Team No. 7

IN THE UNITED STATES DISTRICT COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

C.A. No. 20-000123

CLIMATE HEALTH AND WELFARE NOW,

Plaintiff-Appellee-Cross Appellant,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Defendant-Appellant,

-and-

COAL, OIL, AND GAS ASSOCIATION,

Intervenor-Defendant-Appellant-Cross Appellee.

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

BRIEF OF CLIMATE HEALTH AND WELFARE NOW
Plaintiff-Appellee-Cross Appellant

Oral Argument Requested

TABLE OF CONTENTS

STATEMENT OF ISSUES

I. Whether the District Court had jurisdiction over CHAWN's unreasonable delay claim under CAA § 304(a) when the rule sought would be one of nationwide applicability subject to the venue and jurisdictional constraints of CAA § 307(b)(1)? (Raised *sua sponte* by this Court)

II. Whether the 2009 Endangerment finding is valid with respect to an endangerment of public health?

III. Whether the 2009 Endangerment Finding is valid with respect to an endangerment of public welfare?

IV. Whether the 2009 Endangerment Finding triggered EPA's non-discretionary duty to designate GHGs as a criteria pollutant under CAA § 108 when it determined GHGs are reasonably anticipated to endanger the public health and welfare?

V. Does EPA's ten-year delay in carrying out a non-discretionary duty constitute an unreasonable delay?

STATEMENT OF JURISDICTION

Climate Health and Welfare Now ("CHAWN"); Coal, Oil, and Gas Association ("COGA"); and the United States Environmental Protection Agency ("EPA") all filed timely appeals from a final opinion and order issued by the District Court for the District of New Union. R. at 1. The United States Court of Appeals for the Twelfth Circuit accordingly has jurisdiction over this case pursuant to 28 U.S.C. § 1291 (2018) as this is an appeal of the final order of a United States District Court. This Court also has subject matter jurisdiction pursuant to 28 U.S.C § 1331 (2018), because this claim arises under the Clean Air Act ("CAA"). 42 U.S.C. § 7604 (2018).

STATEMENT OF THE CASE

I. Statement of Facts

In 1990, a coalition of environmental organizations petitioned EPA to make a finding that greenhouse gas ("GHG") emissions from automobiles pose a threat to human health and welfare, which would trigger regulation under CAA § 202. 42 U.S.C. § 7521 (2018). R. at 5. Although the petition did not seek regulation under CAA § 108, 42 U.S.C. § 7408 (2018), and endangerment finding under § 202 is the same as the finding required to list a criteria pollutant under §108. R. at 5. In 2003, EPA denied the petition stating that GHGs do not fit into the definition of "air pollution" under CAA. R. at 5. EPA's denial resulted in litigation against it, *Massachusetts v. E.P.A.*, 549 U.S. 497 (2007), in which the Supreme Court ruled against EPA and directed it to make a finding on whether GHG pose an endangerment to human health and welfare. R. at 5. On December 15, 2009, EPA issued the Endangerment Finding demonstrating that the emissions of GHG do in fact present an endangerment to public health and welfare. R. at 5. GHGs were defined by EPA as a of pollutants including carbon dioxide, nitrous oxide, and methane. R. at 5.

Subsequently, EPA took regulatory actions against GHG under § 202, but failed to do so under § 108. R. at 6. A group of environmental organizations, including CHAWN, once again petitioned EPA to act against GHG, this time in the context of § 108. R. at 4. After ten years, EPA has taken no action on the petition or on regulating GHG under § 108. R. at 4. In 2017, a new presidential administration set regulatory rollbacks as a priority; however, the Endangerment Finding still remains intact. R. at 7.

II. Procedural History

On April 1, 2019 CHAWN served EPA notice of its intention to sue pursuant to the citizen suit requirements of CAA 42 U.S.C. § 7604 ("§ 304"). R. at 4. EPA took no action in response to CHAWN's notice. R. at 4. After waiting the requisite 60-day notice period, CHAWN commenced

suit against EPA under CAA on October 15, 2019 in the United States District Court for the District of New Union. R. at 4. CHAWN alleges that EPA unreasonably delayed designating GHGs as a criteria pollutant subject to NAAQS under §108 which constitutes a failure to perform its non-discretionary duty. R. at 2, 4. CHAWN seeks an order directing EPA to designate GHG as a criteria pollutant under § 108. R. at 4.

On November 30, 2019, COGA intervened pursuant to Fed. R. Civ. P. 24(a) contending that CHAWN's requested relief would destroy the market for its products. R. at 4. COGA is seeking a declaratory judgment that the Endangerment Finding is unsupported by the record and contrary to law. R. at 4. Both CHAWN and COGA moved for summary judgment. R. at 12–13.

On August 15, 2020, the lower court granted summary judgment in part to CHAWN, finding that the Endangerment Finding is valid with respect to public welfare, EPA unreasonably delayed designating GHG as a criteria pollutant, and EPA has a non-discretionary duty to designate GHG as a criteria pollutant. R. at 12–13. The lower court granted summary judgment in part to COGA, finding that the Endangerment Finding is contrary to law with regard to its findings on public health and, thus, that portion of the finding was vacated. R. at 13. The lower court ordered EPA to publish public notice of its proposed rule designating GHGs as a criteria pollutant within 90 days of the order. R. at 12–13. The lower court erroneously granted summary judgment to COGA with regard to the Endangerment Finding being invalid in part. R. at 13.

SUMMARY OF THE ARGUMENT

First, the district court had jurisdiction to review CHAWN's claim for unreasonable delay under § 309(a) despite the fact that the rule sought is one of nationwide applicability subject to § 307(b)(1). Section 307(b)(1) serves a dual function in that it operates as both a jurisdictional and venue provision, granting jurisdiction the United States Court of Appeals as a whole and further

specifying the venue in which specific types of claims should be brought. The language granting the D.C. Circuit with exclusive review of claims for unreasonable delay with national applicability goes to § 307(b)(1)'s venue function, not jurisdictional. Accordingly, EPA's failure to object to venue constitutes a waiver and, further, has no bearing on the district court's jurisdiction over the claim.

Second, the 2009 Endangerment Finding is valid with respect to the endangerment of public health and entitled deference because it supports a determination that GHG effects have both direct and indirect impacts on public health. GHGs have a direct impact on public health , and the indirect impacts should be considered in analyzing GHG emissions' impact on public health as well. EPA's reasonable interpretation of the statute, reflected in the 2009 Endangerment Finding, should have deference because § 108 is ambiguous in defining public health and public welfare.

Third, the 2009 Endangerment Finding is valid with respect to the endangerment to public welfare because EPA properly interpreted § 108 to apply only the latest scientific knowledge, not regulatory policy judgments, to determine whether GHGs may reasonably be anticipated to endanger public welfare. EPA made a rational decision in basing the 2009 Endangerment Finding off of latest scientific knowledge. Despite scientific uncertainty, referring to latest scientific knowledge furthers the CAA's precautionary and preventive purpose.

Fourth, the validity of the 2009 Endangerment Finding triggered EPA's non-discretionary duty to designate GHGs as a criteria pollutant under § 108. Once a pollutant is found to be (1) reasonably anticipated to endanger public health and welfare and (2) the result of numerous and diverse sources, EPA is required to designate it as a criteria pollutant. The unreasonableness of

its failure to do so is further highlighted by the fact that EPA has already regulated GHGs under CAA § 202 based upon the same scientific data, the 2009 Endangerment Finding.

Finally, EPA's ten-year delay in carrying out its non-discretionary duty to list GHGs as a criteria pollutant under §108(a) is unreasonable. EPA's delay fails all six factors courts should look to in determining whether such delays are unreasonable, including the "rule of reason" under which courts have regularly found delays of eight to ten years unreasonable. Further, § 108(a)'s lack of a date certain deadline does not grant EPA unfettered discretion regarding when it should list GHGs as a criteria pollutant. Accordingly, this Court should find EPA's delay in carrying out this critical, non-discretionary duty was unreasonable.

