circuit if "'the Administrator finds and publishes that such action is based on 'a determination of nationwide scope or effect.'" *See id.* Therefore, even if this action could be local or regional, the Administrator could find otherwise. *See id.* In addition, *public* distribution was also considered by the court, and in this case the EPA has listed the

Endangerment Finding on its website. *See Lion Oil Co.,* 792 F.3d at 982; *see also* EPA, *Endangerment and Cause or Contribute Findings for Greenhouse Gases under the Section 202(a) of the Clean Air Act* (Sep. 10, 2020), https://www.epa.gov/ghgemissions/endangerment-and-cause-or-contribute-findings-greenhouse-gases-under-section-202a-clean. Likewise, in *S. Ill. Power Coop.,* the rule sought by Plaintiff ostensibly has a broad geographic scope and would involve implementation under NAAQS, which the states would need to implement via SIPs. *See* 863 F.3d at 670. The case the Seventh Circuit relied on, the *ATK Launch Sys., Inc.*, noted that such SIPs "create a standard that applies to the entire country." 651 F.3d at 1200. The same was true in *S. Ill. Power Coop.,* and likewise true in the present case because the rule would no doubt include SIPs via the NAAQS program, which is a "'uniform process and standard across the country.'" *See* 863 F.3d at 672 (quoting *ATK Launch Sys., Inc.,* 651 F.3d at 1197).

If Plaintiff were to have it their way, the EPA would be forced to require the states to implement their own SIPs subject to the EPA's approval. These SIPs wouldn't be limited to a single state but rather *all fifty* states due to the ubiquitous nature of the GHGs. *See* R. at 6. The current climate crisis is not isolated in a particular region, much less a particular state. *See id.* Because of the broad impact of such GHGs that move freely in the atmosphere, this would require a concerted effort by the entire nation to make a dent. The precedents of both the D.C. Circuit and several courts of appeals stand for the proposition that such a regulation *must* be heard in the D.C. Circuit. *See Texas v. EPA,* 863 F.3d at 672; *see also ATK Launch Sys., Inc.,* 651 F.3d at 1197; *see also Dalton Trucking, Inc.*, 808 F.3d at 879. Congress bestowed upon the D.C. Circuit a special role in hearing cases that implicates the entire nation to prevent inconsistent results that would inevitably occur if Plaintiff's argument were to have any basis. *See Dalton Trucking, Inc.*, 808 F.3d at 879. Because Congress desired uniformity in passing § 307(b), this court must heed

Congress's wishes in determining that the district court lacked the jurisdiction to hear this case. *See Texas v. EPA*, 2011 WL 710598 at *4; *see also Dalton Trucking, Inc.*, 808 F.3d at 879; *see also ATK Launch Syst., Inc.*, 651 F.3d at 1197.

B. Because the Petition Challenging the EPA Action was Brought in the Wrong Venue and the District Court Lacked Jurisdiction, This Court Must Fashion a Remedy.

Plaintiff has brought a petition that seeks regulation that would apply to the entire country, and because the district court lacked jurisdiction, this court must fashion a remedy. The Twelfth Circuit must look to other decisions for guidance and the remedies they have employed. Although the lower court lacked the jurisdiction to hear the present case, this court can still provide relief in the form of dismissal or transfer to the proper court—the D.C. Circuit. *Dalton Trucking, Inc.*, 808 F.3d at 880 (stating that "it is generally understood that court of appeals have the 'inherent power to transfer cases over which we have jurisdiction, but not venue'") (quoting *Alexander v. Comm'r of Internal Revenue*, 825 F.2d 499, 502 (D.C. Cir. 1987)).

In many cases, the courts have dismissed the action. *Dalton Trucking, Inc.*, 808 F. 3d at 882; *Sierra Club*, 926 F.3d at 850. In *Dalton Trucking, Inc.*, the petitioners preserved their objection to venue and the court did not reach the question of whether the court may *sua sponte* dismiss under § 307(b) for lack of venue. 808 F.3d at 880. Nevertheless, the court still dismissed the petition to review. *Id.* at 882. Where the time to recommence the challenge has expired, however, courts will frequently transfer the case to the correct court. *See Producers of Renewables United for Integrity Truth & Transparency v. EPA*, 778 F. App'x. 1, 4 (D.C. Cir. 2019); *S. Ill. Power Coop.*, 863 F.3d at 674; *ATK Launch Sys., Inc.*, 651 F.3d at 1200. In *Producers of Renewables United for Integrity Truth & Transparency*, the D.C. Circuit agreed that "transfer is the appropriate course where the time for original filing in the correct venue may have passed." 778 F. App'x at 4. In *W. VA. Chamber of Com.*, where petitioner had concerns about timeliness of

new challenge to the EPA action if the case were dismissed, the Fourth Circuit found it was "in the interests of justice and in accord with principles of sound judicial administration to transfer th[e] case to the D.C. Circuit." 166 F.3d at 336. Courts have also addressed the question of whether it has authority to transfer a case without first satisfying itself that it has jurisdiction. *See Producers of Renewables United for Integrity Truth & Transparency*, 778 F. App'x. at 4 (concluding that its transfer order "does not assume the 'law declaring power' that would require [the court] to first assert jurisdiction") (citations omitted). In *Texas v. EPA*, the Fifth Circuit declared that it did not matter whether § 7607(b)(1) is a venue or jurisdictional provision because it had "authority to transfer the case either way." *Texas v. EPA*, 2011 WL 710598 at *3.