STANDARD OF REVIEW

Courts review lower courts' denial or grant of summary judgment de novo. *Groves v. Cmty. Workers of Am.*, 815 F.3d 177, 180–81 (4th Cir. 2015). In reviewing the district court's determinations, this Court should inquire whether, when viewing the undisputed facts in the light most favorable to the non-moving party, the moving party is entitled to judgment as a matter of law. Id.; Fed. R. Civ. P. 56(a).

ARGUMENT

I. The District Court for the District of New Union had jurisdiction over CHAWN's unreasonable delay claim as it is a United States District Court within the circuit in which such action would be reviewable under CAA § 307(b) and the determination as to *which* Circuit the claim should have been filed is a question of venue, which has no bearing on jurisdiction.

CAA § 304(a) vests the district courts of the United States with the power to "compel agency action which is unreasonably delayed." 42 U.S.C. § 7604(a) (2018). Under § 304, however, actions or rules sought that have nationwide applicability may only be filed in the district courts within the circuit in which the action would be reviewable under § 307(b)(1)'s judicial review

provision. *Id*.; 42 U.S.C § 7607(b)(1) (2018). While the language of § 307(b)(1) seemingly vests the United States Court of Appeals for the District of Columbia with sole jurisdiction over such nationally applicable actions, the United States Supreme Court clarified in *Harrison v. PPG Industries, Inc.* that the language of § 307(b)(1) is a "conferral of jurisdiction upon the court of appeals" as a whole. *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 593 (U.S. 1980).

In subsequent decisions, other have regularly determined that the language of § 307(b)(1) makes it solely a venue provision rather than a jurisdictional provision. *See Tex. Mun. Power Agency v. Envtl. Protection Agency*, 89 F. 3d 858, 862 (D.C. 1996); *State of New York v. Envtl. Protection Agency*, 133 F. 3d 987, 990 (7th Cir. 1998). However, the D.C. Circuit in *Dalton Trucking v. EPA*, clarified this issue by explaining that under § 307(b)(1), "subject matter jurisdiction and venue are not coterminous," meaning the provision serves "dual functions" in that it addresses both jurisdiction *and* venue. *Dalton Trucking, Inc. v. Envtl. Protection Agency*, 808 F. 3d 875, 879 (D.C. Cir. 2015). While challenges to a court's subject matter jurisdiction may be raised *sua sponte* or at any time during proceedings, venue challenges are waived if not asserted prior to filing a responsive pleading. Fed. R. Civ. P. 12(b).

The district court had jurisdiction over CHAWN's unreasonable delay claim pursuant to § 304(a). The *jurisdictional* function of § 307(b)(1) confers jurisdiction upon the United States Court of Appeals as a whole meaning, when read in conjunction with § 304(a), the district court had jurisdiction to hear the CHAWN's unreasonable delay claim. The language in § 307(b)(1), which specifies that such claims can only be filed in the D.C. Circuit, implicates the *venue* function of the section. Whether or not the district court was the proper *venue* for the claim has no bearing on jurisdiction and, further, is not at issue as it was waived by EPA's failure to object. R. at 12.

A. Section 307(b)(1) is both a jurisdictional and venue provision

The United States Supreme Court ("Supreme Court") made clear in the *Harrison* decision that language of § 301(b)(1) is a "conferral of jurisdiction upon the court of appeals." *Harrison*, 446 U.S. at 593. In subsequent decisions, however, many courts have concluded the language of § 307(b)(1) makes it purely a venue provision. *See Tex. Mun. Power Agency*, 89 F. 3d at 867 (finding "[section] 307(b)(1) is framed more as a venue provision."); *New York*, 133 F. 3d at 990 (explaining "[p]rovisions specifying where a suit shall be filed. . . are generally considered to be specifying venue rather than jurisdiction."); *Clean Water Action Council of Northeastern Wisconsin, Inc. v. Envtl. Protection Agency*, 765 F. 3d 749, 751 (7th Cir. 2014) (holding "the venue and filing provisions of § 7607(b) are not jurisdictional). The D.C. Circuit seems to rectify the differing views regarding the operative language of § 301(b)(1) in the *Dalton Trucking*, where the court explains this provision serves "dual functions" in that it addresses both jurisdiction *and* venue, as the two are not coterminous. *Dalton Trucking*, 808 F. 3d at 879.

The court in *Dalton Trucking* acknowledges the fact that decisions regarding the language of § 301(b)(1) "have not always distinguished between [its] dual functions," and, further, decisions where § 301(b)(1) is determined to be a jurisdictional provision are often at odds with decisions that find it to be a venue provision. *Id*. In explaining the dual function of the provision, the *Dalton Trucking* court doubles-down on the jurisdictional determination made by the Supreme Court in *Harrison*: "Lest there be any confusion going forward, we reiterate what the Supreme Court made clear thirty-five years ago: Section 307(b)(1) is a conferral of jurisdiction upon the court of appeals." *Id*. (quoting *Harrison*, 446 U.S. 578 at 593) (internal quotation marks omitted). The court goes on to explain that § 301(b)(1) similarly operates as a venue provision, as the language discussing *where* a case should be filed is determinative of venue, not jurisdiction. *Id*.

While the lower court was incorrect in its determination that § 307(b)(1) is solely a venue requirement, R. at 12., the "dual function" of the provision, as explained by the *Dalton Trucking* court, nonetheless establishes that the district court had jurisdiction over CHAWN's unreasonable delay claim.

B. The district court had jurisdiction over CHAWN's unreasonable delay claim

In reviewing claims to compel agency action for unreasonable delay which have nationwide applicability under CAA, both § 304(a) and § 307(b)(1) are implicated. 42 U.S.C. § 7604(a); 42 U.S.C. § 7607(b)(1). Section 304(a) provides that "an action to compel agency action referred [which has national applicability] . . .which is unreasonably delayed may only be filed in a . . .District Court within the circuit in which such action would be reviewable under [§ 307(b)(1)] of this title." As discussed above, § 307(b)(1) sets forth both venue and jurisdictional constraints on the claims brought pursuant to this provision.

In *Harrison*, the Supreme Court was tasked with determining the meaning of the term "any other final action" contained in § 307(b)(1). *Harrison*, 446 U.S. 578 at 586. While that determination is not dispositive, the Court explained that it is Congress, not the Court, who is tasked with determining the "ideal forum" under this provision. *Id*. at 593. However, the Court did task itself with determining Congress' intent in vesting the court of appeals with jurisdiction under § 301(b)(1). *Id*. In that regard, the Court explained the language of § 301(b)(1) "clearly provides" the court of appeals has jurisdiction over claims brought under this provision. *Id*.

In determining whether the lower court had jurisdiction over CHAWN's unreasonable delay claim, this Court should read § 304(a) in conjunction with § 307(b)(1). Because § 307(b)(1) claims can be filed in and are properly before all circuits within the United States Court of Appeals, any district court would have jurisdiction to hear such claims pursuant to the language of § 304(a)

as all district courts fall within a circuit in which such actions are reviewable under § 307(b)(1). Accordingly, the United States District Court for the District of New Union had jurisdiction to hear CHAWN's unreasonable delay claim under § 304(a).

C. Determining *which* circuit CHAWN's claim should have been filed in is a matter of venue and was waived by EPA's failure to assert it.