In the present case, dismissal of the action is the most appropriate. Although this issue was raised *sua sponte* and no venue objections have been made, dismissal is appropriate based on the aforementioned cases, and Plaintiff must file a new action in the correct court—the D.C. Circuit. *See* R. 12; *Dalton Trucking, Inc.*, 808 F.3d at 879. Alternatively, even if the court believes there is still uncertainty whether § 307(b) is a venue or a jurisdictional provision, in light of the precedent clearly showing that it has a dual function, the court still has the authority to transfer the case. *See Dalton Trucking, Inc.*, 808 F.3d at 879; *see also Texas v. EPA*, 2011 WL 710598 at *3; *see also S. Ill. Power Coop.*, 863 F.3d at 674; *see also ATK Launch Sys., Inc.*, 651 F.3d at 1200.

II. THE ENDANGERMENT FINDING IS VALID WITH RESPECT TO GHGs BEING AN ENDANGERMENT TO PUBLIC WELFARE.

The NAAQS program is the fundamental basis of the CAA, providing an overarching, comprehensive program for the reduction of those air pollutants that endanger public health or welfare. Howard Crystal, et. al, *Returning to Clean Air Act Fundamentals: A Renewed Call to Regulate Greenhouse Gases Under the National Ambient Air Quality Standards (NAAQS) Program*, 31 GEO. ENVTL. L. REV. 233, 235 (2009). Under the CAA, the EPA is required to list

emissions that "cause or contribute to air pollution which may reasonably be anticipated to endanger public health or public welfare" and promulgate primary or secondary NAAQS for each. 42 U.S.C. §§ 7408(a), 7409(a). *See Alaska Dep't of Env't. Conservation v. EPA*, 540 U.S. 461, 469 (2004). The NAAQS were designed to "define [the] levels of air quality that must be achieved to protect public health and welfare." R. Belden, CAA 6 (2006). As a form of emission standard, the NAAQS establish "requirements which limit the quantity, rate, or concentration of emission of air contaminants on a continuous basis," to achieve these particularized air quality levels. *See Wis. Hosp. Ass'n v. Nat'l Res. Bd.*, 156 Wis.2d 688, 697 (Ct. App. 1990) (citing § 144.30(11), Stats.). To attain the NAAQS as effectively and efficiently as possible, individual states implement SIPs with broad regulatory powers over sectors not subject to federal legislation. *See Alaska Dep't of Env't. Conservation*, 540 U.S. at 470.

The NAAQS program is divided into two priority groups: primary NAAQS and secondary NAAQS. 42 U.S.C. § 7409. Primary NAAQS are focused on the protection of public health, including the health of "sensitive" populations such as asthmatics, children, and elderly. *See id*. Due to the heightened sensitivity of the situation, primary NAAQS are subject to strict statutory deadlines for enforcement procedures. *See id*. Secondary NAAQS, on the other hand, protect public welfare, which encompasses protection against decreased visibility and damage to animals, crops, vegetation, and buildings. *See id*. Because of the decreased state of emergency compared to those related to public health, secondary NAAQS are not subject to statutory deadlines. *See id*.

A. The CAA Allows an Endangerment Finding Based Solely on a Threat to Public Welfare.

Under § 303 of the CAA, the requirement for an endangerment finding is "may reasonably be anticipated to endanger public health *or* welfare." *See* 42 U.S.C. § 7521(a)(1) (2006) (emphasis added). Under § 202(a)(1), the EPA is required to answer only two questions: (1)

whether the particular "air pollution"—here, GHGs—may reasonably be anticipated to endanger public health *or* welfare, and (2) whether motor-vehicle emissions cause or contribute to that endangerment." *See* 42 U.S.C. § 7521. Under § 303(h), the statute specifies that all language referring to effects on welfare includes, but is not limited to, effects on soils, water, crops, vegetation, manmade materials, animals, wildlife, weather, visibility, and climate, damage to and deterioration of property, and hazards to transportation. *See id*. Effects on economic values and on personal comfort and well-being, whether caused by transformation, conversion, or combination with other pollutants are included as well. 42 U.S.C. § 7602(h).

As the Supreme Court has already determined, alleging that an imminent and substantial endangerment to the public health or welfare or the environment exists, or may exist, is a serious undertaking whether alleged by a government or a private citizen plaintiff. *See Massachusetts v. EPA*, 549 U.S. 497, 521 (2007). A court will not entertain an allegation of an endangerment that is remote in time, speculative in nature, or de minimis in degree. *See id.* Nor will a court consider an endangerment that is no longer present. *See id*. An endangerment allegation not supported either by evidence in the agency's administrative record or evidence admitted at trial likewise will not succeed. *See W.R. Grace & Co. v. EPA*, 261 F.3d 330, 339-40 (3d Cir. 2001).

B. Even If GHGs Are Regulated Under NAAQS, GHGs Qualify as a Secondary NAAQS, Not a Primary NAAQS, Due to Their Negative Impact on the Environment.