While § 307(b)(1)'s conferral of jurisdiction to all courts of appeal seems quite broad, its jurisdictional function ends here. *Dalton Trucking*, 808 F. 3d at 879. As the Seventh Circuit explained in *Clean Water Action Council*, the language in § 307(b)(1) regarding where a suit should be filed operates as the "claim-processing" or venue function of § 307(b)(1), rather than its jurisdictional function. *Clean Water Action Council*, 765 F. 3d at 751. The court explains that EPA's contention that this language serves a jurisdictional function disregards the Supreme Court's well-established precedent addressing the differences between jurisdictional and venue rules. *Id*. The court further explained that in determining whether such language represents a jurisdictional or venue provision, the Supreme Court requires a "clear statement of clear indication from Congress before a statute prescribing a precondition to bringing suit will be construed as jurisdictional." Id. at 752 (quoting *Miller v. FDIC*, 738 F. 3d 836, 844 (7th Cir. 2013) (internal quotations marks omitted). Finally, the *Clean Water Action Council* court explained that Congress could change the venue language of § 307(b)(1) and put it in jurisdictional terms, but it has not chosen to do so. *Id*. Because the claim-processing language of § 307(b)(1) is not framed in jurisdictional terms and Congress has not taken action to change it, the court found the language regarding which court a claim should be filed in to be a venue provision. *Id*.

The Supreme Court's determination in *Harrison* that § 307(b)(1) confers jurisdiction upon the court of appeals as a whole was made nearly 40 years ago, yet Congress has since made no change to its language nor any "clear indication" that such filing conditions are jurisdictional. The

language the Court is looking to in its *sua sponte* review of § 307(b)(1) is the same language found to operate as a venue provision by the court in *Clean Water Action Council*—language that specifies *where* a particular case should be filed. R. at 2, 12. The language at issue, specifying § 304(a) claims of national applicability should be brought in the D.C. Circuit, serves the venue function of § 307(b)(1)'s "dual functions." *Dalton Trucking*, 808 F. 3d at 879;42 U.S.C. § 7604(a); 42 U.S.C. 7607(b)(1). This language offers a choice between circuits, which is an "unequivocal characterization" of a venue provision. *Texas Municipal Power Agency*, 89 F. 3d at 867. EPA's failure to object to venue prior constitutes a waiver and, further, has no bearing on a courts' jurisdiction to review a particular proceeding. Fed. R. Civ. P. 12(b). Accordingly, this Court should find the district court had jurisdiction to review CHAWN's unreasonable delay claim.

II. The 2009 Endangerment Finding is valid with respect to the endangerment of public health and is entitled deference.

The Supreme Court in *Massachusetts v. EPA* held that GHGs are pollutants under the CAA and subject to regulation. *Massachusetts v. EPA*, 549 U.S. 497, 532 (2007). The Court demanded EPA to determine whether GHGs present an endangerment to public health or welfare as such a finding would require regulation under the CAA. R. at 6. After compiling a comprehensive scientific record, EPA made the 2009 Endangerment Finding based off the latest scientific knowledge. Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496, 66,497 (Dec. 15, 2009) (to be codified at 40 C.F.R. Ch. I). The 2009 Endangerment Finding concluded that GHGs may "reasonably be anticipated to endanger public health or welfare." CAA § 202(a)(1); Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74. Fed. Reg. at 66,497–99. This language is identical to that of the endangerment provision for § 108, at issue in this case.

The 2009 Endangerment Finding found GHG "pollution may reasonably be anticipated to endanger the public health . . . of current and future generations." *Id.* at 66,523. Further, EPA found the six criteria pollutants, which make up GHGs, under analysis in the 2009 Endangerment Finding, "constitute the root cause of human-induced climate change and the resulting impacts on public health." *Id.* at 66.516. In considering the consequential impact these air pollutants have on public health, EPA's finding that these pollutants pose both direct and indirect endangerments to public health was valid.

The Endangerment Finding supports a determination that GHGs have both direct and indirect impacts on public health. Both direct and indirect impacts should be considered in finding a risk posed to public health by GHG emissions. This Court should defer to EPA's interpretation of § 108 to include climate impacts in effects on public health under a *Chevron* analysis, which gives controlling deference to an agency's reasonable interpretation of an ambiguous statute. *Chevron, USA, Inc., v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

A. The 2009 Endangerment Finding is valid with respect to public health as it supports a finding that GHGs have both a direct and indirect impact on public health.

In the 2009 Endangerment Finding, the Administrator determined that "[GHGs] may reasonably be anticipated to endanger the public health and welfare of current and future generations." Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. at 66,523. Additionally, the Administrator found GHG air pollution is "reasonably anticipated to endanger public health, for both current and future generations." *Id.* at 66,524. These anticipated impacts must be included in the Endangerment Finding as an endangerment to public health under § 108(a) because "the Administrator is not limited to only considering whether there are any direct health effects . . . association with exposure

to [GHGs]." *Id.* This provision makes it clear the Administrator can and should consider the potential of both direct and indirect impacts GHGs pose to public health.

1. The 2009 Endangerment Finding determined GHGs have a direct impact on public health.

The 2009 Endangerment Finding explains the Administrator's consideration of public health effects is not limited to the respiratory or toxic effects associated with GHGs. Instead, the Administrator utilizes four categories of impacts to determine whether GHGs pose a threat to public health: (1) direct temperature effects, (2) air quality effects, (3) changes in vector-borne diseases, and (4) changes in weather events. *Id.* at 66,524. Direct temperature effects and changes in weather events pose a direct threat to public health by increasing the risk of "morbidity and mortality," which "can and should be considered" under § 108(a)'s endangerment provision. *Id.*

GHG air pollution causes temperatures to change dramatically by increasing the frequency of unusually hot days and heat waves. *Id.* With increased and continued GHG air emissions, heat waves will intensify, causing an increase in temperatures along with an increase in morbidity and mortality rates. *Id.* These temperature increases will have a direct impact on those who are most vulnerable to such changes. *Id.* at 66,525. Increases in temperatures are also expected to intensify ozone pollution, creating "risk [of] respiratory illnesses and premature death." *Id.*

The validity that temperature effects and changes in weather events pose a direct danger to public health is shown through multiple health reports. In its third assessment report for climate change and human health, the Intergovernmental Panel on Climate Change focuses on "the connection between weather and health impacts" as "sufficiently direct." Kirk R. Smith et al., *Human health: impacts, adaptation, and co-benefits, in* CLIMATE CHANGE 2014: IMPACTS, ADAPTATION, AND VULNERABILITY, 709, 720 (C.B. Field et. al, eds. 2014). Heat is the number one cause of weather-related deaths in the United States, and "extreme heat events remain a cause of

preventable death nationwide." George Luber et. al., *Human Health, in* CLIMATE CHANGE IMPACTS IN THE UNITED STATES: THE THIRD NATIONAL CLIMATE ASSESSMENT, 220, 224 (J.M. Melillo et. al., eds., 2014). In addition, "[d]eaths related to natural heat exposure represent a continuing public health concern." Ambarish Vaidyanathan et. al., *Heat Related Deaths—United States, 2004–2018*, 69 MMWR 729, 732 (2020). Deaths resulting from "cardiovascular [], respiratory [], and cerebrovascular disease" also will increase due to extreme heat events. Luber et. al., *supra*, at 224.

2. Indirect impacts should be considered in analyzing GHG emissions' impact on public health.

Public health is of utmost importance in determining the risks associated with GHG pollution and climate change, as "[t]he Administrator is not limited to only considering whether there are any direct health effects such as respiratory or toxic effects associated with exposure to [GHGs]." Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. at 66,524. Accordingly, both direct and indirect impacts of GHG pollution should be considered in determining whether GHGs endanger public health.