Even if this Court holds that GHGs should be regulated as criteria pollutants under the NAAQS program, GHGs have been directly linked to detrimentally affecting the environment and accelerating climate change and, therefore, should be classified as a secondary NAAQS. *See Massachusetts v. EPA*, 549 U.S. at 499. In *Massachusetts v. EPA*, the Supreme Court explicitly held that GHGs "fit well within the CAA's capacious definition of 'air pollutant.'" *See id.* at 532. As indicated by the global melting of glacial ice and the accelerated rising of sea level, the

Supreme Court found that the "harms associated with climate change are serious and well recognized." *See id.* at 521. Supported by this cornerstone holding, GHGs present an actual and imminent danger to the environment as "the most significant driver of observed climate change since the mid-twentieth century and, thus, constitute an endangerment to public welfare. *See id*; *see also* Climate Change Indicators, EPA (Feb. 22, 2017), https://www.epa.gov/climate-indicators/greenhouse-gases (citing Intergovernmental Panel on Climate Change, *Climate change 2013: The physical science basis*, Cambridge, United Kingdom: Cambridge University Press, www.ipcc.ch/report/ar5/wg1).

Because GHGs emissions significantly contribute to climate change and negatively impact the environment, GHGs would categorically fall under secondary NAAQS. Therefore, any agency action taken in response to endangerment or damage caused would not be subject to statutory deadlines, meaning any action or inaction taken by the EPA in the last ten years is not unreasonable or subject the agency to liability under the law.

III. THE ENDANGERMENT FINDING IS INVALID WITH RESPECT TO GHGs CONSTITUTING AN ENDANGERMENT FINDING TO PUBLIC HEALTH.

Congressional intent has long served to govern how statutes, regulations, and other federal rules are interpreted. *See Marbury v. Madison*, 5 U.S. 137, 175 (1803); *Anderson v. Dunn*, 19 U.S. 204, 127 (1821). Since the inception of our government, the foundational belief that interpretation of legislation passed by Congress should always begin with the text of the statute has endured for ages. *See Marbury*, 5 U.S. at 175 (1803); *see also Anderson*, 19 U.S. at 127. For it is with careful care and deliberate consideration that each word is chosen to effectuate Congress's true goal. *See Marbury*, 5 U.S. at 175 (1803); *see also Anderson*, 19 U.S. at 127. Numerous statutory canons, intrinsic, extrinsic, and purpose-based alike, have been used to determine what Congress intended

by analyzing specific language used in drafting legislation. For centuries, the Supreme Court has heard countless arguments by parties parsing out statutes word by word to achieve a more favorable interpretation. *E.g.*, *Nix v. Hedden*, 149 U.S. 304, 306-07 (1893). However, the ultimate duty of the courts is to enforce the law according to congressional intent. *See Marbury*, 5 U.S. at 175; *see also Anderson*, 19 U.S. at 127 (stating that the courts enforce the laws and, therefore, need authority to compel obedience).

In the case at bar, the validity and basis for the EPA's Endangerment Finding with respect to public health is being contested on the grounds that GHGs do not in fact affect the general public's wellbeing. Both Plaintiff and COGA argue that the EPA lacks the ability to change its decision and that, even if they can technically change their decision, they are no longer entitled to deference under *Chevron*. The real question, however, is what did Congress intend to qualify as an endangerment?

Looking at the statute itself, § 303 of the CAA, 42 U.S.C. § 7602(h), authorizes the EPA to issue an administrative order to address an endangerment. However, the EPA can only issue an order if "it is not practicable to assure prompt protection of public health *or* welfare *or* the environment" through a judicial action. 42 U.S.C. § 7602(h) (emphasis added). Textual canons of construction necessitate giving attention to keywords within the statute. Brian G. Slocum, *The Importance of Being Ambiguous: Substantive Canons, Stare Decisis, and the Central Role of Ambiguity Determinations in the Administrative State*, 69 MD. L. REV. 791, 826 (2010). Here, health and welfare have been deliberately separated by the disjunctive "or," signifying that an endangerment to public health or welfare alone is sufficient to warrant action, thus narrowing the EPA's obligation to act. *See U.S. v. Conservation Chem.*, 619 F. Supp. at 175, 192; *see also* Crystal, *supra*. Although the Supreme Court, with scientific evidence to support its conclusion,

has found GHGs to have a direct negative impact on the environment, these pollutants only have an indirect effect on public health. *See Massachusetts v. EPA*, 549 U.S. at 499.

Legislative history is another tool that courts routinely use to accurately interpret congressional intent. Slocum, *supra* at 810. Committee reports are consistently held to be not only the most probative but also the most reliable in discerning the authoritative meaning of legislation. George A. Costello, *Average Voting Members and Other "Benign Fictions": The Relative Reliability of Committee Reports, Floor Debates, and Other Sources of Legislative History*, 1990 DUKE L.J. 39, 43 (1990). With this in mind, Senate Report 101-228 states "[a] sound statutory framework for a program as extensive as the one contemplated here should not force the Agency to regulate a category of sources which present no significant public health risk, simply because units in the category emit a pollutant which has been limited in the statute."

As mentioned previously, the success of reducing the effects of GHGs will inevitably require a global partnership. Effectively implementing SIPs will require the cooperation and inclusion of all fifty states. Partial participation will have a trivial impact on the detrimental effect caused by GHGs on the environment. Although the U.S. is one of the largest contributors to GHGs emissions globally, several other countries have an equally negative, if not worse, impact on the environment. *See* R. 9. With the continuing negative effect of populous countries, such as China and India, to contend with and combat, the EPA should not be required to promulgate any such standard that will ultimately be futile. *See Massachusetts v. EPA*, 549 at 499.

If Plaintiff's stance is accepted by this Court, the EPA would be required to establish a safe level of GHGs concentrations in the atmosphere, and states would be required to meet this level in each state within ten years. Isolated change at the United States level is not going to accomplish a global change. If the ultimate goal is to achieve lower emissions to reduce the effect of global

warming, real change necessitates accounting for China, India, and other major contributing countries which collectively contribute more harmful emissions than the United States alone. *See Strengths and Weaknesses of Regulating Greenhouse Gas Emission Using Existing Clean Air Act Authorities: Hearing Before the S. Comm. on Energy and Air Quality*, 110th Cong. No. 110-105, at 436-39 (2008) (statement of Hon. Marsha Blackburn, Rep. in Cong. From Tennessee).

The effect GHGs have on public health cannot be described as anything more than indirect. Although scientific studies and case law both support a finding that GHGs negatively impact public welfare, no such evidence has been presented to substantiate the allegation that GHGs directly harm public health. As held in the landmark Supreme Court case *Twombly*, "a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 552 (2007). Without more than mere allegations, the EPA does not and should not have the authority to regulate indirect effects until evidence substantiates the claim of a direct negative impact on public health.

In all reality as a practical matter, nothing in high quantities is good for public health. As the saying goes, everything in moderation. Although emissions of any kind are not beneficial to human health, there is a certain level of balance that must be achieved in order to serve all interests involved. Not only does conserving the environment and fostering the health of citizens matter significantly, but there is also the economic development of the United States and the necessity for continuous technological innovation to consider as well. Policy matters that will be directly affected by GHGs take precedent over those that are currently only indirectly affected.

There is also an administrative element that must be considered and given credible weight when questioning the EPA's decision to change its stance on GHGs' effect on public health.

Shortly after President Trump was elected, the Executive branch issued an Executive Order, establishing the reduction of regulatory burdens on business and economic activity to be the highest agency priority. *See* Reducing Regul. and Controlling Regul. Costs, Exec. Order 13771, 82 Fed. Reg. 9, 399 (Feb. 3, 2017). This Order came from the President—someone who is directly accountable to the public after being elected by the electoral college. As such, that Order must be given deference in the highest regard. *See* R. 12.

The EPA's ten-year delay in acting on the criteria pollutant determination and the agency's decision to alter its stance on the Endangerment Finding with regards to public health were entirely justified. The ten-year delay was caused solely by the reprioritization that had to occur in response to the President's Executive Order, and the agency's positional shift was a precipitating result from that reprioritization. Due to the overarching reason for the EPA's actions, its determination that the Endangerment Finding is not valid as to public health should not be subject to notice and comment since the ultimate decision came from a person who answers to the electorate. Although the court in *Coal. Resp. Regul. v. EPA* held that the EPA only needs a rational basis for an endangerment finding aimed at preventing public health detriment, that the court did not have to consider the effect of an Executive Order on their policy decisions. *See* 684 F.3d 102, 121 (D.C. Cir. 2012) (citing *Ethyl Corp. v. EPA*, 541 F.2d 1, 25, 28 (D.C. Cir. 1976)).

Because the EPA's change in stance is primarily motivated by an Executive Order, this decision does not reflect an agency's independent interpretation of law. Rather, the action is responsive to an Executive Order and, as a result, should be considered discretionary and is exempt from the traditional notice and comment requirement. However, even if this Court deems the agency's action to be subject to congressional controls, the EPA's interpretation should still receive deference. Using the *Mead* analysis, Executive Orders are intended to carry the force of

law as a form of veto power for use by the Executive branch only. *See United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001). As such, the regulation is binding not only on the Executive branch but also on governmental agencies and the American people at large. *Id*. Moving to *Chevron*, the language of the Executive Order is not ambiguous. *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 843 (1984). The President's Order to prioritize the reduction of regulatory burdens on business and economic activity is not ambiguous to the extent that it relates to environmental concerns. The EPA's interpretation of that Order, in dedicating its limited resources to effectuating the President's Order, thereby causing a reasonable delay in acting on the criteria pollutant determination and amending the applicability of its endangerment finding, is reasonable, lawful, and enforceable under the circumstances.

IV. IN EVALUATING PLAINTIFF'S PETITION, THE EPA'S CAREFUL CONSIDERATION ON LISTING GHGs AS CRITERIA POLLUTANTS DID NOT CONSTITUTE AN UNREASONABLE DELAY.

The EPA has evaluated Plaintiff's petition with care, and the ten years it has taken does not constitute an unreasonable delay under CAA § 108(a) as Plaintiff alleges. A secondary NAAQS would indeed protect public welfare, but since there is no statutory deadlines imposed upon the EPA under such a scheme, there was no unreasonable delay to speak of and no violation of CAA § 108(a). Instead, the time the EPA has spent satisfies the "rule of reason" under the factors laid out by the D.C. Circuit in *Telecomm. Rsch. & Action Ctr. v. FCC* ("TRAC"). 750 F.2d 70, 80 (D.C. Cir. 1984). These factors include:

> "Although the standard is hardly ironclad, and sometimes suffers from vagueness, it nevertheless provides useful guidance in assessing claims of agency delay: (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.' "

750 F.2d at 80, (quoting *PCHRG v. FDA*, 740 F.2d 21, 34 (D.C. Cir. 1984) (citations omitted). The EPA stresses that regulation of GHGs would require a thorough review of difficult policy and scientific concerns, such as the appropriate NAAQS for GHGs and the proper action of States unable to satisfy their respective SIPs. *See* R. at 12. Moreover, forcing the EPA to act prematurely would deleteriously interfere with agency activities of a much higher priority than regulation of GHGs under the fourth *TRAC* factor. *See id.* This higher priority comes in the form of Executive Order 13771 signed by the Trump Administration, which directed the EPA to re-evaluate the preceding administration's efforts of regulating GHGs. *See id.* at 13. Accordingly, the time it has taken is not unreasonable because of the numerous complications the EPA has to take into account. Furthermore, even if the EPA hastily put together a primary NAAQS program within ten years, it would be *impossible* for the states to comply with the binding requirements of a SIP program because it is *unfeasible* for them to reach attainment within 10 years due to the long-lived nature of the GHGs. *See* Crystal, *supra* at 238.