In applying the effects of GHGs on air quality and the public health in the 2009 Endangerment Finding, the Administrator properly considered effects beyond those which have a direct impact on human health. *Id.* at 66,525. All four categories of impacts—direct temperature effects, air quality effects, changes in vector-borne diseases, and changes in weather events—pose indirect dangers to public health. *Id.* at 66,524. An increase in temperatures attributed to GHG pollution affects climate-sensitive diseases and aeroallergens. *Id.* at 66,525. Indirect effects considered include the significant adverse impacts the tropospheric ozone has on "crop yields, pasture and forest growth, and species composition." *Id.*

The importance of considering indirect effects on public health from GHG air pollutions is validated in multiple health sources. An increase in temperatures attributed to GHG pollution

affects climate-sensitive diseases and aeroallergens. Luber et. al., *supra*, at 228. Climate influences "the distribution of diseases borne by vectors." *Id.* at 226. Food-borne diseases and zoonotic disease carriers (for example, a tick carrying Lyme disease) thrive amidst rising temperatures by increasing "the pathogens' survival, persistence," and habitat range under "changing climate and environmental conditions." *Id.* There are also "distinct seasonal patterns in infection that can be related indirectly to temperature." Smith et al., *supra*, at 726.

Regarding extreme weather events, floods pose a risk to public health by elevated waterborne diseases and water intrusion. Luber et. al., *supra*, at 228. Those living in damp indoor environments experience both upper and lower respiratory tract symptoms and infections. *Id.* at 225. Due to changes in rainfall and severe weather events, "crop yields are predicted to decline." *Id.* at 228. Change in climate "is expected to threaten food production and certain aspects of food quality" globally. *Id.* Certain Americans will suffer from a shortage of key food in particular diets, an increase in price of food, a decline in the nutritional value of food, and an increase in the use of herbicides and pesticides. *Id.* at 224. This exposure will directly harm farmers, farmworkers, and consumers due to toxicity of such substances. *Id.*

B. The district court erred in granting controlling deference to congressional intent because EPA's prior interpretation, reflected in the Endangerment Finding, should be given controlling deference.

The endangerment provision in CAA § 108(a) is ambiguous as to the term "public health" because Congress "did not define . . . 'public health.'" Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. at 66,527. Accordingly, this Court should defer to EPA's interpretation of "public health" in the 2009 Endangerment Finding, which determined the scope of impacts considered with regards to threats posed to public health. *Id.* The scope of consideration encompasses "the effects on peoples' health

from changes to climate," which "can and should be included in EPA's evaluation of whether the air pollution at issue endangers public health." *Id.*

Under *Chevron*, this Court should give controlling deference to EPA's interpretation that § 108(a) includes climate impacts in finding an endangerment on public health. The Supreme Court in *Chevron* created a two-step process for courts to follow in questions on statutory interpretation. *Chevron*, 467 U.S. at 842–43. Courts must first determine whether or not the statute at issue is ambiguous. *Id.* If the statute is unambiguous, courts will defer to the plain language of the statute as it follows the "unambiguously expressed intent of Congress." *Id.* at 843. If courts find the statute ambiguous, courts must determine whether the agency's statutory interpretation is reasonable. *Id.* If reasonable, courts will defer to the agency's interpretation. *Id.*

1. The meaning of "public health" under CAA is ambiguous.

Section 108 is ambiguous regarding the meaning of public health because the text of CAA does not define either "public health" or "public welfare." Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. at 66,527. The lower court reasoned that since Congress used the term "climate" in the definition of "effects on welfare" in § 302(h), climate impacts of air pollution are solely a matter of public welfare, not public health. R. at 10. However, this reasoning proves the statute ambiguous. Even though climate clearly applies to effects on welfare, CAA never addresses if and how climate applies to effects on health. Given this ambiguity, this Court must move to step two of *Chevron* and give deference to EPA's reasonable interpretation that climate impacts apply to an endangerment to public health under CAA. *Chevron*, 467 U.S. at 843.

2. This Court should defer to EPA because EPA's interpretation that the 2009 Endangerment Finding is valid to public health is reasonable.

Although the term "public health" is undefined in CAA, EPA's interpretation that "air pollution [that] causes sickness or death [] should be considered when evaluating whether the air pollution endangers public health," is reasonable. Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. at 66,527. Rather than focusing on the chain of causation between the pollutant and the effect, EPA's interpretation of "public health" encompasses the larger, aggregate effect on public health. *Id.*

CAA leaves "public welfare" undefined. Despite public welfare and public health as clearly discreet inquiries, leaving both terms undefined contributes to CAA's ambiguity. *Id.* Nothing in the statute or record provide an obvious indication as to "whether Congress intended there to be a clear boundary between the term terms," or whether the two terms should overlap in some instances. *Id.* (*explaining* "some impacts could be considered both a public health and a public welfare impact"). EPA's consideration of the adverse health effects caused by GHG pollution is reasonable in evaluating whether specific air pollutants pose a danger to public health. *Id.*

CAA's definition of "effects on welfare" similarly lacks clarity, as the definition does not indicate whether health impacts caused by climate change are included in "effects on welfare." *Id.* at 66,528. Section 302(h)'s inclusion of "effects on . . . personal comfort and well-being" in "effects on welfare" differentiates public welfare from public health. *Id.* The term "well-being" broadly applies to "personal, emotion, and mental status." *Id.* This indicates that effects on public welfare should mean those "effects on people other than health effects." *Id.* This language seems to draw a distinct line between public health and public welfare under § 108(a), which requires that they be defined to avoid ambiguities. *Id.*

Due to CAA's ambiguity in defining "effects on welfare," but not "public health" or "public welfare," EPA reasonably interprets that effects of GHG air pollution emissions on climate

change impact public health. EPA and COGA's suggestion to take a narrower approach in interpreting public health would be contrary to the common-sense definition of public health. *Id.* Climate change effects caused by GHGs on public health is relevant in respect to the 2009 Endangerment Finding because EPA's interpretation of § 108 is reasonable.

III. The 2009 Endangerment Finding is valid with respect to the endangerment to public welfare because EPA properly interpreted CAA § 108 and the district court properly deferred to EPA's determination that GHGs endanger public welfare.

Following the Supreme Court's determination in *Massachusetts* that GHGs are an "air pollutant" subject to regulation under the CAA, EPA has since determined GHGs may "reasonably be anticipated to endanger public health or welfare" in its 2009 Endangerment Finding. CAA § 108(a)(1). *Coalition* used the findings in *Massachusetts* to show EPA has an obligation to regulate GHGs under the endangerment provision of § 202 which regulates motor-vehicle emissions. *Coal. Responsible Regulation, Inc. v. EPA*, 684 F.3d 102, 117 (D.C. Cir. 2012) *judgment affirmed in part, reversed in part by Utility Air Regulatory Group v. EPA,* 573 U.S. 302 (2014).

As explained by the court in *Coalition*, when assessing whether pollutants are "reasonably anticipated to endanger," the agency need only look to the latest scientific knowledge, not regulatory policy impacts. *Coalition*, 684 F.3d at 121 In assessing whether the agency's scientific determinations are valid, courts should affirm an agency's findings so long as they are a rational determination based upon the record before the agency. *Id*. at 120. This standard is highly deferential to the agency. *Id*.

The determinations made in *Coalition* were based upon the same 2009 Endangerment Finding at issue before this Court. Accordingly, the lower court's application of *Coalition*'s reasoning in rejecting COGA's claims was appropriate as the D.C. Circuit rejected the same challenges to the validity of the 2009 Endangerment Finding with respect to public welfare in

Coalition. R. at 9. Further, under the highly deferential standard employed in *Coalition*, EPA's rational determination that GHGs are reasonably anticipated to endanger the public welfare, which was made based upon the latest scientific knowledge before the agency, should be affirmed.

A. The statutory term "reasonably anticipated to endanger" only applies to a scientific analysis and consideration on whether air pollution emissions impose a finding of endangerment on public welfare.