Plaintiff argues that taking ten years in evaluating whether to list GHGs as criteria pollutants is *per se* unreasonable, but this ignores the gravity and immense measures necessary to put together a program that is achievable. Most importantly, there is "'no *per se* rule as to how long is too long' to wait for agency action.'" *In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 419 (D.C. Cir. 2004) (citations omitted). Already exacerbated by the CAA's "lack of dispositive statutory instruction" because of the "gap left open by Congress", it will take *much longer* than ten years to reach safe concentration levels. *EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489, 520

(2014). *See also* Crystal, *supra* at 238. Even so, the EPA still retains the "authority to act if it fails to meet that deadline" as the Supreme Court refused "to treat a statutory requirement that an agency 'shall' act within a specified time, without more, as a jurisdictional limit precluding action later.'" *Mont. Sulphur & Chem. Co. v. EPA,* 666 F.3d 1174, 1190 (9th Cir. 2012) (quoting *Barnhart v. Peabody Coal Co.,* 537 U.S. 149, 158 (2003)). Specifically, the NAAQS program includes a separate provision for imposing secondary standards "by which attainment can be achieved as expeditiously as practicable" to protect public welfare. *See Mont. Sulphur & Chem. Co.*, 666 F.3d at 1190; *see also* 42 U.S.C. § 7502(a)(2)(B); *see also* 42 U.S.C. § 7602(h) (defining public welfare to include climate impacts). This provision not only contains *no strict deadline,* but it also expressly calls on the EPA to take into account effects on "climate." 42 U.S.C. § 7502(a)(2)(B), § 7602(h). Furthermore, the Administrative Procedure Act (APA) provides for protection against delay in two sections. Under § 555(b), APA provides that the agency must proceed "within a reasonable time." 5. U.S.C. § 555(b); *Consol. Freightways v. NLRB,* 892 F.2d 1052, 1059 (D.C. Cir. 1989). In addition, authority to conduct interlocutory review of delay may be found in 5 U.S.C § 706(1). *Telecomm. Rsch. & Action Ctr.,* 750 F.2d at 79.

The D.C. Circuit has indicated that "the APA is patient" at least in the absence of statutory deadlines, an agency "need not address all regulatory obligations 'in one fell swoop,'" and courts should avoid second-guessing agency efforts to prioritize among them. *Env't Def. Fund v. EPA*, 922 F.3d 446, 457 (D.C. Cir. 2019) (quoting *U.S. Telecom. Ass'n*, 359 F.3d at 588). The D.C. Circuit identified several factors which might be considered as justification for the delay:

> (1) a court may consider the length of time that has elapsed since the agency was under a duty to act;
> (2) it might consider the mandate of the statute;
> (3) it might determine the extent to which the delay is undermining the statutory scheme; and
> (4) the court must also consider the consequences of the delay.

Cutler v. Hayes, 818 F.2d 879, 897-98 (D.C. Cir. 1987). In addition, the magnitude of the relevant matter before the agency should influence the court's judgment as to the reasonableness of the delay. *In re Monroe Commc'ns. Corp.,* 840 F.2d 942, 946 (D.C. Cir. 1988). Other evidence that the agency was proceeding conscientiously might be considered. *Consumer Fed'n of Am. v. U.S. Consumer Prod. Safety Comm'n*, 883 F.2d 1073, 1078 (D.C. Cir. 1989). Each case must also be analyzed according to its own unique circumstances. *Air Line Pilots Ass'n, Int'l v. Civil Aeronautics Bd.*, 750 F.2d 81, 85 (D.C. Cir. 1984). Thus, the EPA is better-suited to come up with its own timetable in confronting such a large problem than the district court, which lacks the expertise to come up with the appropriate NAAQS program, and is entitled to deference. *See Heckler v. Chaney*, 470 U.S. 821, 831–32 (1985) (stating "an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise"); *Cobell v. Norton*, 240 F.3d 1081, 1096 (D.C. Cir. 2001) (quoting "[a]n agency's own timetable for performing its duties in the absence of a statutory deadline is due 'considerable deference.'"); *In re Barr Lab'ys, Inc.,* 930 F.2d 72, 76 (D.C. Cir. 1991) (quoting "[i]n short, we have no basis for reordering agency priorities. The agency is in a unique—and authoritative—position to view its projects as a whole, estimate the prospects for each, and allocate its resources in the optimal way. Such budget flexibility as Congress has allowed the agency is not for us to hijack.")

Plaintiff claims that ten years is an unreasonable delay, but cases involving delays ranging from nine to twelve years were not unreasonable. *See Dayton Tire v. Sec'y of Lab.*, 671 F.3d 1249, 1253-54 (D.C. Cir. 2012); *see also NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 265 (1969). In *Dayton Tire*, the Commission's twelve-year delay in assessing a penalty, though "excessive and deplorable," was not unreasonable even though the NLRB failed to abide by § 555(b). 671 F.3d at 1253. The D.C. Circuit emphasized that "delay alone is not enough" because it is the

"consequences of the [agency's] delay that dictate whether corrective action is needed." *Id.* The court refused to set aside the penalty "without a compelling reason to do so." *Id.* In *J.H. Rutter-Rex Mfg. Co.*, the Supreme Court did not find a nine-year delay unreasonable, though "deplorable," when it would constitute an interference with the "Board's remedial orders." 396 U.S. at 265.

On the other hand, delays of seven to eight years have been held to be unreasonable. *See In re Core Commc'ns, Inc*., 531 F.3d 849, 851, 855-57 (D.C. Cir. 2008); *In re a Cmty. Voice v. EPA.*, 878 F.3d 779, 786-87 (9th Cir. 2017). The D.C. Circuit held in *In re Core Commc'ns, Inc.* that an eight-year delay in articulating a valid rule was unreasonable when the FCC failed to promulgate rules governing intercarrier compensation for telecommunication traffic. 531 F.3d at 851. Though the court emphasized there was no *per se* rule for unreasonable delay, the FCC continued to "enforce rules for which it [had] articulated no legal basis" and ignored to implement interim rules. *Id.* at 855, 857. The Ninth Circuit held in *In re Cmty. Voice* that the EPA, under a "clear duty under the Toxic Substances Control Act," delay of eight years was unreasonable when the EPA failed to act upon a rulemaking petition regarding lead poisoning. 878 F.3d at 787.

In the present case, which should be analyzed under its unique circumstances, the EPA is in a much better position to combat the current climate crisis, as it has the expertise that both Congress and the courts lack. *See Air Line Pilots Ass'n, Int'l.*, 750 F.2d at 85. Due to the lack of a duty and *per se* rule for unreasonable delay, the time the EPA has spent thus far should not be used against them when they have spent years evaluating the proper course of action and much of their efforts have been bogged down in litigation. *See* R. at 11-12; *see also In re Am. Rivers & Idaho Rivers United*, 372 F.3d at 419; *Consumer Fed'n of Am*, 883 F.2d at 1078. In fact, since the years following *Massachusetts v. EPA*, the EPA has made several efforts to limit GHGs in other ways than under the NAAQS: (1) the EPA established GHG emissions limits for new passenger vehicles

and light trucks; (2) adoption of the so-called Tailoring Rule; and (3) the Clean Power Plan regulations. *See* R. at 7-8. However, *none* of these regulatory initiatives were to survive completely intact as they were struck down in litigation. *See id.* In 2017, the new EPA administration embarked on a series of regulatory rollback actions, including a relaxing of the GHG emissions standards for new motor vehicles, which led to the "The Safer Affordable Fuel-Efficient Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks" and new emissions standards for new and existing power plants. *See id.* Nevertheless, the Trump Administration passed Executive Order 13771, establishing its highest priority as the reduction of regulatory burdens on business and economic activity. *See id* at 13. Therefore, the record clearly shows that the EPA's efforts contradict Plaintiff's assertion that the EPA did nothing. *See id* at 7-8, 13.

Since there was no delay due to the lack of a strict deadline under a secondary NAAQS nor any clear duty to speak present in the statute, it cannot be said that ten years has undermined the regulatory scheme when the EPA has been *attempting* to implement a plan that would be both effective and viable. *See* § 7502(a)(2)(B); *see also Consumer Fed'n of Am.*, 883 F.2d at 1078. The ten-year delay is hardly "deplorable" given the magnitude of the climate crisis, which this court should deem as satisfying the "rule of reason" under *TRAC*, the efforts the EPA has undertaken in the interim, and the D.C. Circuit finding a delay of twelve years to be reasonable. *See Dayton Tire*, 671 F.3d at 1253; *see also In re Monroe Commc'ns Corp.,* 840 F.2d at 946. Further, although Plaintiff urges action now, implementing an ill-advised program would ignore the Executive Order and do little to nothing to ameliorate the situation, thus satisfying the fourth *TRAC* factor. *See* 671 F.3d at 1253; *see also Cutler*, 818 F.2d at 897-98. Furthermore, unlike *In re Cmty. Voice*, the language of the CAA does not impose a clear duty like the duty under the Toxic Substances Control Act. *See* § 7502(a)(2)(B); *see also In re Cmty. Voice*, 878 F.3d at 787. Thus, absent a strict deadline

and duty, there can be no unreasonable delay if Congress has not mandated the EPA to act within a certain time but rather granted them *wide latitude* to create a program that is "reasonable." *EME Homer City Generation,* 572 U.S. at 520; *Heckler,* 470 U.S. at 831–32; *Cobell*, 240 F.3d at 1096; *In re Barr Lab'ys,* 930 F.2d at 76.

V. THE DISTRICT COURT ERRED IN HOLDING THAT THE EPA HAS A NON-DISCRETIONARY DUTY TO DESIGNATE GHGs AS CRITERIA POLLUTANTS UNDER 42 U.S.C. § 7408 BASED ON THE ENDANGERMENT FINDING BECAUSE *NRDC V. TRAIN* IS DISTINGUISHABLE FROM THE CASE AT BAR.