After the Supreme Court's decision in *Massachusetts*, EPA complied with the Court's mandate to begin assessing the harmful effects of GHGs by compiling a substantial scientific record upon which they made the 2009 Endangerment Finding. Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. at 66,497. Based on the scientific record, EPA determined that GHGs in the atmosphere "may reasonably be anticipated to endanger" both the public health and public welfare. *Id.* The 2009 Endangerment Finding found that GHG emissions "contribute to the total greenhouse gas air pollution, and thus to the climate change problem, which is reasonably anticipated to endanger public health and welfare." *Id.* at 66,499.

The court in *Coalition* applied the 2009 Endangerment Finding to the endangerment provision of CAA § 202 which regulates motor-vehicle emissions. *Coalition*, 684 F.3d at 139. The court in *Coalition* determined that § 202(a)(1) requires EPA to answer two questions in determining whether motor-vehicle emissions pose a threat to public health and welfare. *Coalition*, 684 F.3d at 117. First, EPA must determine whether particular air pollution "may reasonably be anticipated to endanger public health or welfare;" and second, whether motor-vehicle emissions "cause, or contribute to" that endangerment. *Id. Coalition* used the Supreme Court's *Massachusetts*' decision as guidance in determining that these questions require application of "scientific judgment" regarding the potential risks GHG emissions pose to public health or welfare,

as opposed to regulatory policy impact judgments. *Massachusetts*, 549 U.S. at 534; *Coalition*, 684 F.3d at 117–18. *Coalition* further explains that policy judgments are irrelevant to whether GHG emissions contribute to climate change because there is no reasonable explanation as to why EPA would consider policy in determining whether GHGs contribute to climate change, as such determinations are best informed by science. *Massachusetts*, 549 U.S. at 534; *Coalition*, 684 F.3d at 118.

Further, the additional regulatory measures EPA must undertake in response to the threat of mobile-source emissions do not influence the "scientific judgment" that EPA is required to apply under § 202(a)(1). *Coalition*, 684 F.3d at 118. Since the Supreme Court in *Massachusetts* made clear EPA need not consider regulatory impacts in conducting an endangerment finding, *Coalition* reasoned "the statute speaks in terms of endangerment, not in terms of policy." *Massachusetts*, 549 U.S. at 534–35; *Coalition*, 684 F.3d at 118. The court ultimately found that in relying only on scientific knowledge, rather than regulatory policy impacts, EPA has complied with § 202(a) in determining whether or not a pollutant is "reasonably anticipated to endanger" the public welfare in compiling data for the 2009 Endangerment Finding. *Coalition*, 684 F.3d at 117–18.

The § 202(a) endangerment provision at issue in *Coalition*, is identical to § 108(a)'s endangerment provision in both purpose and terminology. Because of these similarities, the lower court's application of the reasoning used in *Coalition* and subsequent determination that scientific knowledge, rather than regulatory policy impacts, should serve as the basis of EPA's 2009 Endangerment Finding was correct. R. at 9. Since the 2009 Endangerment Finding was made based on the latest scientific knowledge, it is an appropriate resource for EPA to use in determining whether air pollution emissions are "reasonably anticipated to endanger" the public welfare. It

follows that EPA need only apply scientific knowledge, here, the 2009 Endangerment Finding, in deciding whether or not an air pollutant emission is "reasonably anticipated to endanger" the public welfare under § 108(a).

B. While correctly applying the precautionary purpose of CAA, the district court properly deferred to the EPA's science-based judgment on a rational basis determination.

EPA made a rational determination in using latest scientific knowledge for the 2009 Endangerment Finding. In addition, CAA is precautionary in principle and preventive in nature, for scientific uncertainty allows CAA to look to the future in order to prevent public health harms. The requirement of using only scientific certainty to rationally base 2009 Endangerment Finding off of is contrary to this precautionary and preventive purpose of CAA.

1. The EPA made a rational decision in basing the 2009 Endangerment Finding off of latest scientific knowledge.

In reviewing a science-based judgment, like EPA's 2009 Endangerment Finding, courts "perform a searching and careful inquiry into the facts underlying the agency's decisions . . . [and] presume the validity of agency action as long as a rational basis for it is presented." *Am. Farm Bureau Fed'n v. Evtl. Protection Agency*, 559 F.3d 512, 519 (D.C. Cir. 2009). Courts give "an extreme degree of deference to the agency" when determinations are based on an evaluation of scientific records. *Id.*

The court in *Coalition* determined that science-based judgments are the proper way to determine whether a pollutant is reasonably anticipated to endanger public welfare. *Coalition*, 684 F.3d at 118. *Coalition* reasoned that "EPA is not required to re-prove the existence of the atom every time it approaches a scientific question." *Coalition,* 684 F.3d at 120. Rather, in reviewing science-based judgments like EPA's finding that motor-vehicle emissions threaten public welfare, the courts should "perform a searching and careful inquiry into the facts underlying the agency's

decisions . . . [and] presume the validity of agency action as long as a rational basis for it is presented." *Am. Farm Bureau*, 559 F.3d at 519.

In reviewing existing scientific evidence to determine whether a particular finding is valid, EPA will undergo the same process employed by other decision-makers in constructing science-based judgements. *Coalition*, 684 F.3d at 120; Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74. Fed. Reg. at 66,523. EPA relies on scientific evidence built upon synthesis of studies and research to determine whether such findings represent the best material to reference in assessing whether GHGs may pose a risk to public welfare. *Id.* at 66,510–11.

EPA relied on this scientific evidence to find the "root cause" of the climate is "very likely" the observed increase of GHG emissions by humans. *Id.* at 66,518. Additionally, the Administrator found "the scientific evidence linking human emissions and resulting elevated atmospheric concentrations of . . . [GHGs] to . . . climate change[] to be sufficiently robust and compelling." *Id.* at 66,523. Based on this compelling evidence, the Administrator based the 2009 Endangerment Finding "on the total weight of scientific evidence." *Id.* This affirms that EPA had a rational basis for relying on the scientific evidence in making its determination as to whether or not GHGs threaten public welfare.

2. Referring to latest scientific knowledge, despite scientific uncertainties, complies with the precautionary and preventive purpose of CAA.

CAA applies precautionary language to comply with the main purpose of preventing public harms. Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74. Fed. Reg. at 66,506. The court in *Ethyl Corp. v. EPA* explained that § 211 uses precautionary language with the statutory term "will endanger." 42 U.S.C. § 7545; *Ethyl Corp. v. EPA*, 541 F.2d 1, 25 (D.C.Cir. 1976). Congress relied heavily on this determination

in revising § 202(a) and adopting the current language regarding endangerment. Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. at 66,506. This change in language helped further the precautionary principle of CAA found in *Ethyl*. EPA concludes in the 2009 Endangerment Finding that "the 'will endanger' standard is precautionary in nature and does not require proof of actual harm before regulation is appropriate." *Id.* (citing *Ethyl*, 541 F.2d at 17).

This amended precautionary language in § 202(a) is also found in § 108, which includes "may reasonably be anticipated to endanger public health or welfare." This language is forward-looking in that it pulls the mere *possibility* of endangerment to public welfare within the CAA's purview. This is consistent with CAA's "precautionary and preventive orientation." *Lead Indus. Ass'n. Inc. v. EPA*, 647 F.2d 1130, 1155 (D.C.Cir. 1980). EPA need not prove "rigorous step-by-step proof of cause and effect" in order for courts to find its scientific determinations valid. *Ethyl*, 541 F.2d at 28. To wait for certainty would only allow for reactive regulation, rather than the preventive regulation sought by the core of CAA. *Id.* at 25. Constraining EPA to rely solely on scientific certainty in determinations regarding potential threats to the public welfare would contradict CAA's precautionary nature in achieving its purpose of protecting public welfare.