The district court erred in holding that the EPA has a non-discretionary duty to designate GHGs as criteria pollutants under CAA § 108(a), 42 U.S.C. § 7408 based on the Endangerment Finding. This is a case of first impression for the Twelfth Circuit, and the Supreme Court has not ruled directly on this issue. Under 42 U.S.C. § 7408(a)(1), the EPA is only required to designate an air pollutant as a criteria pollutant once the air pollutant has met all of the elements outlined in the three-prong test in the statute: (1) the air pollutant has been determined to endanger public health or welfare, (2) the air pollutant has been determined to accumulate in the ambient air as a result of the numerous or diverse mobile or stationary sources, and (3) the air pollutant is a pollutant that the Administrator of the EPA ("Administrator") plans to issue quality criteria for under this statute. *See* 42 U.S.C. §§ 7408(a)(1)(A)-(C). The trial court misinterpreted 42 U.S.C. § 7408(a)(1) to impose a non-discretionary duty on the Administrator to designate air pollutants as criteria pollutants even when the last prong of the test has not been satisfied. *See* R. 13. In reaching its holding, the lower court incorrectly relied on *NRDC v. Train*, a forty-five-year-old case from the Second Circuit. *See* R. 13. However, the holding in *NRDC v. Train* predates the seminal decision of the Supreme Court in *Chevron*, predates the integral development in the rules for statutory construction, and predates a critical amendment to the CAA. In addition, much of the court's reasoning in *NRDC v. Train* is narrow in scope and is inapplicable to GHGs, including the

legislative history that the court cites to. Moreover, interpreting the Administrator to have a non-discretionary duty to designate GHGs as criteria pollutants under 42 U.S.C. § 7408(a)(1) based on the Endangerment Finding leads to absurd results, which is in direct opposition to legislative intent and public policy. *See Holy Trinity Church v. United States*, 143 U.S. 457, 460 (1892).

A. *NRDC v. Train* Predates Significant Developments in the Law and is Narrow in Scope, Making the Case at Bar Clearly Distinguishable from *NRDC v. Train*.

The case at bar is distinguishable from *NRDC v. Train* in several respects, which is narrow in scope and predates significant legal developments. In *NRDC v. Train*, the court held that the Administrator had a non-discretionary duty to list lead under the CAA § 108(a)(1) when CAA §§ 108(a)(1)(A)-(B) have been met. *See* 545 F.2d 320, 328 (2d. Cir. 1976). While the court admitted that the statute was ambiguous, it nonetheless dismissed the interpretation offered by the EPA that construed CAA § 108(a)(1)(C) to provide the Administrator with the discretion to list lead as a criteria pollutant. *See id.* at 324, 327-28. Instead, the court substituted their own interpretation of the statute for the agency's interpretation, citing the plain meaning rule, the statutory structure, and the legislative history as rationales for finding the duty to be non-discretionary. *See id.* at 325-27.

1. A decade after the holding in *NRDC v. Train*, the Supreme Court held that courts must defer to an agency's interpretation of the statute.

NRDC v. Train was decided almost a decade before the Supreme Court's seminal decision in *Chevron*, which held that when a statute is ambiguous, the courts must defer to the statutory interpretation of the agency which is ultimately responsible for administering that statute. *See* 467 U.S. at 843. The Court even noted that the agency's interpretation needs not be the best available interpretation of the statute—as long as the agency's interpretation was reasonable, the courts had to defer to it. *See id.* at 865. The Court explained that the normative reasons for deferring to the agency's interpretation included Congressional delegation, agency expertise, and political

accountability. *See id*. After *Chevron*, the D.C. Circuit explicitly noted that deference to the EPA was particularly appropriate in the case of a "statutory scheme as unwieldy and science-driven as the Clean Air Act." *See Appalachian Power Co. v. EPA*, 135 F.3d 791, 801-02 (D.C. Cir. 1998). Thus, this Court should not substitute its own judgment for the permissible interpretation of the agency that 42 U.S.C. § 7408(a)(1)(C) creates a discretionary duty to list GHGs as criteria pollutants under 42 U.S.C. § 7408(a)(1).

2. The statutory language in *NRDC v. Train* was interpreted in the context of lead, which creates different implications in the context of GHGs.

In addition, the court's explanations in *NRDC v. Train* for construing "shall" are inapplicable for the current case. In *NRDC v. Train*, the court applied the plain meaning rule to argue that the term "shall" in the statute should be construed as mandatory because otherwise "shall" would be rendered as mere surplusage. *See* 545 F.2d at 325. However, the court in *NRDC v. Train* considered the word "shall" in the context of "shall publish" because lead was one of the pollutants already recognized during the enactment of the act as meeting all of the conditions for a criteria pollutant under CAA § 108. *See id*. On the other hand, arguing that GHGs should be listed as criteria pollutants under 42 U.S.C. § 7408(a)(1) invokes different statutory language—instead of "shall publish," the affected language would become "shall from time to time thereafter revise." *See* 42 U.S.C. § 7408(a)(1). The word "shall" in this new context of GHGs does not need to be inherently constituted as mandatory. The ambiguity of the word "shall" has been well documented and recognized by the courts who advise that "shall" can convey an element of discretion and can even have the same meaning as "may." *See Guierrez de Martinez v. Lamagno,* 515 U.S. 417, 424 n.9 (1995). Because of the ambiguous nature of the word "shall," even the Committee on Rules of Practice and Procedure "recognized 'shall' as an 'inherently ambiguous word[]' and recommended restyling the Federal Rules of Civil Procedure to 'replace "shall" with

"must," "may," or "should" . . . '" in 2006. Whitney B. Arp, *The IRS's Failure to Comply: Does "Shall" Still Mean "Shall"?*, 32 GA. ST. U.L. REV. 673, 695 (2016). Thus, the reasoning advanced in *NRDC v. Train* regarding the word "shall" is not only too narrow to be applicable in the context of GHGs but is outdated given the decades-long developments in the rules of statutory construction and in light of the *Chevron* deference.