In the 2009 Endangerment Finding, the Administrator acknowledged that there is an aspect of uncertainty with respect to some of the climate change science; however, "the current state of knowledge of observed and past climate changes and their causes enables projections of plausible future changes." Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. at 66,524. Reliance on strong knowledge of plausible future changes in light of scientific uncertainties furthers the precautionary purpose of CAA. In carrying out the purpose of CAA, EPA must be allowed to regulate even those harms

which are only potential, despite uncertainty regarding the scope and precise causation of such harms. *Ethyl*, 541 F.2d at 28.

IV. The validity of the 2009 Endangerment Finding triggered EPA's non-discretionary duty to list GHGs as a criteria pollutant under § 108.

Section 108 requires EPA to list air pollutants that reasonably may "endanger public health or welfare," as "criteria pollutants." 42 U.S.C. § 7408(a)(1)(A). EPA must then maintain a list of such criteria pollutants and set air quality standards in order to curb the danger such criteria pollutants pose to the public health and welfare. *Id*. This duty is one of EPA's most critical, as criteria pollutants are not only harmful but prevalent as a result of "numerous and diverse sources." *Id.* § 7408 (a)(1)(B). Prior to the 1970 Amendments to CAA, little progress had been made in the way of fighting air pollution. *Natural Resources Defense Council, Inc. v. Train*, 545 F.2d 320, 325 (2nd Cir. 1976). Consequently, Congress employed strong language to ensure that EPA's primary goal of preventing pollution would be carried out. 42 U.S.C. § 7401(C) (1990).

EPA has a nondiscretionary duty to list GHGs as criteria pollutants under § 108 because (1) EPA's 2009 Endangerment Finding triggered its non-discretionary duty to do so; (2) EPA acknowledged the validity of the Endangerment Finding by enacting regulations which address GHGs under § 202's identical language; (3) EPA's interpretation of § 108 is not entitled to deference as it is contrary to the text of § 108 and Congress' intent in enacting it.

A. EPA's 2009 Endangerment Finding that determined GHGs pose an endangerment to public health and welfare triggered its non-discretionary duty to list GHG as a criteria pollutant under § 108.

In determining whether a non-discretionary duty to act exists, courts should first look to the plain language of the relevant statutory provision. *Cmty. Voice v. EPA*, 878 F.3d 779, 783 (9th Cir. 2017). Section 108 requires EPA designate criteria pollutants after meeting two requirements. 42 U.S.C. § 7408(a)(1). First, the Administrator must exercise discretion in finding the emissions

of the pollutant "contribute to air pollution which may be reasonably anticipated to endanger public health and welfare." *Id.* at § 7408(a)(1)(A). Second, the pollutant must be present in the air as a result of "numerous and diverse mobile or stationary sources." *Id.* at §7408(a)(1)(B).

Once a pollutant is found to be reasonably anticipated to endanger public health and welfare as a result of numerous sources, EPA is required to designate the pollutant as a "criteria pollutant" and issue NAAQS within 12 months of such a designation. *Train*, 545 F.2d at 324 (finding "once the conditions of §§ 108(a)(1)(A) and (B) have been met, the listing of [a pollutant] and the issuance of air quality standards for [a pollutant] become mandatory"). Although EPA retains discretion as to how the pollutant will be regulated, it does not retain discretion regarding whether or not to issue NAAQS after the requisite scientific findings have been made. *Id.*

Here, EPA has already determined that GHG pose an endangerment to human health and welfare in the 2009 Endangerment Finding. R. at 6–7. EPA has also found that GHG are present in the air as a result of "numerous and diverse mobile or stationary sources." R. at 6. Consequently, EPA is now subject to a non-discretionary duty to designate GHGs as a criteria pollutant and subsequently regulate GHGs under §108 by issuing NAAQS.

B. EPA's failure to regulate GHGs under § 108 is unreasonable because it has already acknowledged the validity of the Endangerment Finding by enacting regulation which address GHGs under § 202's identical language.

Pursuant to the decision in *Massachusetts*, once EPA made the Endangerment Finding, it was required to issue regulations for GHG under § 202. *Massachusetts,* 549 U.S. at 531. Section 202 requires EPA to issue emission standards for vehicle engines if it finds pollutants emitted from vehicle engines endanger public health or welfare. 42 U.S.C. §7521(a)(1) (1970). Similarly, § 108 requires the Administrator issue NAAQS for pollutants which are present in the air as a result of "diverse mobile or stationary sources" and "may reasonably be anticipated to endanger public

health and welfare." *Id.* at §§ 7408(a)(1)(A) & (B). Although a finding that triggers the endangerment provision of one section may not necessarily trigger another automatically, the language of § 202 and § 108 mirror one other by using identical operative language —"reasonably be anticipated to endanger public health or welfare." *Id.* at §§ 7408(a)(1)(A) & 7521(a)(1).

In *Massachusetts* the Supreme Court examined the language of § 202. *Massachusetts,* 549 U.S. at 507. The Court explained the word "shall" makes the Administrator's duty to designate—and subsequently regulate—mandatory once an endangerment finding is made. *Id.* at 531. Thus, the duty to designate is conditioned upon a finding that the pollutant "causes or contributes to air pollution reasonably anticipated to endanger public health or welfare." *Id.* While the Court noted that EPA retains discretion in whether or not an initial finding is made, once a finding is made, EPA must regulate based on that finding. *Id.* Accordingly, the only way to avoid regulating GHGs would be to find the pollutant does not pose a danger to human health and welfare. *Id.*

Thus, the Endangerment Finding triggered the non-discretionary duty to regulate GHG under both § 202 and § 108 as it concluded that GHGs endanger public health and welfare and are emitted from both vehicle engines and "diverse mobile or stationary sources." Consequently, EPA's regulatory action against GHGs under one CAA provision and failure to do so under a provision with identical language is unreasonable.

C. EPA's interpretation of § 108 is not entitled to deference as it is contrary to the text and structure of § 108 and Congress' intent as expressed by the legislative history.

Under *Chevron*, courts will defer to an agency interpretation if it is consistent with Congress' unambiguously expressed intent, or if Congress spoke ambiguously the court will defer to reasonable agency interpretation. *Chevron*, 467 U.S. at 842–43. To determine whether Congress spoke unambiguously, the court will look to the text of the statute, the structure of the act as a

whole, and the legislative history. *Train*, 545 F.2d at 325. The EPA contends that it has discretion over whether to list a criteria pollutant even after it has made the requisite endangerment finding; however, EPA's interpretation is contrary to the text and structure of §108 and Congress' intent expressed in the legislative history.

1. EPA's interpretation of § 108 is contrary to the text of the statute because it would render its mandatory language meaningless, make the mandatory deadline of subsequent sections discretionary, and twist the order of the provisions within § 108.

In determining if Congress constructed an ambiguous statute courts will look to the exact words of the statute, and then to the structure of the act as a whole. *Chevron*, 467 U.S. at 843. If Congress has left a gap for the agency to fill, then this is an express delegation to the agency; however, the agency may not defy the will of Congress that is explicitly or implicitly stated. *Morton v. Ruiz*, 415 U.S. 199, 231 (1974).

Similar to the case at bar, in *Train*, EPA made an endangerment finding on lead and subsequently regulated it as a fuel additive under § 211 of CAA. *Train*, 545 F.2d at 324. Although EPA conceded that the endangerment finding established that lead met the threshold conditions of § 108, it sought to avoid designating lead as a criteria pollutant under §108. *Id.* at 325. Additionally, EPA contended that in making a finding of endangerment, §108(a)(1)(C) is an additional threshold before EPA's duty to list a criteria pollutant becomes non-discretionary. *Id.* EPA contended it retains discretion to designate GHG as a criteria pollutant, even after it meets § 108 requirements.

First, the court first looked to the mandatory language of § 108(a)(1)(A), focusing on "shall . . . list." *Id.* at 325—327. Second, the court looked at § 108(a)(1)(B) which requires an issuance of air quality criteria for pollutants within twelve months of designating a criteria pollutant. *Id.* Finally, the court looked to § 109 and § 110 and found they contained strict mandatory deadlines. *Id.* The court found that if EPA's interpretation was accepted "the mandatory language of §

108(a)(1)(A) would become mere surplusage" effectively allowing the Administrator to bypass the deadlines of § 108, 109, and § 110 at will. *Id.* The Second Circuit rejected EPA's interpretation because it was contrary to the text and structure of §108, which is unambiguous and leaves no room for interpretation by the EPA. *Id.* at 328.

EPA attempted to make a similar argument under § 202 in *Massachusetts* before the Supreme Court. *Massachusetts,* 549 U.S. at 507. In this case, EPA contended it was only required to designate pollutants under § 202 if it planned to promulgate emission limitations which, in turn, would make the Administrator's non-discretionary duty to designate a criteria pollutant a discretionary decision. *Id.* at 511–14. The Court stated such an interpretation of the statute would twist the order of the provisions within § 202. *Id.* at 531. Further, the Court explained the word "shall" makes the Administrator's duty to designate—and subsequently regulate—mandatory once an endangerment finding is made. *Id.*

Although the Second Circuit found that Congress did not construct an ambiguous statute, EPA attempts to make the same argument here that has already been rejected in both *Train* and *Massachusetts*. *Train*, 545 F.2d at 328. EPA argues that it is only required to designate criteria pollutants that it plans to promulgate air quality criteria for, this reading of the statute is contrary to the text and structure of § 108 for three reasons. First, as the court found in *Train*, EPA's interpretation would give the mandatory language of § 108 no meaning by allowing EPA discretion to designate a criteria pollutant that it knows endangers public health and welfare. Second, EPA's interpretation would effectively make the mandatory deadlines of § 108, § 109, and § 110 discretionary. Third, as the Supreme Court found in *Massachusetts*, making (C) a threshold to activation of EPA's non-discretionary duty, would twist the order of the provisions within the statute. If Congress intended to deviate from the structure of the rest of CAA, as it was found by

the Supreme Court, by giving EPA wider discretion in § 108, it would have been much clearer in doing so as it does not "hide elephants in mouseholes."

2. EPA's interpretation of § 108 is contrary to Congressional intent it the strict deadlines of sections triggered by § 108 were a response to inaction under the previous regulatory structure.

When a specific provision within a statutory scheme conflicts with the congressional purpose expressed in an act, it becomes necessary to examine the act's legislative history to determine whether the specific provision is reconcilable with the intent of Congress. *Id.* at 325.

Although the Second Circuit found in *Train* that the text of § 108 was unambiguous, it went on to conduct an analysis of the legislative history of § 108. *Id.* The 1970 Amendments to CAA were passed in response to inaction under the earlier regulatory structure. *Id.* Congress enacted § 108(a)(1) in the Amendments, providing that the Administrator "shall" publish a list of criteria pollutants. *Id.* at 325–326. Congress also enacted the mandatory deadlines that appear in § 109 and § 110 which are triggered automatically by designating a criteria pollutant. *Id.* Congress issued an initial list of pollutants and instructed EPA to designate them as criteria within 30-days of the Amendment's passage and required EPA to publish NAAQS for the pollutants within a year. *Id.* Overall the court found that the Amendments spoke to Congress' intent "to eliminate, not perpetuate, opportunity for administrative foot-dragging," *Id.* EPA's interpretation was not supported in legislative history, and therefore leave no room for interpretation. *Id.* at 328.

Like *Train*, EPA has already made the requisite finding that GHGs pose an endangerment to public health and welfare in the 2009 Endangerment Finding. R. at 6–7. Further, EPA acknowledged the validity of the Endangerment Finding and the danger of GHGs by regulating GHGs under § 202. R. at 6. EPA's non-discretionary duty to designate GHGs as a criteria pollutant is evidenced by the text and structure of §108, and Congress' intent. Therefore, EPA's failure to designate GHGs as a criteria pollutant goes directly against its statutory mandate.

V. EPA's failure to carry out its non-discretionary duty to list GHG as a criteria pollutant under § 108 in the ten years since it made the Endangerment Finding constitutes an unreasonable delay because it fails the TRAC factors and the lack of a date certain deadline does not grant EPA unfettered discretion over when to list GHG as a criteria pollutant under § 108.

CAA § 304(a) authorizes citizens to bring suit against EPA to compel agency action which is unreasonably delayed. 42 U.S.C. § 4604(a)(3). When examining claims for unreasonable delay, courts must first look to whether the agency has a non-discretionary duty to act, as an agency cannot be found to delay that which it is not required to do. *Cmty. Voice*, 878 F.3d at 783 (quoting: *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 66 n.1 (2004)). If a non-discretionary duty to act exists, the court must then assess whether the agency's delay was unreasonable. *Id*. Unreasonable delay claims are assessed by applying the six-factor test set forth in *TRAC* ("TRAC factors"). *Telecomm. Research & Action Ctr. v. F.C.C. ("TRAC")*, 750 F.2d 70, 80 (D.C. Cir. 1984).

The TRAC factors are: (1) The time agencies take to act "must be governed by a rule of reason;" (2) the statutory scheme may represent the rule of reason if Congress has provided some indication such as a time table with which it expects the agency to proceed; (3) delays that may be tolerable "in the sphere of economic regulation are less tolerable when human health and welfare are at stake;" (4) how expediting agency action may affect agency activities of higher or competing priority; (5) "the nature and extent of the interest prejudice by delay; (6) no impropriety is required

to find the agency unreasonably delayed. *Id.* Further, the lack of a date certain deadline does not grant EPA's unfettered discretion over when to list GHG as a criteria pollutant under § 108.

A. EPA's failure to designate GHGs as a criteria pollutant under § 108 in the ten years since it made the Endangerment Finding fails the TRAC factors' "rule of reason."

Though no single TRAC factor is determinative, the most important is the first, the "rule of reason." *Cmty. Voice*, 878 F.3d at 786. Agency decision-making should occur "within a reasonable time encompassing months, occasionally a year or two, but not several years or a decade." *MCI Telecomm. Corp. v. F.C.C.*, 627 F.2d 322, 340–41 (D.C. Cir. 1980). While in some instances delay is inevitable, there must be some reasonably prompt action taken by the agency so that the delay does not threaten its credibility. *In re Core Commc'ns Inc.*, 531 F.3d 849, 856 (D.C. Cir. 2008) (finding six-year delay in responding to the court's remand was egregious); *In re Pesticide Action Network N. Am. v. E.P.A.*, 798 F.3d 809, 814 (9th. Cir. 2015) (holding that EPA's 8-year consideration of a petition and lack of a concrete timeline "stretched the rule of reason beyond its limits"); *MCI*, 627 F. 2d at 325 (holding "FCC's four-year delay in determining a just and reasonable tariff" is unreasonable.); *In re American Rivers and Idaho Rivers United,* 372 F.3d 419–20 (D.C. Cir. 2004) (holding "[a] six-year-plus delay is nothing less than egregious").

The first *TRAC* factor was addressed by the Ninth Circuit in *Cmty. Voice* in which the EPA granted a rulemaking petition on lead but failed to conclusively act on it for more than eight years. *Cmty. Voice*, 878 F.3d at 779. During that time, EPA had taken some action such as forming a panel to provide advice, performing a literature review, and performing a survey. *Id.* at 782–83. Although EPA did not challenge the validity of the petition or dispute that its current standards were insufficient to meet Congress' intent, it contended that it had no duty to make a decision within a specific timeframe, or ever. *Id.* at 782. The Ninth Circuit explained that although EPA

had taken some steps, its failure to show that it had developed a concrete timetable for action constituted an unreasonable delay. *Id.* at 788. Further, the court pointed out that no caselaw supported EPA's contention that such a delay had been previously upheld. *Id*.