3. The statute has been amended significantly since the holding in *NRDC v. Train*, making the structure arguments in *NRDC v. Train* moot.

Furthermore, the structure of the statute has changed dramatically since the holding in *NRDC v. Train*. In its opinion, the court cites the structure of the 1970's CAA to highlight that the duty must be non-discretionary because otherwise, the Administrator would be able to easily avoid the rigid deadlines for attaining the air quality standards outlined in CAA §§ 108(a)(2), 109, and 110. *See Train*, 545 F.2 at 325. However, as part of the 1977 Amendments, the legislation added § 122, later codified in 42 U.S.C. § 7422, to guide the EPA on the "Listing of Certain Unregulated Pollutants." *See* 42 U.S.C. § 7422. This statutory addition instructs the EPA to conduct an endangerment finding for a list of certain unregulated pollutants but specifically notes that the authority of the Administrator to revise the list of criteria pollutants is not affected. *See* 42 U.S.C. §§ 7422(a)-(b). The statutory addition then proceeds to state that even if the endangerment finding is affirmative for any of the proposed air pollutants, the Administrator still reserves the discretion on the manner of regulating these pollutants (whether it be via § 7408(a)(1), § 7411(b)(1)(A), or some other combination of regulatory action). *See* 42 U.S.C. § 7422(a). Thus, the added section not only validates that the Administrator has the discretionary duty to revise the list of criteria pollutants but that *there is no non-discretionary duty* to regulate GHGs under the NAAQS. Therefore, the addition of 42 U.S.C. § 7422 moots the structure arguments proposed in *NRDC v. Train*.

4. The portions of the legislative history cited in *NRDC v. Train* are specific to lead and are far too narrow to be applicable for GHGs.

Lastly, in *NRDC v. Train* the court points twice to the legislative history to support their interpretation of finding non-discretional duty in the statutory language. *See Train*, 545 F.2d at 325-27. In *NRDC v. Train*, the legislative history explicitly mentions lead as a pollutant meant to be regulated under NAAQS. *See* S. Rep. No. 91-1196, at 11 (1970). However, the legislative history is void of anything that would even remotely indicate Congressional intent for GHGs to be the subject of a regulation under the NAAQS. Also, further examination of the legislative history that the court cites in *NRDC v. Train* shows permissive intent when it states that "[i]f the Secretary subsequently should find that there are other pollution agents for which the ambient air quality standards procedure is appropriate, he *could* list those agents." *See* S. Rep. No. 91-1196, at 436-39 (1970) (emphasis added). Thus, the legislative history that the court mentions is not only inapplicable in the current context but fails to indicate Congressional intent to include GHGs as criteria pollutants.

B. Misinterpreting the EPA to have a Non-Discretionary Duty to Designate GHGs as Criteria Pollutant Under CAA § 108 Leads to Absurd Results That Are Contrary to Legislative Intent and Public Policy.

Misinterpreting the Administrator to have a non-discretionary duty to designate GHGs as criteria pollutants under 42 U.S.C. § 7408(a)(1) based on the Endangerment Finding would lead to absurd results, which is in direct opposition to legislative intent and public policy. *See Holy Trinity Church*, 143 U.S. at 460. A non-discretionary duty to list GHGs as criteria pollutants would trigger regulation under NAAQS. *See* 42 U.S.C. §§ 7408-09. Once NAAQS is triggered, the states have three years to propose a SIP to the EPA that outlines how that state is planning on curbing the concentration of the criteria pollutant to satisfy the approved levels under NAAQS. *See* 42 U.S.C. § 7410. However, it would be impossible to attain the standards set under NAAQS because

it would require an international effort to reduce the concentration of GHGs to acceptable levels under NAAQS. *See Strengths and Weakness of Regulating Greenhouse Case Emissions Using Existing Clean Air Act Authorities: Hearing Before Subcommittee on Energy and Air Quality of the Committee on Energy and Commerce*, 110th Cong. 84 (2008). Courts favor statutory interpretations that avoid absurdity because courts do not believe that Congress would intend to produce absurd results. *See United States. v. Turkette*, 452 U.S. 576, 580 (1981) ("absurd results are to be avoided" when construing the meaning of a statute). Because interpreting 42 U.S.C. § 7408(a) to result in a non-discretionary duty for the Administrator to designate a pollutant as a criteria pollutant under 42 U.S.C. §§ 7408(a)(1)(B)-(C) would lead to absurd results, the statute must be construed in a manner that finds the duty to be discretionary.

CONCLUSION AND PRAYER

For the foregoing reasons, the EPA respectfully prays that this Court affirms the district court's judgment that the Endangerment Finding is contrary to law with respect to public health, and rightfully holds that the district court lacked jurisdiction over Plaintiff's unreasonable delay claim under 42 U.S.C. §§ 7604(a), 7607(b)(1). Further, the EPA respectfully requests that this Court reverses the district court's erroneous holding that the Endangerment Finding is valid with respect to public welfare, that the EPA unreasonably delayed responding to the petition for designation of GHGs as criteria pollutants and unreasonably delayed designating GHGs as criteria pollutants, and that the EPA has a non-discretionary duty to designate GHGs as criteria pollutants.