Similarly, in the current case EPA's initial actions occurred about a decade ago in 2009 when EPA made the Endangerment Finding establishing GHGs as an endangerment to human health and welfare, thus meeting the threshold for designating GHGs as a criteria pollutant under §108. Unlike *Cmty. Voice* in which EPA had made some efforts to address the petition, in the ten years since EPA made the Endangerment finding it has taken no steps toward listing GHGs as a criteria pollutant nor has it expressed any intention to do so. Consequently, EPA ten-year delay is not within the rule of reason.

B. EPA's failure to designate GHG as a criteria pollutant under § 108 in the ten years since it made the Endangerment Finding fails the remaining five TRAC factors

When looking to the second *TRA*C factor "[t]he reasonableness of the delay must be judged 'in the context of the statute' which authorizes the agency's action." *Sierra Club v. Thomas*, 828 F.2d 783, 797 (D.C. Cir. 1987). Courts will look to the statute itself to determine whether Congress intended swift deliberation concerning the matter, which can be exemplified by a timetable, applicable deadlines, or inferred or the statutory schemes overall contemplation of timely final action. *Id*. This factor was address in *Cmty. Voice*. Although Congress had not provided a timetable in the text of the statute at issue, the court stated the Congress' intent, which indicated its contemplation of timely final action, was clear. *Cmty. Voice,* 878 F.3d at 779. Similarly, §108 does not contain a timetable or specific deadline for designating a criteria pollutant; however, the court in *Train* established that Congress' intent to eliminate administrative food-dragging when it

enacted §108 was clear. Thus, this second factor indicates EPA's ten-year delay is unreasonable in the context of §108.

The third factor states that delays "are less tolerable when human health and welfare are at stake." *Id.* at 786. This factor was also addressed in *Cmty. Voice*, in which the Ninth Circuit found that the first factor weighted in favor of the Appellant because EPA had itself found that lead was a clear threat to human health and welfare. *Id*. Similarly, in *Pesticide Action Network*, the third factor weighted in favor of the Appellant because EPA's own assessment concluded that the pesticides in question posed dangers to human health. *In Re Pesticide Action Network N. Am. Inc*, 798 F.3d at 814. This factor also weights in favor of CHAWN as EPA's own Endangerment Finding establishes that GHG pose an endangerment to human health and welfare.

As to the fourth *TRAC* factor, the effect that expediting agency action may have on agency activities of a higher priority, although the Supreme Court did not address an unreasonable delay claim in Massachusetts, it did address competing agency activities in the context of regulating GHGs under CAA. In *Massachusetts* the Supreme Court rejected EPA's argument that there were substantial regulatory complexities that would result from regulating GHGs and that EPA had competing priorities to de-regulate. *Massachusetts,* 549 U.S. at 510. The Court specifically stated that in the context of CAA "once EPA finds that GHG emissions potentially endanger public health and welfare it may not decline to regulate GHG on policy grounds." *Id*. Similarly here, EPA states two justifications for its failure to designate GHG as a criteria pollutant: (1) substantial regulatory complexities that would result, and (2) the 2017 Executive Order that establishes de-regulation as EPA's highest priority. R. at 7. Both of these justifications fail because (1) the Executive Order was made in 2017, eight years after the Endangerment Finding was made, and the EPA has offered no explanation as to the delay of that eight years prior to the Executive Order. (2) while an

incoming administration may at its discretion set priorities among the administrative agencies, it may not instruct agencies to defy the unambiguously expressed commands of Congress.

The fifth factor, "the nature and extent of the interest prejudiced by delay," was also addressed in *Cmty. Voice* by the Ninth Circuit. *Cmty. Voice*, 878 F.3d at 786. The court found that children, whose health were at steak, because of EPA's failure to regulate lead were "clearly prejudiced." *Id.* Conversely, in *Independence Mining* the appellant asserted that the delay by the Secretary of the Interior in issuing their patent posed a threat to their employee's job security and thus to public welfare but provided no evidence that employees jobs were at stake because of the delay and thus did not properly demonstrate that any interest were "prejudiced by delay." *Independent Min. Co., Inc.*, 105 F.3d at 509. Similar to *Cmty. Voice* and unlike Independence *Mining,* in the current case EPA has already made a complete Endangerment Finding and subsequently promulgated regulations to protect the public from GHGs, thus recognizing the danger GHG pose. The nature of the threat caused by GHGs are global and have the possibility to have an effect on every single person on this earth as GHG contribute to climate change. Thus the fifth factor weighs *heavily* in favor of CHAWN.

Concluding with the sixth factor, although the court need not find any impropriety lurking within the agencies actions to find it unreasonably delayed, there may be evidence of it here. As EPA only made the Endangerment Finding, and subsequent regulations, of GHG under §202 not as a result of its own realization of its duties under CAA, but because the Supreme Court directly ordered it to do so in *Massachusetts*. However EPA did not continue on to listing GHGs under §108 because it was not forced to do so.

Consequently, all six TRAC factors weigh against EPA, indicating EPA's ten-year delay in designating GHGs as a criteria pollutant under §108 is unreasonable.

C. The lack of a date certain deadline does not grant EPA unfettered discretion over when to list GHG as a criteria pollutant under § 108.

In examining whether there is a date-certain deadline for a non-discretionary duty, courts should look to the text of the statute to determine if an explicit deadline for action is included. *WildEarth Guardians v. Jackson,* 888 F. Supp. 2d 1112, 1116 (D.N.M. 2012). If the text does not specify deadlines, courts should determine whether it can be "readily inferred" from the statute *Id.*

In *WildEarth*, EPA agreed with Petitioner that it had a mandatory duty to either issue or deny a permit under § 505 of CAA. *Id*. at 1115. However, EPA disputed whether it must carry out the duty within a certain timeframe, based on the statute's lack of a "readily ascertainable deadline." *Id*. The court found that although the statute clearly establishes EPA has a duty to act upon the permit and further imposed a deadline upon the permitting authority, the plain text did not impose a date-certain deadline upon EPA to issue the permit. *Id.* at 1115–16. Additionally, the statute imposed a number of procedural requirements that EPA must take prior to issuing or denying a permit, none of which specified a deadline. *Id*. The court determined a deadline was not "readily inferred" from the statute. *Id.*

Although § 108 does not specify a timetable for designating criteria pollutants after the requisite endangerment finding has been made, the holding in *WildEarth* is inapplicable to the current case for two reasons. First, *WildEarth* addressed EPA's discretion over *when* to issue a permit, a process that in itself entails a "certain amount of discretion" as it requires EPA to provide notice and hearing, among other steps, before it is required to either issue or deny the permit. *Id.* at 1116. This contrasts with the process of §108 in which the only discretion given to EPA is the discretion in making an initial finding regarding whether a pollutant poses an endangerment. Second, unlike the statutory scheme in *WildEarth*, the related part of §108, (a)(2), does pose a deadline on EPA to promulgate NAAQS after twelve months of designating a criteria pollutant,

demonstrating Congress' intent to quickly deal with pollutants that pose an endangerment to human health after that endangerment is clear.

Accordingly, the ten years that has passed since the Endangerment Finding was made egregiously exceeds the limits of the discretion afforded to EPA in timing of designation.

CONCLUSION

For the foregoing reasons, CHAWN respectfully requests this Court affirm the lower court's determinations that the Endangerment Finding is valid with respect to public welfare; that EPA has a non-discretionary duty to designate GHGs as a criteria pollutant; that EPA has unreasonably delayed this action; and the lower court's order requiring EPA to publish notice of a proposed rule and subsequent final rule designating GHGs as a criteria pollutant. Additionally, CHAWN requests this court reverse the lower court's determination that portions of the Endangerment Finding are invalid with respect to public health. Finally, CHAWN respectfully requests this Court find the lower court had jurisdiction to review CHAWN's unreasonable delay claim under § 304(a).